

## THE EU RACE DIRECTIVE: TIME FOR CHANGE?

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### ABSTRACT

The European Union (EU) Directive against racial and ethnic origin discrimination has been criticized for a number of reasons. The main ones are, firstly, that it places racial and ethnic origin at the top of the hierarchy of discrimination grounds in the EU and that it does not cover discrimination on the grounds of religion or belief; secondly, that its main aim appears to be to establish formal equality or equal treatment rather than a more substantive form of equality; and, thirdly, that it gives only limited protection to third country nationals (nationals of non-EU Member States). In this paper a number of changes to the Directive are suggested in order to make it into a more effective tool in the fight against racism and racial and ethnic origin discrimination.

### INTRODUCTION

In June 2000, the EU adopted the Race Directive,<sup>1</sup> a Directive against discrimination on the grounds of racial or ethnic origin. It was the first legislative measure taken by the EU in the fight against racism and racial discrimination. In the same year, the EU also adopted a Directive against discrimination on the grounds of religion or belief, disability, age and sexual orientation<sup>2</sup> and an Action Programme to combat discrimination.<sup>3</sup> These measures were all taken on the basis of Article 13 EC, which was inserted in the EC Treaty by the Treaty of Amsterdam of 1997 and provided the competence for the EU to adopt legislation against discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Nationality discrimination was already prohibited by Article 12 EC, while discrimination on the ground of sex has been prohibited in a number of Directives adopted since 1975.<sup>4</sup> The main Directive against sex discrimination, the Equal Treatment Directive, was amended in 2002<sup>5</sup> to bring it more in line with the 2000 Directives. In 2004, the EU adopted a Directive to extend the protection against sex discrimination to the access to and the supply of goods and services.<sup>6</sup> Together, these Directives provide protection

against discrimination on all the grounds of Article 13 EC. However, the protection against discrimination is not the same for the different grounds of discrimination.

In this paper, a number of changes, to be made to the Race Directive, are proposed in order to make it into a more effective tool to combat racism and racial and ethnic origin discrimination in the EU. Changes will only be suggested in relation to the Race Directive and, due to limitations of space, not in relation to the other Equality Directives, although many of the proposed changes could also be made in the same way to those other Directives. This is based on the opinion that all four Directives, and possible future Directives adopted on the basis of Article 13 EC, should, wherever possible, contain the same definitions, provisions and exceptions and unnecessary differences in wording should be avoided, as this would only create confusion and make interpretation more difficult.

The first part of the paper contains an overview of the differences in protection provided by the different Equality Directives – the Equal Treatment, Race, Framework, Gender Amendment and Goods and Services Directives – because this provides the context in which the Race Directive must be placed: the Equal Treatment Directive and the case law of the ECJ in relation to sex discrimination have influenced the Race and Framework Directives, which, in their turn, have influenced the Gender Amendment and the Goods and Service Directives. After the overview, the major points of criticism directed at the Race Directive will be discussed and this is followed by suggestions on how to improve the Directive in light of these.

The changes suggested are inspired by and based on international measures against racial discrimination like the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and General Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI),<sup>7</sup> a body of the Council of Europe specifically appointed to deal with racism and racial discrimination. In this Recommendation, ECRI recommends that the Member States of the Council of Europe enact legislation against racism and racial discrimination and gives key components of such legislation. As all 25 Member States of the EU have signed and ratified the ICERD and are Members of the Council of Europe, it appears logical to look at these instruments for guidance.

Two points relating to the character of the Race Directive need to be kept in mind in this discussion: firstly, it is a EU measure, and as such it needs to conform to the principles of subsidiarity and proportionality laid down in Article 5 EC. According to Recital 28 of the

Race Directive, the principle of subsidiarity is adhered to, because action by the Community is necessary to achieve a common high level of protection against discrimination in all the Member States. The proportionality principle does require that this action should not go beyond what is necessary to achieve this objective.

Secondly, a Directive is, according to Article 149 EC, binding upon the Member States as to the results to be achieved, but leaves the choice of form and methods to the national authorities. Therefore, there are limits to what the EU can do.

### **DIFFERENCES IN LEVEL OF PROTECTION PROVIDED**

Together, the Equality Directives provide protection against discrimination on the grounds of sex, racial or ethnic origin, religion and belief, disability, age and sexual orientation, but the protection is not the same for the different grounds of discrimination. One of the main differences between the Directives is their material scope. The Framework Directive prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation in the following areas: access to employment; access to training; employment conditions; and, membership of professional organisations. The legislative protection against sex discrimination under the Equal Treatment and Gender Amendment Directives covers these same areas, but the protection was extended by the Goods and Services Directive to include the access to and the supply of goods and services. However, the Race Directive prohibits discrimination on the grounds of racial or ethnic origin not only in all the areas covered by the above Directives, but also in the areas of social protection, which includes social security and health care, social advantages and education. The material scope of the Race Directive is, thus, much wider than that of the other Directives, and this is one of the strong features of the Race Directive.

Another feature which makes the protection against racial or ethnic origin discrimination stronger than the protection against discrimination on the grounds covered by the Framework Directive is that the Race Directive allows for justification of direct discrimination only in very limited and prescribed circumstances: for genuine and determining occupational requirements (Article 4) and for positive action measures (Article 5). Direct racial or ethnic origin discrimination cannot be justified under any other circumstances. With regards to sex discrimination, a distinction must be made between the areas covered by the Gender Amendment Directive – i.e. the employment sphere – where also only very limited exceptions are allowed; and, the access to and supply of goods and services,

proposed. The main points of criticism raised against the Race Directive are discussed first.

## **POINTS OF CRITICISM**

### **Grounds for Discrimination**

EU anti discrimination measures have been criticised for creating a hierarchy of discrimination grounds,<sup>12</sup> because, as already mentioned, the protection provided against discrimination on the grounds of racial or ethnic origin is stronger than that provided against discrimination on the other Article 13 EC grounds. The omission of religion or belief as a discrimination ground in the Race Directive is seen as especially problematic<sup>13</sup> because, firstly, religion is often closely related to racial and ethnic origin, so it can be difficult to distinguish between the two. Racial discrimination may be closely connected with discrimination on grounds of a person's religion or ethnicity. And, secondly, limiting the protection against religious discrimination to the area of employment – as it is under the Framework Directive – while the protection against racial and ethnic discrimination covers a much wider area might create a loophole: perpetrators could claim that they discriminate against victims because of their religion rather than because of their racial or ethnic origin and so evade legal action.

### **Notions of Equality**

The Race Directive has also been criticised for mainly aiming to establish formal equality or equal treatment rather than a more substantive form of equality that takes account of the disadvantages and inequalities that some groups in society face as the results of past and on-going discrimination. And, even where it goes some way towards a more substantive notion of equality – in prohibiting indirect discrimination and allowing positive action measures – it is criticised for not going far enough. But what do the terms 'formal equality' and 'substantive equality' mean in relation to measures against discrimination? And, is the term 'equality' used in any other way?<sup>14</sup>

Formal equality, or equal treatment, is grounded in the principle that like should be treated alike and that everyone has a right to be treated like anyone else in the same situation. Anti discrimination legislation which aims at formal equality, would prescribe equal treatment of persons in the same or very similar situations. The

definition of direct discrimination in Article 2(2)(a) of the Race Directive is a good example:

Direct 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.

There are, however, a number of problems with this concept. Firstly, the concept of formal equality relies on a comparator: is a person treated unequally compared to another person in the same situation? But, who is like who? The choice of a comparator can influence the outcome. Secondly, the notion that like should be treated alike, negates the value of difference and assumes sameness and, therefore, leaves no room for any recognition of the positive aspects of difference or for a requirement that people should be treated appropriately according to their differences. Thirdly, the notion of formal equality ignores any existing inequalities and social disadvantages. It does not look at any imbalances that have been created by past discrimination. The fourth problem with the notion of formal equality is that it is a relative concept, that it does not guarantee a particular outcome. The law is complied with as long as two like persons are treated equally, and it does not make any difference if they are treated equally well or equally badly. The concept allows for levelling-down (where both people compared are deprived of a benefit) as well as levelling-up (where the benefit is conferred on both of them).

Because formal equality is perceived as not touching the substantive inequalities that exist in most societies, or even as reinforcing these, a more substantive equality, which is sensitive to the effects of past and ongoing discrimination, is put forward. Substantive equality aims to compensate for the social disadvantages and inequalities suffered by certain groups. Anti discrimination measures aiming for substantive equality will allow unequal treatment of disadvantaged groups where that is necessary to achieve equality in fact. An example can be found in Article 5 of the Race Directive, entitled 'Positive Action':

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Within the concept of substantive equality two types can be distinguished: equality of opportunity and equality of results. The notion of equality of opportunity concentrates on equalising the starting point for all, on giving everyone the same opportunities. This approach may well involve unequal treatment and unequal

finishing points, because it is not concerned with the end result, but only aims to make the starting point equal for all. Equality of opportunity recognises that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of 'being alike' so that the right to like treatment becomes applicable.

The notion of equality of results aims to equalise the outcome or result. It is based on a system of justice which concentrates on correcting maldistribution and takes account of past or present discrimination. Its aim is thus redistributive.

The Race Directive does not give any indication as to what sort of positive action is allowed and how far this action can go. The case law on positive action in relation to sex discrimination shows that the ECJ sees positive action as a derogation from the principle of equal treatment and as such it should be interpreted strictly.<sup>15</sup> Under Article 2(4) of the Equal Treatment Directive<sup>16</sup> and Article 141(4) EC which both allow for positive action measures in relation to women, the ECJ will not allow measures that give automatic preferential treatment to women at the point of selection for employment. It has also held that positive measures should be limited to the period necessary to overcome the disadvantage.<sup>17</sup> As Poiares Maduro writes: 'the case law of the ECJ regarding affirmative action measures has therefore been framed largely by the notion of equality of opportunities'.<sup>18</sup> This has been criticised for not going far enough towards remedying existing inequalities in society.

Apart from the formal and substantive notions of equality, there is also a pluralist approach to equality, in which the positive aspects of difference and diversity are recognised and celebrated and people are treated with equal respect and in accordance with their own requirements and aspirations.

## Scope

Both the material and the personal scope of the Race Directive can be found in Article 3. However, there are three problems with this Article: firstly, what is meant by the opening sentence: 'within the limits of the powers conferred upon the Community'? A similar sentence can be found in Article 13 EC and there appear to be two possible legal positions on the meaning of this sentence in that Article.<sup>19</sup> Most leading commentators hold that the powers under that Article can only be used in areas which are already regulated by Community law or so closely attached to such areas as to make it necessary to regulate them. In other words, this sentence means that the power 'is subject to the limits of the existing Community

competencies',<sup>20</sup> so 'the Community does not enjoy competence to regulate any discrimination whatever'.<sup>21</sup> The second view, which is the view of the Starting Line Group and Chopin and Niessen,<sup>22</sup> is that Article 13 gives an autonomous power, but, in exercising that power, the Community must act in accordance with the procedural powers at its disposal. As Article 3(1) of the Race Directive uses the same words as Article 13, there is no reason why the above discussion should not also be applicable to Article 3(1). The correct interpretation of this sentence is thus not clear and it will ultimately be up to the ECJ to clarify this.

Secondly, the Race Directive shall apply to 'all persons'. This suggests that third country nationals are also protected, which would fit in with the explicit statement in Recital 3 of the Preamble that 'the right to equality before the law and protection against discrimination for all persons constitutes a universal right'. However, Article 3(2) appears to limit the protection afforded to third country nationals against racial discrimination. It reads:

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 on the territory of the Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Recital 13 determines that discrimination under the Directive 'should be prohibited throughout the Community'. It then adds:

This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

The Race Directive makes an exception for discrimination on grounds of nationality because this is, as mentioned, prohibited under Article 12 EC rather than under Article 13 EC, which forms the basis for the Directive. However, there are two problems with this. Firstly, it is not always easy to distinguish discrimination on grounds of racial or ethnic origin from nationality discrimination. And, secondly, Article 12 does not apply to third country nationals, so they are not protected against nationality discrimination under that Article. Paragraph 2 was not present in either the original or the amended proposals for the Race Directive, but was added, together with Recital 13, after much discussion during the negotiations. Some Member States were concerned about preserving their immigration and asylum systems. The Commission argued that admission policies were not included in the material scope of the

Directive, but this did not satisfy all Member States and in the end it was agreed that Article 3(2) and Recital 13 would be added.<sup>23</sup> This suggests that the Race Directive applies to non-EU nationals and thus protects them against racial and ethnic discrimination, except in relation to immigration laws or other legal acts covering entry, residence and legal status.

Thirdly, the meaning of 'public bodies' is not clear. Are the activities of the police, law enforcement officials, border control officials, prison personnel and the military included under 'public bodies'? It is not completely clear if they are. Bell writes that:

... discrimination on grounds of racial and ethnic origin (...) is forbidden in all forms of employment, whether public or private. This means that whereas the Directive does not apply to the police in terms of their administration of law enforcement, it does apply to matters such as police recruitment.<sup>24</sup>

However, Brown<sup>25</sup> argues that the Directive does not expressly provide for tackling 'institutionalized racism',<sup>26</sup> but that the ECJ could either define 'discrimination based on racial or ethnic origin' as including 'institutionalized racism'; or it could define 'access to and supply of goods and services which are available to the public' as catching bodies such as the police and other institutions.<sup>27</sup> It is, according to Brown, at least arguable that this phrase catches the police service. He concludes that, 'by including the police and other such bodies, a powerful message will be sent to racial and ethnic minorities that no such discrimination, regardless of the perpetrator, will be condoned...'. Turning this around: by not or only partially including the police and other such bodies a very negative message would be sent out.

The Race Directive also mentions 'social protection' and 'social advantages'. The latter should, according to the Explanatory Memorandum to the Proposal for the Directive, be given the same interpretation as that given by the ECJ in relation to Regulation (EEC) 1618/68: they are 'benefits of an economic or cultural nature which are granted within the Member States by public authorities or private organizations'.<sup>28</sup> Perhaps some functions of the police, law enforcement officials, border control officials, the army and prison personnel outside the employer/employee relationship could be considered to fall under 'social protection' or 'social advantages'?

The above suggests that at least some activities of these bodies fall under the Directive: they appear to be covered in areas such as employment and training, but the situation is unclear with regard to the exercise of their law enforcement and other duties, although these might be included under Article 3(1)(e), (f) or (h).

These are the main points of criticism directed at the Race Directive. The next part will contain suggestions for changes to the Directive to deal with the criticisms.

## PROPOSALS FOR CHANGE

### Changes to the Grounds for Discrimination

As the Race Directive already provides stronger protection against discrimination on the grounds of racial and ethnic origin and leveling down is prohibited, this Directive would not need to be changed to deal with the problem of a hierarchy of discrimination grounds at EU level. The protection under the other Equality Directives could be extended to the same areas covered by the Race Directive, but discussion of this would go beyond the subject of this paper.<sup>29</sup>

The simplest way of dealing with the problem of the omission of 'religion or belief' from the grounds covered by the Race Directive would be to add 'religion or belief', so that the purpose of the Race Directive would be to lay down a framework for combating discrimination on the grounds of racial or ethnic origin and religion or belief. This would alleviate both problems mentioned above: no distinction would have to be made between these grounds and perpetrators would not be able to avoid legal action. Another solution which would deal in particular with the second problem would be to follow the amendment to Article 2 suggested by the European Parliament:

Discrimination on the basis of racial or ethnic origin which is presented as a difference in treatment on the grounds of religion, conviction or nationality is deemed to be discrimination within the meaning of Article 1.<sup>30</sup>

### Changes in Relation to the Notions of Equality

Above, we have distinguished different notions of equality. According to Fredman,<sup>31</sup>

at least three functions are required of equality if it is to begin to combat racism: first, a means of redressing racist stigma, stereotyping, humiliation and violence; secondly, the redistributive aim of breaking the cycle of disadvantage associated with groups defined by race or ethnicity; and thirdly, the positive affirmation and accommodation of difference as a part of the right to equal concern and respect.

These three functions each correspond to the notions of equality distinguished earlier: the first to formal equality: equal treatment

without differentiating on the ground of racial or ethnic origin. The second function corresponds to substantive equality in both its forms, while the third corresponds with a pluralist notion of equality. This suggests that equality in all its types is needed to fight racism and racial discrimination. The Race Directive's prohibition of direct discrimination, of unequal treatment, performs the first function mentioned by Fredman and, as such, it is useful because it makes clear that behaviour in which racial prejudice finds expression will not be tolerated.

The Race Directive's title and its stated purpose (Article 1) mention the principle of equal treatment. It might be better to replace this with the 'principle of equality' for two reasons. Firstly, the principle of equality is, according to the case law of the ECJ, a fundamental principle of Community law. For example, in the *Frilli v. Belgium* case, the ECJ stated that equality of treatment is 'one of the fundamental principles of Community law'.<sup>32</sup> And, in the *Karlsson* case<sup>33</sup> the ECJ held that the fundamental rights in the Community legal order 'include a general principle of equality and the obligation not to discriminate'. The general principles of Community law are binding on the Community Institutions and the primary source of guidance on which principles are to be considered as general principles of Community law is Article 6 TEU. The ECJ also uses as guidelines 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.<sup>34</sup> The ECJ 'has consistently held that all sources of fundamental rights support the existence of a strong principle of equality and non-discrimination'.<sup>35</sup>

Secondly, the principle of equality is wider than the principle of equal treatment and could include measures performing the second and third functions and thus aiming for more substantive or pluralist concepts of equality. The need to go beyond the prevention of unequal treatment is now recognised at the EU level, as is clear from a Communication<sup>36</sup> and the Proposal for an European Year of Equal Opportunities for All,<sup>37</sup> which both came out in June 2005. These papers acknowledge that positive action may be necessary to compensate for the structural barriers and long-standing and deep-rooted inequalities that some groups experience. They also stress the importance of social inclusion and the 'need to develop appropriate responses to the different needs of new migrants, established minorities of immigrant origin and other minority groups'.<sup>38</sup>

Four problems were identified in relation to the concept of formal equality. The first one was, that it required a comparator and that this was a manipulative notion as the choice of comparator could influence the outcome. However, the words 'would be' in the

definition of direct discrimination in Article 2(2)(a) of the Race Directive seem to suggest that a hypothetical comparator can be accepted,<sup>39</sup> although the ECJ has rejected such a comparator in sex discrimination cases except in cases of discrimination on grounds of pregnancy. This situation might have changed, however, because the two new Gender Directives contain the same definition, including the words 'would be'. In many cases of direct discrimination, it will be easier to find a hypothetical comparator and hopefully the ECJ will indeed allow its use for discrimination on all Article 13 EC grounds including sex.

Another problem with the concept of formal equality is, as mentioned, that it is a relative concept, and that equal treatment can be achieved by levelling-up or by levelling-down. However, under the Race and the other new Equality Directives, equal treatment can no longer be achieved by limiting or taking away existing benefits, as the non-regression clause is a clear 'prohibition on levelling-down'.<sup>40</sup>

The third problem with the notion of formal equality is that it negates the value of difference and leaves no room for a requirement that people should be treated appropriately according to their differences. The fourth problem is that formal equality ignores any existing inequalities and social disadvantages created by past discrimination and is not interested in the outcome or result. The Race Directive deals with this in two ways: it prohibits indirect discrimination and it allows Member States to take positive action measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

The Race Directive defines indirect discrimination in Article 2(2)(b):

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In this, the Race Directive goes beyond a notion of formal equality towards a substantive equality concept, because indirect discrimination takes account of the disparate impact equal treatment can have on certain groups, or in other words, it takes account of the result of equal treatment.

In its provision for positive action in the already mentioned Article 5, the Race Directive also shows a more substantive equality concept. The Race Directive can thus be said to move towards performing the second function of equality distinguished by Fredman.

However, this move is rather tentative in that indirect discrimination is not always against the law, because of the possibility of justification. For example, business interests could be taken to justify a practice which indirectly discriminates against persons from certain racial or ethnic origins. In this the Race Directive follows most national and international provisions against indirect discrimination which allow for justification and, therefore, the definition should not be changed. The ECJ could play a role in ensuring that Member States do not overstep the margin of appreciation given by the definition.

The move towards substantive equality made by the provision for positive action is also tentative, for two reasons. Firstly, Article 5 permits Member States to take positive action measures, but does not put a duty on them to do so. Secondly, there are limitations on what positive action is allowed if the ECJ follows its own case law in sex discrimination cases.

The move towards performing the second of Fredman's functions, could be made much stronger if the Race Directive would require Member States to take positive action like Article 2(2) of the ICERD does. Article 5 could also move towards performing the third function by following paragraph 5 of the General Recommendation No. 7 of ECRI<sup>41</sup> and requiring Member States to adopt specific measures not only to prevent or compensate for disadvantages, but also to promote the full participation of disadvantaged groups in all fields of life.

As mentioned, the Race Directive does not indicate what sort of actions are permissible under Article 5. It is suggested that this is as it should be, as it is difficult to go into details in an EU measure like a Directive. It will thus be up to the ECJ to decide what is permissible. The ECJ has limited positive action measures for women to measures that embody an equality of opportunity concept. Will the ECJ follow this interpretation for discrimination based on racial or ethnic origin? On the one hand, there might be some room to allow for a broader interpretation because, firstly, the case law of the ECJ is partly based on its interpretation of Article 2(4) of the Equal Treatment Directive, but this Article has been deleted by the Gender Amendment Directive.<sup>42</sup>

Secondly, there might be some room for a broader interpretation in the case of racial or ethnic origin discrimination because the scope of the Race Directive goes beyond the employment field. The ECJ might decide to allow broader positive action measures in the other areas covered. Support for this can be found in the *Lommers* case<sup>43</sup> in which the ECJ upheld an employer's scheme that provided subsidised nursery places only for female employees (save in exceptional circumstances). And, thirdly, as Schiek<sup>44</sup> argues, the text of the Race and Framework Directives point to a

more result-oriented approach. Both Directives allow for positive measures 'with a view to ensuring full equality in practice', which appears to indicate that these Directives are aiming for equality of results. Schiek writes:

Neither of the directives thus uses the term 'equal opportunity' from the old Gender Equality Directive, which led both Advocates General Tesouro and Jacobs in their conclusions on *Marschall* and *Kalanke* respectively to assume that positive action measures aiming at results are inadmissible. On the contrary, aiming to 'ensure full equality in practice', the directives appear to envisage result-oriented as well as procedural measures.

On the other hand, some authors argue that the text of Article 141(4) EC is wider than that of the Race Directive.<sup>45</sup> Waddington and Bell anticipate 'that the Court will seek to extend these general principles on positive action [from the sex discrimination cases] to the other grounds of discrimination enumerated in Article 13 EC', although they do admit that 'there remains a variety of positive action schemes that have yet to be tested'.<sup>46</sup> There might thus be some scope for a broader interpretation.

An argument could also be made for allowing the Member States some discretion in deciding how far these measures should go. In the *Lommers* case, the ECJ held that:

in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive [Article 2(4) Equal Treatment Directive 1976], due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aims pursued.<sup>47</sup>

This case law could be laid down in the Directive by adding the following sentence at the end of Article 5: 'provided these measures remain within the limits of what is appropriate and necessary in order to achieve that aim'. As Poiares Maduro<sup>48</sup> writes:

It cannot be excluded that the reference in Article 141 EC to compensatory measures has as its aim providing a broader margin of discretion to Member States in adopting measures of positive discrimination. The issue here for the ECJ, and the decision that it has to take regarding admissibility of affirmative action and positive discrimination measures adopted by the Member States, is not actually whether affirmative action is the best way to fight discrimination and to reinstate equality in the labour market, but whether to give Member States a margin of discretion to decide what is compatible with the principle of equality.... In my view, in an area such as this that is

subject to intense discussion and scrutiny, it may be appropriate for the court to allow for some diversity of national political choice regarding the extent to which Member States adopt affirmative action measures.

Allowing the Member States some discretion as to how far these measures can go, provided these measures remain within the limits of what is appropriate and necessary in order to achieve the aim of ensuring full equality in practice, will allow Member States some freedom to go beyond mere measures of the equality of opportunity model and use measures of the equality of results model, but with an opportunity for scrutiny by the ECJ. This might lead to the development of some interesting and innovative measures that could be used as examples of good practice for other Member States. It might also help to extend the boundaries of what the ECJ will accept as permitted positive action, not only under the Race Directive, but also under the other Equality Directives.

Another change that would move the Race Directive further towards performing Fredman's second and third functions would be to add a mainstreaming duty. The Race Directive (and the Framework Directive) could follow the Gender Amendment Directive which adds the following paragraph to Article 1 of the Equal Treatment Directive:

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.

There appears to be no reason why this duty should only exist in relation to gender equality and not to the other grounds of Article 13 EC. Indeed, the Draft Constitution for Europe extends the duty to those other grounds,<sup>49</sup> although it is not sure whether the Constitution in its present form will ever come into force. It would, therefore, be better to add the duty to the Race and Framework Directives.

### **Changes in Relation to the Scope**

The extensive material scope of the Race Directive, going beyond the employment sphere, is to be welcomed, but the meaning of 'within the limits of the powers conferred upon the Community' in both Article 13 EC and Article 3(1) is not clear. However, it could be that the legislator meant to leave this rather vague because a more detailed description would be more restrictive. The ECJ will most likely follow the view of most leading commentators that this phrase means that the power is subject to the limits of the existing Community competencies, as the view that it provides the necessary

powers, where these are lacking, for measures to be taken, might overstep the dividing line between the competences of the Community and those of the Member States and so infringe the principles of subsidiarity and proportionality.

The personal scope of the Race Directive is, again, not very clear. The Directive appears to apply to non-EU nationals and thus protects them against racial and ethnic origin discrimination, except in relation to immigration laws or other legal acts covering entry, residence and legal status. It is clear from the negotiations on the proposed scope<sup>50</sup> that this is a very sensitive area as it touches on a State's sovereignty and the division of powers between the Member States and the Union. Article 3(2) appears, however, to be very broad in scope and could be used to deny third country nationals protection in a very wide range of discriminatory situations. Two possible ways of building in safeguards for the protection of third country nationals can be found in the ICERD and the Race Directive could follow either of these. Articles 1(2) ICERD determines that 'this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by States Parties to this Convention between citizens and non-citizens'. The Committee on the Elimination of All Forms of Racial Discrimination (CERD), the body that oversees the implementation of the ICERD, has brought out a General Recommendation on discrimination against non-citizens.<sup>51</sup> Point 1(4) determines:

Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

Therefore, under the ICERD, differential treatment of non-citizens will be considered to be discrimination, unless it is objectively justified. A similar objective justification test could be added to Article 3 of the Race Directive. This would also cover the police, law enforcement officials, border control officials, and the army and prison personnel in all their activities, including law enforcement. They could use the exceptions of Article 3(2) as long as that use was objectively justified. It would build in an objective test, which could be scrutinised by the courts.

The other alternative would be to follow Article 1(3) ICERD, which states:

Nothing in this Convention may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

The first alternative would provide stronger protection, but both alternatives would improve the protection for third country nationals and would be more in line with Recital 3 of the Preamble to the Race Directive. If the second alternative was followed, the suggestion of the European Parliament to add 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions',<sup>52</sup> might be useful to take away all doubt about whether these bodies and functions are covered.

### Other Changes

The Framework Directive contains a duty on employers to make reasonable accommodation for disabled persons unless such measures would impose a disproportionate burden on them. This duty could also be useful for other grounds of discrimination.<sup>53</sup> For example, allowing for alternatives to uniforms or other clothing and head gear, providing a place and time for religious worship, and adapting the (work) environment and adjusting patterns of working time for elderly or disabled people could all be seen as making reasonable accommodation. It is, therefore, suggested to extend the duty in the Framework Directive beyond disability. If, as was suggested, religion or belief are added to the grounds of discrimination prohibited in the Race Directive, then the duty to make reasonable accommodation should also be included in that Directive. A similar Recital to Recital 21 of the Framework Directive should then also be added. This Recital suggests what should be taken into account to decide whether a measure would impose a disproportionate burden: the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility to obtain public funding or any other assistance. 'Health and safety' might also be mentioned.

According to the general rule of Community law, it is for the national law of the Member States to provide remedies to protect rights derived from Community law and to determine what sanctions should be made available. The EU can, therefore, not give very detailed provisions, because this would be contrary to the principles of subsidiarity and proportionality. Therefore, no changes are proposed to the provisions on remedies and sanctions.

No changes are suggested in relation to the tasks of the body or bodies of Article 13 of the Directive, as it is clear that the list of tasks is non-exhaustive. According to the Explanatory Memorandum to the Proposal for the Directive, the proposal establishes a number of minimum requirements for such independent bodies, but Member States are free to decide on the structure and functioning

of such bodies in accordance with their legal traditions and policy choices.<sup>54</sup> The negotiations on the Directive show, that providing for more extensive competences for these bodies was seen as overstepping 'the line between setting objectives and telling Member States how to achieve them (so contravening the principle of subsidiarity)'.<sup>55</sup> Leaving the Member States some discretion as to the tasks to be given to these bodies might also lead to some interesting developments.

## CONCLUSION

Changes to be made to the Race Directive have been suggested with the aim of making it into a more effective legislative measure in the fight against racism and racial discrimination in the EU. The major points of criticism specifically raised against the Race Directive were, firstly, with regards to the grounds of discrimination, that it puts racial and ethnic origin at the top of the hierarchy of discrimination grounds and that it omits 'religion or belief' from the protected grounds; secondly, with regards to the concept of equality that it mainly aims for a notion of formal equality and does not really go very far towards other concepts of equality; and, thirdly, that the protection it provides for third country nationals appears to be limited.

As all Equality Directives contain the same non-regression clause and thus prohibit levelling-down, the Race Directive itself does not need any changes to deal with the hierarchy as the protection against discrimination on the grounds of racial or ethnic origin is already stronger than that against discrimination on the other Article 13 EC grounds. To deal with the hierarchy, the protection provided by the other Equality Directives could be 'levelled-up' to the same level as that provided by the Race Directive.

The suggestion to add 'religion and belief' to the grounds covered by the Race Directive responds to the second point of criticism mentioned in relation to the grounds of discrimination. Even if the level of protection provided by the Framework Directive would be extended to cover all areas covered by the Race Directive, 'religion or belief' should still be added to the grounds in the Race Directive, because that would avoid having to make a distinction between racial and ethnic origin on the one hand and religion or belief on the other hand. Perpetrators do, indeed, not often make such a clear distinction either.

In relation to the concept of equality, the premise was that equality in all its concepts or, in other words, equality performing all Fredman's functions, is needed to combat racism and racial discrimination. To move the Race Directive further towards substantive and pluralist

concepts of equality, the following changes were suggested: firstly, the title and purpose of the Directive should be to implement the principle of equality, rather than the principle of equal treatment. Secondly, the provisions for positive action should be made compulsory, like they are under the ICERD. Thirdly, positive action should be required not only to prevent or compensate for disadvantages, but also to promote full participation of disadvantaged groups in all fields of life. Fourthly, the Member States should be given some discretion in relation to positive action measures. And, lastly, a mainstreaming duty like the one in the Gender Amendment Directive should be added to the Race Directive.

Suggestions for changes to Article 3(2) of the Race Directive have been made to ensure that the exception in this article is not used to deny third country nationals protection. The first suggestion was to add a proportionality or objective justification test to the second paragraph, while the second one added a proviso. Both suggestions were based on the ICERD and the interpretation of that Convention as given by the CERD.

The time is ripe to suggest changes to the Race Directive, because the Commission is currently working on its five year report on the application of the Directive under Article 17 and on the feasibility study on possible new measures to complement the current legal framework, announced in the 2005 Communication.<sup>56</sup> This paper is meant to contribute to the discussion on possible changes to the Race Directive.

## NOTES

- 1 Council Directive 2000/43/EC, hereafter referred to as the (Race) Directive.
- 2 Council Directive 2000/78/EC, hereafter referred to as the Framework Directive.
- 3 Council Decision 2000/750/EC.
- 4 The main Directives are: Council Directive 75/117/EEC and Council Directive 76/207/EEC. The latter will be referred to as the Equal Treatment Directive.
- 5 Council Directive 2002/73/EC, referred to as the Gender Amendment Directive.
- 6 Council Directive 2004/113/EC, referred to as the Goods and Services Directive.
- 7 ECRI, General Policy Recommendation 7. I have argued elsewhere, that this Recommendation and the Race Directive, which are both addressed to all 25 EU Member States, should influence and strengthen each other, see Howard, 2005.
- 8 Articles 8a Gender Amendment Directive and 12 Goods and Services Directive.

- 9 See Liegl *et al.*, 2004:12; and COM (2004) 379:7.
- 10 Articles 6 Race Directive; 8 Framework Directive; 8e Gender Amendment Directive; and, 7 Goods and Services Directive.
- 11 See for example, Guild, 2000a:418; McInerney, 2000:317–23; Barnard, 2001:968; Toggenburg, 2001/2; Bell, 2002a:72–9; Brown, 2002:204; Ellis, 2002:291–305; Brennan, 2002/3:320–4; Waddington, 2003a; Parmar, 2004:137.
- 12 For more on this see: Waddington, 1999:142; Bell, 2000:80; Waddington, 2000:176–7; Waddington and Bell, 2001; Fredman, 2001a:151–2; O’Hare, 2001:144 and 158; Bell 2002a:32–3 and 52–3; Brown, 2002:222–3; Schiek, 2002:308–9; Bell and Waddington, 2003; Waddington, 2003a:47–9; Liegl *et al.*, 2004:9.
- 13 See for example, Guild, 2000a:418; Fredman, 2001a:158–9; Niessen, 2001:9; Bell, 2001:25; O’Hare, 2001:45; Bell, 2002b:12; Brown, 2002:204–5; Miguel Sierra, 2002:16–7; McInerney, 2003:12; Liegl *et al.*, 2004:9.
- 14 Only a very brief overview is given here. For more information the reader is referred to: Lacey, 1987; Gregory, 1987; O’Donovan and Szyszczak, 1988; Hepple, 1992; Lacey, 1992; Townshend-Smith, 1998; Barnard, 1998; Barnard, 1999; Barnard and Hepple, 2000; Fredman, 2001a; Fredman, 2001b; Fredman, 2002; Schiek, 2002.
- 15 Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at [36].
- 16 Article 2(4) is now replaced by Article 2(8) Gender Amendment Directive.
- 17 See for example, Case 450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051; Case 409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363; Case 158/97 *Badeck’s Application* [2000] ECR I-1875; Case 407/98 *Abrahamsson and Anderson v. Fogelqvist* [2000] ECR I-5539. For a detailed discussion of positive action and the different concepts of equality, including the cases mentioned, see Fredman, 2002:125–60.
- 18 Poiars Maduro, 2005:25.
- 19 Guild, 2000b:67.
- 20 Bryan, 2002:227.
- 21 Brown, 2002:212.
- 22 Chopin and Niessen, 1998:21–2; Chopin, 1999:121.
- 23 Tyson, 2001:209–10.
- 24 Bell, 2002b:22.
- 25 Brown, 2002:215.
- 26 Brown uses the term ‘institutionalized racism’ and refers to the Lawrence Report. This Report, defined ‘institutional racism’ as: the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people. See para 6.34 of the Report.
- 27 Farkas, 2006:22. Farkas also argues that policing could be considered as a service available to the public.

- 28 COM (1999) 566:5.
- 29 Howard, 2006.
- 30 Opinion European Parliament, A5-0136/2000, Amendment 29.
- 31 Fredman, 2001b:15.
- 32 Case 1/72 *Rita Frilli v. Belgium* [1972] ECR 457, at [19]. See also Joined Cases 117/76 *Ruckdeschel and Another v. HZA Hamburg-St. Annen* and 16/77 *Diamalt AG v. HZA Itzehoe* [1977] ECR 1753, at [7]; Case 149/77 *Defrenne v. Sabena* [1978] ECR 1365, at [26] and [27].
- 33 Case 292/97 *Kjell Karlsson and Others* [2000] ECR I-2737, at [37–39].
- 34 Case 4/73 *Nold v. Commission* [1974] ECR 491, at [13].
- 35 Bell 2002a:20.
- 36 COM (2005) 224.
- 37 COM (2005) 225. In June 2006 the Proposal was adopted and a special website for the year was set up. See: IP/06/712.
- 38 COM (2005) 224:9–10.
- 39 This opinion is also expressed by Waddington and Bell, 2001:592; Bell, 2002a:75; Ellis, 2002:296; Schiek, 2002:295–6; Parmar, 2004:143; Liegl *et al.*, 2004:9.
- 40 McColgan, 2005:58; Waddington, 2003b:14–5.
- 41 ECRI General Policy Recommendation 7.
- 42 This argument is also used by Poiares Maduro, 2005:26.
- 43 Case 476/99 *Lommers v. Ministerie van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, at [37].
- 44 Schiek, 2002:299.
- 45 Brown, 2002:216; Waddington and Bell, 2001:602.
- 46 Waddington and Bell 2001:602.
- 47 Above note 43, at 39. This was repeated in the *Briheche* case: Case 319/03 *Serge Briheche v. Ministre de l'Interieur, Ministre de l'Education nationale and Ministre de la Justice*, judgement 30/09/2004, at 24.
- 48 Poiares Maduro, 2005:26.
- 49 Article III-118 of the Draft Constitution for Europe.
- 50 Tyson, 2001:209–10.
- 51 CERD, General Recommendation 30.
- 52 Opinion European Parliament, A5-0136/2000, Amendment 37.
- 53 See: Waddington, 2000:178; and Bell and Waddington, 2003:360–2. Both suggest that reasonable accommodation provisions would be useful in relation to religion and age as well.
- 54 COM (1999) 566:7.
- 55 See Tyson, 2001:216.
- 56 COM (2005) 225:6.

## REFERENCES

- Barnard, C: (1998) The Principle of Equality in the Community Context: *P, Grant, Kalanke and Marschall*: Four uneasy Bedfellows? *Cambridge Law Journal* 57, 2, 352–73.

- Barnard, C. (1999) Article 13: Through the Looking Glass of Union Citizenship. In *Legal Issues of the Amsterdam Treaty* (O'Keeffe, D. and Twomey, P. (eds.), 375–95. Hart Publishing; Oxford.
- Barnard, C. and Hepple, B. (2000) Substantive Equality. *Cambridge Law Journal* 59, 3, 562–85.
- Barnard, C. (2001) The Changing Scope of the Fundamental Principle of Equality? *McGil Law Journal* 46, 4, 955–77.
- Bell, M. (2000) Article 13 EC: The European Commission's Anti-Discrimination Proposals. *Industrial Law Journal* 29, 1, 79–84.
- Bell, M. (2001) Meeting the Challenge? A Comparison between the EU Racial Equality Directive and the Starting Line. In *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States* (Chopin, I. and Niessen, J. (eds.), 22–54. Commission for Racial Equality/Migration Policy Group; London/Brussels.
- Bell M.(2002a) *Anti-Discrimination Law and the European Union*. Oxford University Press: Oxford.
- Bell, M. (2002b) Combating Racism through European Laws: A Comparison of the Racial Equality Directive and Protocol 12. In *Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further* (Chopin, I. And Niessen, J. (eds.), 7–34. Commission for Racial Equality/Migration Policy Group; London/Brussels.
- Bell, M. and Waddington, L. (2003) Reflecting on Inequalities in European Equality Law. (2003) *European Law Review* 28, 349–69.
- Brennan, F. (2002/3) The Race Directive: Recycling Racial Inequality. *Cambridge Yearbook of European Legal Studies* 5, 311–31.
- Brown, C. (2002) The Race Directive: Towards Equality for All the Peoples of Europe? *Yearbook of European Law* 21, 195–227.
- Bryan, I. (2002) Equality and Freedom from Discrimination: Article 13 EC Treaty. *Journal of Social Welfare and Family Law* 24, 2, 223–38.
- CERD (Committee on the Elimination of Racial Discrimination) (2004) General Recommendation 30, *Discrimination against Non-Citizens*, CERD/64/C/Misc.11/rev.3, < [www.ohchr.org/english/bodies/cerd/docs/CERD-GC30.doc](http://www.ohchr.org/english/bodies/cerd/docs/CERD-GC30.doc) (Last visited 16/08/2006).
- Chopin, I. and Niessen, J. (eds.) (1998) *Proposals for Legislative Measures to Combat Racism and to Promote Equal Rights in the European Union*. Belmont Press; London.
- Chopin, I. (1999) The Starting Line Group: A Harmonized Approach to Fight Racism and to Promote Equal Treatment. *European Journal of Migration and Law* 1, 111–29.
- Cm 4262-I (1999), *The Stephen Lawrence Inquiry*, Report by Sir William MacPherson of Cluny.
- COM (1999) 566, Proposal for a Council Directive implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin.
- COM (2004) 379, Green Paper on Equality and Non-discrimination in an Enlarged European Union.
- COM (2005) 224, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and

- the Committee of the Regions, Non-Discrimination and Equal Opportunities for All – A Framework Strategy.
- COM (2005) 225, Proposal for a Decision of the European Parliament and the Council on the European Year of Equal Opportunities for All (2007) Towards a Just Society.
- Council Decision 2000/750/EC establishing a Community Action Programme to combat Discrimination (2001–2006) [2000] OJ L303/23.
- Council Directive 75/117/EEC on the Approximation of the Laws of the Member States relating to the Application of the Principle of Equal Pay for Men and Women [1975] OJ L45/19.
- Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions [1976] OJ L39/40.
- Council Directive 2000/43/EC implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] OJ L180/22.
- Council Directive 2000/78/EC establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303/16.
- Council Directive 2002/73/EC amending Council Directive 76/207/EEC [2002] OJ L269/15.
- Council Directive 2004/113/EC implementing the Principle of Equal Treatment between Men and Women in the Access to and the Supply of Goods and Services [2004] OJ L373/37.
- ECRI (European Commission against Racism and Intolerance) (2003) General Policy Recommendation 7, *On National Legislation to Combat Racism and Racial Discrimination* CRI 8. Council of Europe; Strasbourg.
- Ellis, E. (2002) The Principle of Non-Discrimination in the Post-Nice Era. In *Accountability and Legitimacy in the European Union* (Arnall A. and Wincott, D. (eds.), 291–305. Oxford University Press; Oxford.
- Farkas, L. (2006) A Good Way to Equality: Roma seeking Judicial Protection against Discrimination in Europe. *European Anti-Discrimination Law Review* 3, 21–9.
- Fredman, S. (2001a) Equality: A New Generation? (2001) *Industrial Law Journal* 30, 2, 145–68.
- Fredman, S. (2001b) Introduction, Combating Racism with Human Rights: The Right to Equality. In *Discrimination and Human Rights The Case of Racism*. (Fredman, S. (ed.), 1–44. Oxford University Press: Oxford.
- Fredman, S. (2002) *Discrimination Law*. Clarendon Law Series: Oxford.
- Gregory, J. (1987) *Sex, Race and the Law. Legislating for Equality*. Sage: London.
- Guild, E. (2000a) The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations. *Industrial Law Journal* 29, 4, 416–23.
- Guild, E. (2000b) The European Union and Article 13 of the Treaty establishing the European Community. In *Race Discrimination. Developing and Using a New Legal Framework* (Moon, G. (ed.), 65–79. Hart Publishing; Oxford/Portland, Oregon.

- Hepple, B. (1992) Have Twenty-Five Years of the Race Relations Acts in Britain been a Failure? In *Discrimination: The Limits of Law* (Hepple, B. and Szyszczak, E. (eds.)), 19–34. Mansell; London.
- Howard, E. (2005) Anti Race Discrimination Measures in Europe: An Attack on Two Fronts. *European Law Journal* **11**, 4, 468–81.
- Howard, E. (2006) The Case for a Considered Hierarchy of Discrimination Grounds in EU Law. *Maastricht Journal of European and Comparative Law* **13**, 4, 445–70.
- IP/06/712 (1/06/2006), 2007 starts Today: 'European Year of Equal Opportunities for All' gets green light. The website can be found at: [www.ec.europa.eu/employment\\_social/equality2007/index\\_en.htm](http://www.ec.europa.eu/employment_social/equality2007/index_en.htm) (last visited 16/08/06)
- Lacey, N. (1987) Legislation Against Sex Discrimination: Questions from a Feminist Perspective. *Journal of Law and Society* **14**, 4, 411–21.
- Lacey, N. (1992) From Individual to Group? In *Discrimination: The Limits of Law* (Hepple, B. and Szyszczak, E. (eds.)), 99–123. Mansell; London.
- Liegl, B., Perching, B. and Weys, B. (2004) *Combating Religious and Ethnic Discrimination in Employment From the EU and International Perspective*. ENAR; Brussels.
- McColgan, A. (2005) *Discrimination Law Text, Cases and Materials*. 2nd ed. Hart Publishing; Oxford/Portland, Oregon.
- McInerney, S. (2000) Equal Treatment between Persons irrespective of Racial or Ethnic Origin: a Comment. *European Law Review* **25**, 317–23.
- 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 the Law* **6**, 1, 3–43.
- Miguel Sierra, M. (ed.), (2002) *Towards Equal Treatment Transposing the Directive – Analysis and Proposals*. ENAR; Brussels.
- Niessen, J. (2001) The Further Development of European Anti-Discrimination Policies. In *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States* (Chopin, I. and Niessen, J. (eds.)), 7–21. Commission for Racial Equality/Migration Policy Group; London/Brussels.
- O'Donovan, K. and Szyszczak, E. (1988) *Equality and Sex Discrimination Law*, 1–20. Basil Blackwell; Oxford.
- O'Hare, U. (2001) Enhancing European Equality Rights: A New Regional Framework. *Maastricht Journal of European and Comparative Law* **8**, 2, 133–65.
- Opinion European Parliament, A5-0136/2000, 18/05/2000, on COM (1999) 566.
- Parmar, S. (2004) The European Court of Justice and Anti-Discrimination Law: Some Reflections on the Experience of Gender Equality Jurisprudence for the Future Interpretation of the Racial Equality Directive. In *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Niessen, J. and Chopin, I. (eds.)), 131–54. Martinus Nijhoff Publishers; Leiden/Boston.
- Poiaras Maduro, M. (2005) The European Court of Justice and Anti-Discrimination Law. *European Anti-Discrimination Law Review* **2**, 21–6.

- Schiek, D. (2002) A New Framework on Equal Treatment of Persons in EC Law? *European Law Journal* **8**, 2, 290–314.
- Toggenburg, G. (2001/2) The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe. *European Yearbook of Minority Issues* **1**, 231–44.
- Townshend-Smith, R. (1998) *Discrimination Law: Text, Cases and Materials*, 61–86. Cavendish Publishing; London.
- Treaty establishing a Constitution for Europe, [2004] OJ C310/1.
- Tyson, A. (2001) The Negotiation of the European Community Directive on Racial Discrimination. *European Journal of Migration and Law* **3**, 199–229.
- Waddington, L. (1999) Testing the Limits of the EC Treaty Article on Non-Discrimination. *Industrial Law Journal* **28**, 2, 133–51.
- Waddington, L. (2000) Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive. *Industrial Law Journal* **29**, 2, 176–81.
- Waddington, L. and Bell, M. (2001) More Equal than Others: Distinguishing European Union Equality Directives. *Common Market Law Review* **38**, 587–611.
- Waddington, L. (2003a) The New Equality Directives: Mixed Blessings. In *Equality in Diversity The New Equality Directives* (Costello, C. and Barry, E. (eds.), 39–54. Irish Centre for European Law/Irish Equality Authority/Ashfield Publishing; Dublin.
- Waddington, L. (2003b) *The Expanding Role of the Equality Principle in European Union Law. Policy Paper*, European University Institute, Robert Schuman Centre of Advanced Studies, <[www.iue.it/RSCAS?e-texts/CR2003-04.pdf](http://www.iue.it/RSCAS?e-texts/CR2003-04.pdf)> (Last visited 16/08/2006).