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## Equality between Europe's Citizens: Where Does the Union Now Stand?

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# EQUALITY BETWEEN EUROPE'S CITIZENS: WHERE DOES THE UNION NOW STAND?

*Philippa Watson\**

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## *INTRODUCTION*

This Essay seeks to address the issue of equality amongst the European Union's citizens. How has the European Union succeeded since its inception more than half a century ago in giving rights under EU law to citizens who, because of their specific characteristics, attributes, or position in life, are viewed as inferior to others and consequently treated differently to their ultimate prejudice?

The general principle of equality governs the exercise of Union competence and the means by which Member States can transpose EU law into their national legal systems. This principle precludes comparable situations from being treated differently or different situations being treated equally unless there is an objective justification for doing so.<sup>1</sup> The general principle of

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1. See *Albert Ruckdeschel & Co. & Diamalt AG v. Hauptzollamt Itzenhoe*, Joined Cases 117/76 & 16/77, [1977] E.C.R. 1753, ¶ 7; see also TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 61–62 (2d ed. 2006). See generally Koen Lenaerts & José Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*,

equality finds specific expression in a number of provisions of the treaties that govern the European Union, in the Charter of Fundamental Rights, and in legislation. These instruments proscribe discrimination on specific grounds including nationality, gender, race, age, religion or belief, disability, and sexual orientation. These instruments have been the subject of an extensive body of case law emanating from the European Court of Justice (“CJ” or “Court”). The effect of this case law in combating discrimination is extensive. It has influenced, if not indeed led, both legislative and treaty development.

This Essay is concerned with discrimination between EU citizens in the social and employment spheres. It does not extend to discrimination on an economic level. Part I of this Essay considers briefly the evolution of equality law in the European Union up to the present day. Part II then considers the application of the principle of equal treatment between nationals; men and women; and the elimination of discrimination on the grounds of race or ethnic origin, age, religion, disability, and sexual orientation. Equality on the basis of nationality developed mainly through the case law of the CJ; there is no specific legislative instrument dealing with national discrimination generally. This case law will be considered first, followed by a discussion of the legislative instruments as interpreted by the CJ that deal with the other prohibited grounds of discrimination. Finally, Part III discusses the present state of equality law: has the Union managed to achieve its goals? Has equality of treatment as set out in the various Union instruments been achieved? If not, why not? What remains to be done to achieve the goals set out in the treaties and the Charter of Fundamental Rights?

### I. *EVOLUTION: THREE PHASES—ROME TO LISBON*

The right to equal treatment between employed persons having the nationality of a Member State with respect to access to employment remuneration and other conditions of work and employment are assured by Article 45 of the Treaty on the

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47 COMMON MKT. L. REV. 1629 (2010) (providing background on the European Union's approach to discrimination).

Functioning of the European Union (“TFEU”).<sup>2</sup> Directive 1612/68<sup>3</sup> implemented the principle of equal treatment. Thus, for example, nationals of a Member State who take up employment in another Member State have the right to vocational training under the same conditions as nationals of their host Member State.<sup>4</sup> In addition, they have the right to the same “social and tax advantages,” a concept that has been interpreted broadly by the CJ.<sup>5</sup> The broad scope of these rights is designed to achieve the total integration of the worker and his family into the society of the host Member State. This departs from the traditional view that prevailed when the European Economic Community (“EEC”) came into being—that of the migrant as being a mere economic tool. The view of the founding fathers of the European Union was that the worker and his family should have the right—and should be facilitated in the exercise of that right—to integrate into the Member State in which he chooses to be economically active.

Equality also was established within Article 119 of the Treaty Establishing the European Economic Community (“EEC Treaty”), which provided for equal pay for men and women doing equal work.<sup>6</sup> It appears to have been drafted originally to address economic concerns. The Ohlin Committee,<sup>7</sup> set up in 1956 to examine what the social aspects of the future EEC should be, concluded that there was only one aspect of social

2. See Consolidated Version of the Treaty on the Functioning of the European Union art. 45, 2010 O.J. C 83/47, at 65–66 [hereinafter TFEU].

3. Council Regulation No. 1612/68/EEC on Freedom of Movement for Workers Within the Community, 1968 O.J. L 257/2.

4. See *id.* art. 7, at 5.

5. See *id.*; see also, e.g., Schmid v. Belgian State, Case C-310/91, [1993] E.C.R. I-3011 (addressing such matters as an allowance for handicapped adults); Frascogna v. Caisse des Dépôts et Consignations, Case 256/86, [1987] E.C.R. 3431 (addressing minimum income benefits); Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout, Case 249/83, [1985] E.C.R. 973 (addressing special unemployment benefits); Office National de l’Emploi v. Deak, Case 94/84, [1985] E.C.R. 1873 (addressing special unemployment benefits); Reina v. Landeskreditbank, Case 65/81, [1982] E.C.R. 33 (addressing interest free loans granted on childbirth); Cristini v. Société Nationale des Chemins de Fer Français, Case 32/75, [1975] E.C.R. 1085 (addressing fare reduction cards by railway companies).

6. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 119, 298 U.N.T.S. 11, 62 [hereinafter EEC Treaty].

7. This was a group of independent experts appointed by the International Labour Organisation chaired by Professor Ohlin. See *Social Aspects of European Economic Co-operation*, 74 INT’L LAB. REV. 99, 99 n.1 (1956) (listing the committee members).

policy that should be regulated on a European level and that was the pay levels of the female workforce. At that time, with few exceptions, notably France, women were paid at a lower rate than men. The Committee concluded that this could lead to a distortion in production costs with consequent imbalances in competition conditions within the common market.<sup>8</sup>

Article 119 seems therefore to have been designed to ensure free and fair competition—nothing more. It was not viewed in the early years of the European Union as having a social objective,<sup>9</sup> although, with the evolution of the European Union from a regional trading area, purely economic in nature, to a fully integrated internal market concerned with the well being of its citizens and their fundamental rights, the CJ placed a broader interpretation on Article 119, finding its primary aim to be social: “[T]he economic aim pursued by Article 119 . . . namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.”<sup>10</sup>

The European Union’s equality law has developed in three phases, each of which reflects a growing commitment to the principle of equality and respect for human rights. The first phase in the development of EU equality law ran from 1957 to 1987. What is now the European Union had its origins in the EEC, which was created by the EEC Treaty, also known as the Treaty of Rome, on March 25, 1957.<sup>11</sup> The EEC Treaty contained a number of references to the concept of equal treatment, most of which were concerned with economic operators. There was one general provision, the potential of which was certainly never realized by the founding fathers of the European Union, and yet with the passage of time has possibly had the greatest impact upon the daily lives of citizens living and

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8. INT’L LABOUR ORG., NO. 46, SOCIAL ASPECTS OF EUROPEAN ECONOMIC CO-OPERATION ¶ 109 (1956). For a summary of the report, see generally *Social Aspects of European Economic Co-operation*, *supra* note 7.

9. See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT’L L.J. 331, 337 (2003).

10. Deutsche Telekom AG v. Schröder, Case C-50/96, [2000] E.C.R. I-743, ¶ 57.

11. EEC Treaty, *supra* note 6.

working within the European Union. That provision is Article 6 of the EEC Treaty, which is now Article 18 of the TFEU. It states that: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”<sup>12</sup> The essence of this provision has remained unchanged throughout the many Treaty revisions and amendments that have occurred in the past quarter of a century. Moreover, the CJ has held that this Article requires Member States to provide “perfect” or “absolute” equality of treatment between its own nationals and those of other Member States.<sup>13</sup> Thus, the prohibition is generally uncompromising.

In addition to prohibiting discrimination on the basis of nationality in the sphere of employment in what is now Article 45 of the TFEU, and, more generally, with respect to all matters within the scope of the Treaty, the original EEC Treaty laid down the principle of equal pay for men and women.

Article 119 did not prohibit discrimination between men and women in the matter of pay nor did it provide for the adoption of legislative measures to enforce this principle, relying instead on requiring the Member States themselves to bring about equal pay for equal work within their own legal systems by December 31, 1961. This deadline was not respected, and the Member States passed a resolution on the matter in late December 1961 giving themselves an extension until December 31, 1964 to achieve equality between men and women in pay.

Articles 7, 45, and 119 of the EEC Treaty were the only provisions granting the European Union competence to adopt measures on discrimination between Europe’s citizens until the Treaty of Amsterdam (“ToA”),<sup>14</sup> which came into force in 1997.

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12. Compare TFEU, *supra* note 2, art. 18, 2010 O.J. C 83, at 56, with EEC Treaty, *supra* note 6, art. 6, at 17.

13. See, e.g., *Hayes v. Kronenberger*, Case C-323/95, [1997] E.C.R. I-1711, ¶ 18; *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, Case C-43/95, [1996] E.C.R. I-4661, ¶ 16.

14. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam].

In 1974, the European Council passed a resolution concerning a social action program,<sup>15</sup> which included amongst its priorities “action for the purpose of achieving equality between men and women as regards access to employment and vocational training and promotion and as regards working conditions including pay.”<sup>16</sup> The European Commission (“Commission”) thus began drawing up proposals for what ultimately became the Equal Pay Directive,<sup>17</sup> adopted on February 10, 1975. Article 3 of the Equal Pay Directive obliged the Member States to abolish all discrimination between men and women in laws, regulations, and administrative provisions which were contrary to the principle of equal pay.<sup>18</sup> Employees were required to be informed of the provisions adopted in pursuance of the Directive.<sup>19</sup> Article 4 obliged Member States to ensure that “collective agreements, wage scales, wage agreements or individual contracts of employment” that were “contrary to the principle of equal pay . . . be declared null and void or may be amended.”<sup>20</sup>

In the meantime, Miss Gabrielle Defrenne, an air stewardess with the now defunct national Belgian airline SABENA, began a series of actions complaining of discrimination with respect to her pension rights pay and some of her working conditions, all which she claimed were less favorable than those of her male colleagues doing the same work. In the second of these actions, *Defrenne II*,<sup>21</sup> Miss Defrenne relied upon Article 119 in support of her claim. In a preliminary ruling referred to the CJ by the Cour de Travail Brussels, the Court was asked whether Article 119 had direct effect with the result that workers could rely on it before national courts to claim equal pay. The Court held that indeed they could. It

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15. Council Resolution of 21 January 1974, 1974 O.J. C 13/1 (Social Action Program).

16. *Id.* at 2.

17. 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 O.J. L 45/19 [hereinafter Equal Pay Directive].

18. *See id.* art. 3, at 20.

19. *See id.* art. 7, at 20.

20. *Id.* art. 5, at 20.

21. *See Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II)*, Case 43/75, [1976] E.C.R. 455.

began its analysis of the issue by stating that Article 119 had a double aim: 1) to ensure free and fair competition by avoiding prejudice to undertakings that were obliged by law to offer equal pay to their workforce as opposed to those who were not, and 2) it also had the social aim of improving working conditions and living standards.

The Court went on to find that Article 119 was “directly applicable and may thus give rise to individual rights which the courts must protect.”<sup>22</sup> It imposed upon Member States a duty to bring about a specific result within a fixed period. Article 119 was not a vague declaration nor did it give the Member States any discretion as to the attainment of its objective. The Court pronounced the principle of equal pay to be one of the foundations of the European Community (“Community”) that must be attained by raising the lowest salaries rather than lowering the highest. Women’s pay was to move up to the level of that of men.<sup>23</sup>

The *Defrenne II* case was, at the time, viewed as dramatic. Far from the Member States meandering gently on their own terms towards equal pay for men and women, the objective was achieved by the CJ declaring equal pay to be a directly effective right, the substance of which could not be limited by national legislation. Given the potentially grave financial consequences of its judgment for many sectors of industry, the Court limited the temporal effect of its judgment: Article 119 could not be relied upon to support claims for pay periods prior to the date of judgment, April 8, 1976, save with respect to those claimants who had instituted proceedings prior to that date.<sup>24</sup>

The Equal Pay Directive came into force some eight weeks before the judgment in *Defrenne II* was pronounced. That judgment did not make the directive in any way redundant, and required no amendment to its provisions. From being perceived,

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22. *Id.* ¶ 24.

23. See *Pensioenfond v. Beunc*, Case C-7/93, [1994] E.C.R. I-4471, ¶ 28 (holding that the “meaning and scope of [the principle of equal pay] cannot . . . be determined by a formal criterion, which is [in] itself dependent upon [a] rule[] or practice[] followed in the Member States”).

24. A similar approach was adopted in *Barber v. Guardian Royal Exchange Assurance Group*, which found to everyone’s apparent astonishment that occupational pensions were part of pay. See *Barber v. Guardian Royal Exch. Assurance Grp.*, Case C-262/88, [1990] E.C.R. I-1889, ¶ 30.



as it was at the time of its adoption, as the sole source of enforceable equal pay rights, the directive instead became complementary with and subject to Article 119. The directive could not detract from Article 119's provisions and its main role was to provide a source of rights for those cases of indirect discrimination that could not be dealt with under Article 119. As stated in *Defrenne II*: "Directive No 75/117 . . . was intended to encourage the proper implementation of Article 119 . . . in order, in particular, to eliminate indirect forms of discrimination, but was unable to reduce the effectiveness of that Article or modify its temporal effect."<sup>25</sup>

In two other sets of proceedings instituted by Miss Defrenne, the Court found that Article 119 related to pay only, it did not require equal treatment with respect to working conditions<sup>26</sup> or within state social security systems.<sup>27</sup>

Accordingly, following these judgments two directives were adopted in 1976 and 1978 respectively: the Equal Opportunities Directive<sup>28</sup> and the Equal Treatment in Social Security Directive.<sup>29</sup> In 1986, the Equality of Treatment in Occupational Welfare Schemes<sup>30</sup> was adopted in the mistaken belief that the concept of "pay" did not extend to occupational welfare

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25. *Defrenne II*, [1976] E.C.R. 455, ¶ 60. While this seemed to rule out any interpretation of the directive that could limit the effectiveness of Article 119 but did not detract from the possibility that it might have a broader approach than Article 119, in *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, Case 96/80, [1981] E.C.R. 912, ¶ 22, and *Lengerich v. Helmig*, Joined Cases C-399/92, 409/92, 425/92, 34/93, 50/93, 78/93, [1994] E.C.R. I-5727, ¶ 19, the Court indicated that the scope of both instruments was coterminous.

26. See *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne III)*, Case 149/77, [1978] E.C.R. 1365, ¶ 24.

27. See *Defrenne v. Belgium (Defrenne I)*, [1971] Case 80/70, E.C.R. 445.

28. See 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 O.J. L 39/40, at 40 [hereinafter *Equal Opportunities Directive*].

29. See Council Directive 79/7/EEC on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 1979 O.J. L 6/24 [hereinafter *Equal Treatment in Social Security Directive*].

30. See Council Directive 86/378/EEC on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 1986 O.J. L 225/40 [hereinafter *Equality of Treatment in Occupational Welfare Schemes Directive*].

schemes such as pensions and thus specific legislation was required to ensure the equal treatment of men and women.<sup>31</sup>

Following the *Defrenne* cases and the adoption of the four directives on equal treatment between men and women, a steady flow of references for preliminary rulings arrived at the CJ from courts and tribunals throughout the European Union before which claims for equal treatment, brought overwhelmingly by women, had been commenced. It was during this decade that the Court began to put flesh on skeletal legislative provisions, which left key concepts largely undefined and thus their scope of application and concrete effects undetermined.<sup>32</sup>

The second phase in the evolution of equality law ran from 1987 to 1997. This was a decade of great change. The EEC Treaty was amended for the first time since its adoption thirty years earlier, and not just once but three times. The face of equality law changed both as a result of these amendments and the continuing stream of case law emanating from the CJ.

The Single European Act was adopted in February 1986.<sup>33</sup> It entered into force on July 1, 1987. This extension of qualified majority voting to the field of health and safety enabled the adoption of the Pregnancy Directive,<sup>34</sup> which lays down a number of standards designed to promote the welfare of pregnant workers and those who have recently given birth.<sup>35</sup> Article 10 of the Pregnancy Directive enshrines the right of pregnant women not to be dismissed during the period commencing with the beginning of the pregnancy until the end of maternity leave, save in exceptional cases not connected with

31. See *Barber v. Guardian Royal Exch. Assurance Grp.*, Case C-262/88, [1990] E.C.R. I-1889, ¶ 30 (holding occupational pensions to be “pay” under Article 119).

32. See generally SIOFRA O’LEARY, *EMPLOYMENT LAW AT THE EUROPEAN COURT OF JUSTICE: JUDICIAL STRUCTURES, POLICIES AND PROCESSES* (2002); Philippa Watson, *Creative Responses in Unchartered Territory*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 453 (Malcolm Langford ed., 2009); Philippa Watson, *The Role of the European Court of Justice in the Development of Community Labour Law*, in *HUMAN RIGHTS AND LABOUR LAW: ESSAYS FOR PAUL O’HIGGINS* 76 (K.D. Ewing et al. eds., 1994).

33. See Single European Act, 1987 O.J. L 169/1.

34. See Council Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or Are Breastfeeding, 1992 O.J. L 348/1 [hereinafter *Pregnancy Directive*].

35. See *id.* art. 1(1), at 2.

their pregnancy.<sup>36</sup> This provision has been held to be of direct effect and may be relied upon before national courts and tribunals in actions against state authorities,<sup>37</sup> and is discussed in more detail below.

The Community Charter of Fundamental Social Rights for Workers ("Social Charter") was adopted in December 1989.<sup>38</sup> It was the first use of a charter to express a commitment on the part of the Member States to commonly held values. Amongst the Social Charter's provisions was an affirmation of the right of equal treatment for men and women in employment, in paragraph 16.<sup>39</sup> The United Kingdom, opposed to any extension of Community competence in the social field, was not a party to the Social Charter.

From the late 1980s, the right to not be subject to differential treatment on grounds of nationality began to be extended by the CJ beyond the economic sphere.<sup>40</sup> Discrimination on the grounds of nationality is discussed below.

In the decade preceding the adoption of the ToA there were a number of initiatives, which sought both to heighten awareness of the issue of racial discrimination and to seek means by which it could be at least attenuated, if not altogether eliminated. A rise in immigration highlighted racist attitudes within the Member States during the 1990s. Increased lobbying, particularly by the Starting Line Group, an organization representing some 400 nongovernmental organizations established in 1991,<sup>41</sup> focused on the adoption of legislation on a

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36. *See id.* art. 10, at 4.

37. *See, e.g.*, *Melgar v. Ayuntamiento de Los Barrios*, Case C-438/99, [2009] E.C.R. I-6915, ¶ 34.

38. Commission of the European Communities, Community Charter of Fundamental Social Rights, COM (89) 471 Final (Oct. 1989).

39. *See id.* ¶ 16.

40. *See, e.g.*, *Cowan v. Le Trésor Public*, Case C-186/87, [1989] E.C.R. 216, ¶ 20.

41. At the initiative of the British Commission for Racial Equality, the Dutch National Bureau Against Racism, and the Churches Commission for Migrants in Europe, other pan-European organizations soon joined groups including the European Jewish Information Centre, the European Anti-Poverty Network, the Belgian Centre for Equal Opportunities, and the Commissioner for Foreigners of the Berlin Senate. *See* Isabelle Chopin, *The Starting Line Group: A Harmonised Approach to Fight Racism and to Promote Equal Treatment*, 1 EUR. J. MIGRATION & L. 111, 111 (1999).

Community-level basis to outlaw discrimination on the grounds of race and ethnic origin.<sup>42</sup>

The Starting Line Group drafted a proposal for a directive in 1993, which was somewhat premature since there was no specific legal basis whereby it could be adopted, but it was well-supported and ultimately influenced the Commission in its preparation of what became the Race Directive.<sup>43</sup>

The Commission's Communication on Racism, Xenophobia and Anti-Semitism of December 13, 1995<sup>44</sup> proposed the insertion, where appropriate, of antidiscrimination clauses in new Community instruments and in instruments revising and updating Community legislation. This resulted notably in amendments to Regulation 1612/68 on the free movement of workers.<sup>45</sup>

Momentum for legislation grew during 1997, designated the European Year Against Racism, which had as its objective the raising of awareness of racism. That year also saw the establishment of the European Monitoring Centre on Racism and Xenophobia,<sup>46</sup> entrusted with the broad mandate of gathering of information on racism and assisting in the formulation of policy on a Community level.

These efforts culminated in the inclusion, by virtue of the ToA, of Article 13 within the Treaty Establishing the European Community ("EC Treaty"), which is now Article 19 of the TFEU.<sup>47</sup> Article 19 singles out specific grounds of discrimination that it treats as "suspect grounds" or "suspect classifications." The aim of Article 19 is "to protect the dignity and autonomy of persons belonging to those suspect classifications."<sup>48</sup>

42. See, e.g., *id.*

43. See Adam Tyson, *The Negotiation of the European Community Directive on Racial Discrimination or Ethnic Origin*, 3 EUR. J. MIGRATION & L. 1999, 199–200 (2001).

44. Commission of the European Communities, Communication from the Commission on Racism, Xenophobia and Anti-Semitism, COM (95) 653 Final (Dec. 1995).

45. See generally Council Regulation 1612/68/EEC on Freedom of Movement Within the Community, *supra* note 3.

46. Council Regulation No. 1035/97/EC Establishing a European Monitoring Centre on Racism and Xenophobia, 1997 O.J. L 151.

47. See TFEU, *supra* note 2, art. 19, 2010 O.J. C 83, at 56.

48. Opinion of Advocate General Maduro, *Coleman v. Attridge Law & Steve Law*, Case C-303/06, [2008] E.C.R. I-5603, ¶ 10.

Article 19 provides a legal basis for the adoption of measures but it does not impose any specific obligations on the Member States, nor does it impose any obligations on the institutions of the European Union: they have complete discretion as to whether to act or not.<sup>49</sup> In contrast, therefore, to Article 18, which is concerned with the elimination of discrimination on the grounds of nationality, it has no direct effect in the sense that it cannot be relied upon by individuals seeking to use it as a basis to assert the right to equal treatment.

The Agreement on Social Policy, set out in Protocol 14 to the Maastricht Treaty,<sup>50</sup> enhanced the legislative competence of the European Union in the field of social and employment policy by broadening and increasing the use of qualified majority voting, the European Union's lawmaking powers in the social and employment sphere, and by empowering the adoption of legislation in the field of equal pay.

The ToA merged the Agreement on Social Policy into the social chapter of the EC Treaty. As a result, the legislative competence of the Union was greatly extended. Article 119 was renumbered Article 141 and amended to empower the adoption of measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation including equal pay.<sup>51</sup>

In the years immediately following the adoption of the ToA, further directives were adopted, completely eliminating discriminatory practices in the workplace legislation and facilitating the enforcement of the principle of equality of treatment between men and women. Directive 97/80<sup>52</sup> codified the Court's case law on balancing the burden of proof between parties in gender discrimination cases<sup>53</sup>. The Part-Time Work

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49. See *Assoc. Belge des Consommateurs Test-Achats ASBL v. Conseil des ministres (Test-Achats)*, Case C-236/09, [2011] E.C.R. I\_\_\_\_, ¶¶ 20–21 (delivered Mar. 1, 2011) (not yet reported); Opinion of Advocate General Kokott, *Test-Achats*, [2011] E.C.R. I\_\_\_\_, ¶¶ 34–35.

50. See Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. C 191/1, Protocol on Social Policy, at 90–93 [hereinafter Maastricht TEU].

51. See Treaty of Amsterdam, *supra* note 14, art. 2(2), 1997 O.J. C 340, at 24.

52. Council Directive 97/80/EC on the Burden of Proof in Cases of Discrimination Based on Sex, 1998 O.J. L 14/6.

53. *Id.* pmb. ¶ 18.

Directive<sup>54</sup> and the Fixed Term Work Directive<sup>55</sup> were adopted in 1997 and 1999, respectively. They aimed to eliminate discrimination between part-time workers and full-time workers, and between those working on fixed term contracts as compared with those working on contracts of indefinite duration. The Parental Leave Directive,<sup>56</sup> adopted in 1996, gives parents the right to leave for the purpose of bringing up children and in cases of *force majeure* relating to illness requiring the presence of a parent.

The third phase in the evolution of EU equality law runs from 1997—the ToA—to the present day. During this period the Charter of Rights was adopted, the Treaty of Lisbon came into being, and gender equality was strengthened by the adoption of legislation outlawing discrimination on the basis of gender in the supply of goods and services. Directives were adopted to implement Article 13 of the EC Treaty, which after the Treaty of Lisbon became Article 19 of the TFEU.

The Treaty of Lisbon amended the Treaty on European Union (“TEU”) and the EEC Treaty, which was (somewhat inelegantly) renamed the Treaty on the Functioning of the European Union.<sup>57</sup> By Article 6(1) of the TEU, the Charter of Rights was given the same status as “the Treaties.”<sup>58</sup> Article 6(2) of the TEU provides that the Union shall accede to the European Convention on Human Rights (“ECHR”). The provisions of the ECHR on discrimination are wider than those of the TEU or the TFEU and, should accession occur, it may have an impact on the equality rules that govern the exercise of Union powers. The principles of equality of treatment and nondiscrimination are set out in Articles 2 and 3(3) of the

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54. Council Directive 97/81/EC Concerning the Framework Agreement on Part-Time Work Concluded by UNICE, CEEP and the ETUC, 1997 O.J. L 14/9.

55. Council Directive 1999/70/EC concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, 1999 O.J. L 175/43.

56. Council Directive 96/34/EC on the Framework Agreement on Parental Leave Concluded By UNICE, CEEP and the ETUC, 1996 O.J. L 145/4, at 6–8 [hereinafter Parental Leave Directive].

57. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, 2007 O.J. C 306/01.

58. Consolidated Version of the Treaty on European Union art. 6(1), 2010 O.J. C 83/13, at 19 [hereinafter TEU post-Lisbon].

TEU,<sup>59</sup> and Articles 8 and 10 of the TFEU.<sup>60</sup> Article 141 of the EC Treaty on equal pay was renumbered Article 157 in the TFEU and remained essentially unchanged.<sup>61</sup> Article 13 of the EC Treaty became Article 19 of the TFEU, and was amended to augment the role of the European Parliament in forming measures to combat discrimination.<sup>62</sup> Article 13 of the EC Treaty had merely required that the European Parliament should be consulted on proposed measures; Article 19 of the TFEU specifies that the European Parliament should “consent” to such measures.<sup>63</sup>

Title III of the Charter of Rights is entitled “Equality.” Article 20 provides that “[e]veryone is equal before the law.”<sup>64</sup> Article 21(1) prohibits discrimination on a broader number of grounds than Article 19 of the TFEU, namely those of “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.”<sup>65</sup> Article 21(2) prohibits discrimination on the grounds of nationality “[w]ithin the scope of application of the Treaties and without prejudice to any of their specific provisions.”<sup>66</sup> Article 23 provides that “[e]quality between men and women must be ensured in all areas, including employment, work and pay” but that “[t]he principle of equality shall not prevent the maintenance or adoption of measures

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59. *Id.* art. 2, at 17 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of person belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.”); *id.* art. 3(3), at 17 (stating that the Union “shall combat social exclusion and discrimination, and shall promote . . . equality between men and women”).

60. TFEU, *supra* note 2, art. 8, 2010 O.J. C. 83, at 53 (“In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”); *id.* art. 10, at 53 (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”).

61. *See id.* art. 157, at 117; *see also supra* note 53 and accompanying text (noting the history of the treaty provision on equal pay).

62. TFEU, *supra* note 2, art. 19, 2010 O.J. C. 83, at 56.

63. *Id.*

64. Charter of Fundamental Rights of the European Union art. 20, 2010 O.J. C 83/389, at 395 [hereinafter Charter of Fundamental Rights].

65. *Id.* art. 21(1), at 396.

66. *Id.* art. 21(2), at 396.

providing for specific advantages in favour of the under-represented sex.”<sup>67</sup> Article 26 is concerned with the integration of disabled persons into the community: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”<sup>68</sup>

In spite of the force of these provisions it is unclear what their real impact will be given the constraints placed on the scope of application of the Charter of Fundamental Rights in Article 51. Article 51(1) specifies that the provisions of the Charter of Fundamental Rights “are addressed to institutions, bodies, offices and agencies of the Union . . . and to the Member States only when they are implementing Union law.”<sup>69</sup> The second paragraph of the same provision states that the “Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers or tasks as defined in the Treaties.”<sup>70</sup>

In the Explanations to the Charter of Fundamental Rights it is stated that Article 21(1) does not “alter the extent of powers granted under TFEU Article 19 nor the interpretation given to that Article,”<sup>71</sup> as “Article 19 confers power on the Union to adopt legislative acts.”<sup>72</sup> Article 21(1) of the Charter of Fundamental Rights “does not create any power to enact anti-discrimination laws . . . it only addresses discrimination by the institutions and bodies of the Union themselves, when exercising powers under the Treaties, and by the Member States when they are implementing Union law.”<sup>73</sup>

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67. *Id.* art. 23, at 396.

68. *Id.* art. 26, at 397.

69. *Id.* art. 51, at 402.

70. *Id.*

71. Explanations to the Charter of Fundamental Rights, 2007 O.J. C 303/17, at 24.

72. *Id.*

73. See Evelyn Ellis, *The Impact of the Lisbon Treaty on Gender Equality*, EUR. GENDER EQUALITY L. REV., June 2010, at 7, 10–11. See generally Sophia Koukoulis-Spiliotopoulos, *The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the Acquis in Gender Equality*, EUR. GEND. EQUAL. L. REV., Aug. 2008, at 15 (noting the Treaty of Lisbon’s impact on the status of the Charter of Fundamental Rights).



## II. NATIONALITY DISCRIMINATION

Although Article 7 of the EEC, now Article 18 of the TFEU, empowered the adoption of rules designed to prohibit nationality discrimination, none have ever been adopted. Instead, the law on nationality discrimination has been developed by the CJ.

The earliest cases involving claims of equal treatment on the basis of nationality started to come before the CJ in the early 1980s. They concerned the right of equality of treatment between nationals and nonnationals with respect to conditions of access to education. In *Forcheri v. Belgium*, the Court ruled that “although educational and vocational training policy is not as such part of the areas which the Treaty has allotted to the competence of the Community institutions” the Treaty did, in Article 128, empower the European Union Council (“Council”) to “lay down general principles for implementing a common vocational training policy.”<sup>74</sup> Such a policy had been laid down in a Council decision adopted in 1963.<sup>75</sup> Consequently, conditions of access to education have to be the same for nationals and nonnationals alike. In *Gravier v. City of Liège*, decided some two years later, the CJ held that Ms. Gravier, a French national, who wished to study the art of strip cartoon (for which the Belgians are well known), could not be required

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74. *Forcheri v. Belgium*, Case 152/82, [1983] E.C.R. 2323, ¶¶ 14, 17.

75. Council Decision No. 63/266/EEC, 1963 O.J. L 1338/63. Consequently, if a Member State organized vocational training courses Article 18 prohibited it from requiring an enrollment fee to be paid by nationals where such a fee was not payable by its own nationals. Subsequent case law clarified the meaning of vocational training. *Gravier v. City of Liège*, Case 293/83, [1985] E.C.R. 593, ¶ 30, held that “any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students.” Some years after *Gravier*, the Court in *Blaisot v. University of Liège*, Case 24/86, [1988] E.C.R. 379, further refined its thinking on the issue, giving vocational training a broad interpretation. The term now included not only studies where the final academic examinations directly provide the required qualification for a particular profession, trade, or employment, but also those studies that equip a person with the knowledge needed for the pursuit of a profession, trade, or employment. *Id.* ¶ 19. In general university studies fulfilled these criteria, the only exception being “certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation.” *Id.* ¶ 20.

to pay a fee (the “minerval”) that was not levied on Belgian students.<sup>76</sup>

Subsequently, the CJ extended the principle of equality between nationals broadly into other areas. In *Cowan v. Le Trésor Public*,<sup>77</sup> a UK national was attacked violently outside a metro station in Paris. The CJ held that, as a recipient of services, he fell within the scope of Article 18 and was thus entitled under French law to compensation for victims of violent crimes on the same terms as French nationals.

*Cowan* marked the beginning of a period that has lasted until this day of broadly using what is now Article 18 of the TFEU to achieve equality of treatment among Community citizens. As we have seen above, the *Gravier* line of case law established the principle of equal rights in access to education. *Data Delecta Aktiebolag v. MSL Dynamics Ltd.* held that a foreign plaintiff who was not a resident in Sweden could not be required to provide security to guarantee payment of costs of judicial proceedings where Swedish nationals were not subject to such a requirement.<sup>78</sup> *Pastors v. Belgium*<sup>79</sup> accepted that while it was justifiable for Belgian law to require a nonnational, who did not reside permanently in Belgium, and who was accused of a criminal offense to pay a deposit to cover the eventual cost of fines and legal expenses, the Court found the level of the deposit in question to be disproportionately high. In *Bickel & Franz*,<sup>80</sup> the Court held that Article 6 requires a Member State that grants residents in a part of its territory the right to use a language other than its official language in criminal proceedings to extend that right to nonnationals. In *Garcia Avello v. Belgium*,<sup>81</sup> the CJ affirmed the right of nonnationals to exceptional treatment under national law in order to respect the rights attaching to their nationality. Under Belgian law, children bear the name of their father. By contrast, in Spain children carry the name of both parents. Mr. Garcia Avello wanted his

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76. *Gravier*, [1985] E.C.R. 593, ¶¶ 5–6, 26.

77. *Cowan v. Le Trésor Public*, Case C-186/87, [1989] E.C.R. 195, ¶¶ 2, 17, 20.

78. *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, Case C-43/95, [1996] E.C.R. I-4661, ¶¶ 3, 22.

79. *Pastors v. Belgium*, Case C-29/95, [1997] E.C.R. I-285, ¶ 28.

80. *Bickel & Franz v. Italy*, Case C-274/96, [1998] E.C.R. I-7637, ¶ 31.

81. *Garcia Avello v. Belgium*, Case C-148/02, [2003] E.C.R. I-13031.

children to have the surname Garcia Weber, Weber being his wife's maiden name. Belgian law did not allow for such a possibility. The CJ held that this rule was discriminatory in the sense it treated children in dissimilar situations in the same way: that children with dual nationality were treated in the same manner children of Belgian nationality. Such treatment could have practical consequences in their private and professional lives.

The European citizen came into being with the adoption of the Maastricht Treaty in 1992.<sup>82</sup> It is within the sphere of European citizenship that Article 18 has played a most important role giving meaning and substance to a vaguely worded provision, the meaning and content of which were unclear. Citizenship of the European Union has been proclaimed to be “destined to be the fundamental status of nationals of the Member States.”<sup>83</sup>

The extent and scope of the rights of the European citizen began to be developed by the CJ in the seminal case of *Martínez Sala v. Freistaat Bayern*.<sup>84</sup> Mrs. Martínez Sala was a Spanish national who had lived and work for some years in Germany. She had had successive residence permits and at the relevant time had applied for a renewal of her permit. She claimed a child raising allowance. This was refused on the ground that she did not have a residence permit as her application for its renewal was still being processed. She lawfully resided in Germany in the sense that she could not be deported. The case, according to the German authorities, turned on whether Mrs. Martínez Sala was a worker. The Court, however, took the view that even if Mrs. Martínez Sala was not a worker, she was a European citizen as she was a national of a Member State lawfully residing on the territory of another Member State. She could therefore rely on Article 18.

*Martínez Sala* marked a huge leap in the thinking of the Court on Article 18—it signaled that Article 18 could be used as a source of rights for the European citizen within its scope of application. It marked the beginning of an era in which the

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82. Maastricht TEU, *supra* note 50, art. 8, 1992 O.J. C 191, at 7.

83. *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Case C-184/99, [2001] E.C.R. I-6193, ¶ 31.

84. *Martínez Sala v Freistaat Bayern*, Case C-85/96, [1998] E.C.R. I-2691.

Court endowed the European citizen with a substantive body of rights, thereby giving life to what can only be described as a fetus (albeit with a constitutional pedigree).

*Martínez Sala* appeared, at first sight, to state unconditionally that lawful residence generates entitlement to all socioeconomic rights within the scope of the EU legal order and this was believed to be the case for some time. However, it is important to view this case against its factual background: Mrs. Martínez Sala did have a long standing connection with Germany, from whose authorities she sought a child raising allowance, having lived there since the age of twelve and having been employed at substantial intervals. Even if the Court in *Martínez Sala* did intend, as its wording would suggest, to give all persons lawfully in the territory of a Member State entitlement to EU socioeconomic rights, it has moved away from this stance in subsequent case law.

*Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*,<sup>85</sup> *D'Hoop v. Office national de l'emploi*,<sup>86</sup> and *Bidar v. London Borough of Ealing*<sup>87</sup> established that entitlement to benefits and loans from a Member State on the same terms as nationals of that State was dependent on the claimant having a link with that State, an issue to be determined by the circumstances of each case.

In *Trojani v. Centre public d'aide sociale de Bruxelles*,<sup>88</sup> the Court held that the exercise of the right to free movement is not unconditional but is subject to the limitations set out in EU law. A right to reside in a Member State does not flow automatically from Article 18 of the EC Treaty, now Article 19 of the TFEU, but is dependent upon the fulfillment of the various conditions laid down both in the Treaty itself and secondary legislation. However, once a person was lawfully resident in a Member State, he or she had the right to be treated equally with nationals of that State and could rely on Article 18 to claim a social assistance benefit.

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85. *Grzelczyk*, [2001] E.C.R. I-6193.

86. *D'Hoop v. Office national de l'emploi*, Case C-224/98, [2002] E.C.R. I-6191.

87. *Bidar v. London Borough of Ealing*, Case C-209/03, [2005] E.C.R. I-2119.

88. *Trojani v. Centre public d'aide sociale de Bruxelles*, Case C-456/02, [2004] E.C.R. I-7573.

*Collins v. Secretary of State for Work & Pensions*<sup>89</sup> went further than *Trojani* in that the Court found that although the claimant (who was of dual American-Irish citizenship) was lawfully resident in the United Kingdom and that the job seekers allowance that he claimed was within the scope of the EC Treaty, it was legitimate for the United Kingdom to grant such an allowance only after it was possible to establish that a genuine link existed between the person seeking work and the employment market of that State. Such a link may be determined in particular by establishing that the person concerned has, for a reasonable period, genuinely sought work in the Member State in question.

The position at present seems to be that lawful residence alone will not bring entitlement to equal treatment of social welfare and related rights funded by the host State. Some further link with the host State is necessary to engender the solidarity that warrants support from the citizens of that State.<sup>90</sup> And that is surely right.

The Equal Pay Directive, the Equal Opportunities Directive, and the Burden of Proof Directive were repealed and replaced with effect on August 15, 2009 by the Recast Directive.<sup>91</sup> The Equal Treatment in Social Security Directive, the Pregnancy Directive, the Parental Leave Directive, the Goods and Services Directive, and the Equal Treatment for the Self-Employed Directive<sup>92</sup> make up the full complement of legislation dealing with gender discrimination.

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89. *Collins v. Sec'y of State for Work & Pensions*, Case C-138/02, [2004] E.C.R. I-2703.

90. The "link principle" has been recently confirmed by the Court of Justice ("CJ" or "Court") in *Stewart v. Sec'y of State for Work & Pensions*, Case C-503/09, [2011] E.C.R. I\_\_\_\_ (delivered July 21, 2011) (not yet reported). See generally Charlotte O'Brien, *Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's "Real Link" Case Law and National Solidarity*, 33 EUR. L. REV. 643 (2008).

91. See Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 2006 O.J. L 204/23, art. 34, at 33 [hereinafter Recast Directive].

92. Equal Treatment in Social Security Directive, *supra* note 29; Pregnancy Directive, *supra* note 34; Parental Leave Directive, *supra* note 56; Council Directive 2004/113/EC Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, 2004 O.J. L 373/37 [hereinafter Goods and Services Directive]; Directive 2010/41/EU of the European Parliament and of the Council on the Application of the Principle of Equal Treatment

Two other directives have been adopted pursuant to Article 19 of the TFEU: first, the Race Directive<sup>93</sup> and second, the Framework Employment Directive.<sup>94</sup>

### III. *THE LEGISLATIVE LANDSCAPE: PRINCIPAL FEATURES*

At the outset it should be noted that some aspects are common to all directives, for example the definition of direct and indirect discrimination, forms of discrimination and certain principles, and mechanisms relating to enforcement. In other respects the directives differ, leading to a fragmentation in the application of the principle of equal treatment regarded by some as regrettable and unnecessary,<sup>95</sup> but by the Commission as inevitable given the differing characteristics of the various grounds of discrimination.<sup>96</sup> The CJ has, in general, been consistent in its approach to common issues, transposing principles established in one domain of antidiscrimination to others. Yet there is a marked difference in the rigor of its approach to exceptions and derogations, with a generosity of spirit shown in favor of the Member States when determining their social and employment policy with respect to some types of discrimination, notably age, which is denied in others, for example, gender discrimination.

The directives impose minimum standards only: Member States are free to adopt more favorable provisions if they wish. The directives, however, should not serve to justify any

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Between Men and Women Engaged in an Activity in a Self-Employed Capacity, 2010 O.J. L 180/1 [hereinafter *Equal Treatment for the Self-Employed Directive*].

93. Council Directive 2000/43/EC Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. L 180/22 [hereinafter *Race Directive*].

94. Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. L 303/16 [hereinafter *Framework Employment Directive*].

95. See Mark Bell & Lisa Waddington, *Reflecting on Equalities in European Equality Law*, 28(3) EUR. L. REV. 349, 350–51 (2003); Lisa Waddington & Mark Bell, *More Equal than Others: Distinguishing European Union Directives*, 38 COMMON MKT. L. REV. 587, 590 (2001).

96. See Commission of the European Communities, *Non-Discrimination and Equal Opportunities: A Renewed Commitment*, COM (2008) 420 Final, at 5, ¶ 2.2 (July 2008) (“The various grounds of discrimination differ substantively, and each demands a tailored response.”).

regression in standards prevailing at the time of its adoption. They are thus measures of upward harmonization.

All directives prohibit direct and indirect discrimination, concepts developed by the CJ in its case law and subsequently transposed into legislation. Direct discrimination is defined as the treatment of one person less favorably on one of the prohibited grounds with which the legislation is concerned (sex, racial or ethnic origin, age, religion, disability, or sexual orientation) than another person would be treated in comparable circumstances.<sup>97</sup> Indirect discrimination occurs where an apparently neutral provision, criterion, or practice would put persons bearing certain characteristics at a particular disadvantage compared with persons who do not possess those characteristics, unless such differential treatment can be objectively justified by a legitimate aim and the means of achieving that aim are proportionate.<sup>98</sup> Discrimination also includes harassment and, where relevant, sexual harassment and instructions to discriminate.<sup>99</sup> Less favorable treatment of women who are pregnant or on maternity leave is also prohibited.<sup>100</sup> Positive action to ensure full equality is permitted both under Article 157(4) of the TFEU, the Recast Directive, and the Race Directive.<sup>101</sup> The directives are all expressed to apply both in the public and private sectors and to employment in public bodies—thus they cover all types of remunerated activity.

With respect to enforcement, the picture is somewhat mixed. There are some common features in the directives and at the same time there are differences that result in a higher level of protection against discrimination in some areas but not others.

Laws, regulations, or administrative provisions that are contrary to the principle of equal treatment are required to be abolished. Member States are required to make null and void, have declared null and void, or subject to the obligation to

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97. See, e.g., Race Directive, *supra* note 93, art. 2(2)(a), at 24.

98. See, e.g., *id.* art. 2(2)(b), at 24.

99. See, e.g., Goods and Services Directive, *supra* note 92, art. 1, at 40.

100. See Pregnancy Directive, *supra* note 34, art. 10, at 4.

101. See TFEU, *supra* note 2, art. 157(4), 2010 O.J. C 83, at 117; Recast Directive, *supra* note 91, art. 3, at 27; Race Directive, *supra* note 93, art. 5, at 24.

amend, any provisions contrary to the principle of equal treatment that are in individual contracts, collective agreements, internal rules of undertakings, rules governing profit-making or non-profit-making organizations, and rules governing the independent professions and workers' and employers' organizations. Thus, directives impose on the Member States the duty to render their provisions effective right across the entire spectrum of those aspects of economic and social life with which it is concerned.

Judicial or administrative remedies must be made available to all persons who consider themselves to have been the subject of discriminatory acts. These remedies must be available even if the relationship within which the unequal treatment is alleged to have occurred has ended. The right to bring proceedings extends to associations, organizations, or other legal entities that have a legitimate interest in ensuring compliance with the directives. Member States may determine which groups have a legitimate interest.

Sanctions for breach of national provisions adopted to implement the directives must be put in place by the Member States. Such sanctions, which may include the payment of compensation, must be effective, proportionate, and dissuasive.

Apart from granting the claimant the right to bring proceedings for the enforcement of the principle of equal treatment, the directives institute a number of other enforcement mechanisms, aimed at the prevention of discriminatory conduct. First, they advocate the dissemination of information relating to the provisions of the directive within the Member States. Secondly, they advocate fostering equal treatment in the workplace through social dialogue. Thirdly, they require Member States to encourage dialogue with appropriate nongovernmental organizations. Lastly, with the notable exception of the Framework Equality Directive, Member States are required to designate a body responsible for the promotion of equal treatment. Such bodies must be competent to provide independent assistance to victims of discrimination in the pursuit of their complaints, to conduct independent surveys, and to make public reports and recommendations on any issue relating to discrimination.



Where a claim for equal treatment requires a claimant to adduce factual evidence, the burden of proving that such evidence does not show unequal treatment shifts to the respondent who must prove that there has not been any discrimination. The plaintiff must simply provide evidence from which it may be presumed that there has been discrimination. Generally this rule does not apply to criminal proceedings or proceedings in which it is for a court or competent body to investigate the case. Thus in *Coleman v. Attridge Law*,<sup>102</sup> where harassment due to associative disability was alleged, the Court held that should Ms. Coleman establish facts from which it could be presumed that there has been harassment, the effective application of the principle of equal treatment requires that the burden of proof should fall upon the respondents to prove that there has been no harassment in the circumstances of the case.

#### IV. GENDER DISCRIMINATION

Article 157 of the TFEU, as we have seen, provides for equal pay for work of equal value. In addition to this provision, which is limited to pay, there are currently six directives dealing with gender discrimination: the Recast Directive,<sup>103</sup> the Equal Treatment in Social Security Directive,<sup>104</sup> the Pregnancy Directive,<sup>105</sup> the revised Parental Leave Directive (“Parental Leave Directive II”),<sup>106</sup> the Equal Treatment for the Self-Employed Directive,<sup>107</sup> and the Goods and Services Directive.<sup>108</sup>

All except one are concerned with employment-related discrimination. In addition to these six directives there is a vast body of case law on gender discrimination stretching back over forty years. The principles established by these cases have, to a large extent, been reflected both in treaty amendments, the

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102. *Coleman v. Attridge Law & Steve Law*, Case C-303/06, [2008] E.C.R. I-5603.

103. Recast Directive, *supra* note 91.

104. Equal Treatment in Social Security Directive, *supra* note 29.

105. Pregnancy Directive, *supra* note 34.

106. Council Directive 2010/18/EU Implementing the Revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and Repealing Directive 96/34/EC, 2010 O.J. L 68/13.

107. Equal Treatment for the Self-Employed Directive, *supra* note 92.

108. Goods and Services Directive, *supra* note 92.

Recast Directive, and recent amendments to the Parental Leave Directive and the Equal Treatment for the Self-Employed Directive. While many of the directives have common features, there are differences between them necessitated by the circumstances to which they are addressed.

Let us now consider each of the directives briefly. The Recast Directive repeals and replaces four directives adopted between 1975 and 1997 dealing with equal pay, equal opportunities, equality of treatment in occupational social security systems, and the burden of proof in cases of discrimination based on sex. It reflects and incorporates the significant body of case law interpreting and applying those directives. Its provisions implement the principle to equal treatment in relation to: “(a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; (c) occupational social security schemes.”<sup>109</sup>

“Pay” is defined as “the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her an employer.”<sup>110</sup> This definition reflects the generous interpretation given to the concept of pay developed by the CJ in the years since *Defrenne II* and the earlier Equal Pay Directive. Neither Article 119 of the EEC Treaty nor the latter directive defined pay, so it was left to the CJ to elaborate. The CJ did so by relying on the link between monies received by the employee and his employment.<sup>111</sup> It considered whether the employee received the sum in question as a direct result of his contract of employment or employment relationship.

Article 119 refers to equal pay for equal work. *Worringham v. Lloyds Bank Ltd.* interpreted the concept of “equal work” in Article 119 as including work of equal value.<sup>112</sup> *Murphy v. Bord Telecom Eireann* went further, holding that Article 119 could be relied upon when a group of women were engaged in work of higher value than that of the men to whom they compare themselves. The women in question were employed as factory

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109. Recast Directive, *supra* note 91, art. 1, at 26.

110. *Id.* art. 3, at 27.

111. *Garland v. British Rail Eng'g Ltd.*, Case 12/81, [1982] E.C.R. 359, ¶ 5.

112. *Worringham v. Lloyds Bank Ltd.*, Case 69/80, [1981] E.C.R. 767, ¶ 21.

workers. Their jobs were found to have a higher value than store laborers. The Court found that they were entitled to compare themselves to men in order to claim their equal pay rights.<sup>113</sup> *McCarthy Ltd. v. Smith* concerned the question of at which point in time jobs could be compared. The Court held that the concept of “equal work” could not be constrained by a requirement of contemporaneity. Thus a female employee could claim parity of pay with her male predecessor even if he had vacated the employment before she was hired. The Court gave no indication as to whether there was any temporal limit on the period during which such a comparison could be made.<sup>114</sup> The issue has not been raised subsequently.

Discrimination on the ground of sex is prohibited in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals . . . ;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.<sup>115</sup>

A difference of treatment based on a characteristic related to sex may be permitted by the Member States “where, by reason of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.”<sup>116</sup> A woman on maternity leave is entitled after

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113. *Murphy v. Bord Telecom Eireann*, Case 157/86, [1988] E.C.R. 673, ¶ 9.

114. *Macarthys Ltd. v. Smith*, Case 129/79, [1980] E.C.R. 1275, ¶ 7.

115. Recast Directive, *supra* note 91, art. 14(1), at 30.

116. *Id.* art. 14(2), at 30.

the expiry of that period of leave “to return to her job or to an equivalent post on terms and conditions which are no less favorable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.”<sup>117</sup> The same guarantees must be made available where a Member State recognizes the right to paternity or adoption leave to those availing themselves of such leave.<sup>118</sup>

Chapter 2 of the Recast Directive contains a number of provisions relating to occupational social security schemes. These provisions reflect the principles established by the CJ in the wake of *Barber v. Guardian Royal Exchange Assurance Group*.<sup>119</sup> Discrimination is prohibited with respect to the scope of occupational social security schemes, the conditions of access to them, contribution obligations and rates, and the calculation of benefits.<sup>120</sup> Employed or self-employed persons “whose activity is interrupted by illness, maternity, accident or involuntary unemployment . . . persons seeking employment . . . retired or disabled workers, and to those claiming under them [family members]” are covered in respect of five types of risk: sickness, invalidity, old age (including early retirement), industrial accidents and occupational diseases, and unemployment.<sup>121</sup> Schemes in which there is no employer involvement are excluded.<sup>122</sup> Eleven specific examples are given in Article 9 of provisions in occupational social security schemes that are deemed to be contrary to the principle of equal treatment.<sup>123</sup> “Where men and women may claim a flexible pensionable age under the same conditions,” this is not to be regarded as incompatible with the principle of equal treatment.<sup>124</sup>

The Equal Treatment in Social Security Directive provides that there should be no discrimination, either direct or indirect, on the grounds of sex with respect to the scope of the social security schemes to which the directive relates: payment

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117. *Id.* art. 15, at 30.

118. *Id.* art. 16, at 30.

119. *Barber v. Guardian Royal Exch. Assurance Grp.*, C-262/88, [1990] E.C.R. I-1889.

120. Recast Directive, *supra* note 91, art. 5, at 27.

121. *Id.* art 6, at 27.

122. *Id.* art. 8, at 28.

123. *See id.* art. 9, at 28–29.

124. *Id.* art. 13, at 29.

obligations, rates of contribution, or the calculation of benefits.<sup>125</sup> The directive applies without prejudice to provisions relating to the protection of women on the grounds of maternity.<sup>126</sup>

As per Article 3, the directive applies to statutory schemes relating to classic risks such as: sickness, invalidity, old age, work accidents, occupational diseases, and unemployment.<sup>127</sup> The directive also applies to social assistance programs designed to supplement or replace social security benefits.<sup>128</sup> It covers the working population, which includes employed and self-employed individuals, in addition to those whose activity has been interrupted by one of the risks specified in Article 3. The CJ has interpreted the concept of “working population” broadly to include those who are working and seeking employment as well as those temporarily out of the labor market by reason of one of the risks set out in Article 3.<sup>129</sup> The essential criterion is that the person in question must be normally in the labor market or seeking actively to enter it.<sup>130</sup> The CJ has been generous with regard to the length of time a person can be absent from the labor market without losing status as a member of the working population.<sup>131</sup>

The directive is not confined to the prohibition of discrimination on the grounds of sex; it also applies in the case of gender reassignment.<sup>132</sup>

Article 4 defines the principle of equal treatment.<sup>133</sup> Both direct and indirect discrimination are prohibited. In *McDermott*

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125. Equal Treatment in Social Security Directive, *supra* note 29, art.4(1), at 25.

126. *Id.* art 4(2), at 25.

127. *Id.* art. 3(1)(a), at 24.

128. *Id.* art. 3(1)(b), at 24.

129. *Id.* art. 2, at 24.

130. A person who has never worked for remuneration cannot be considered a member of the working population even if such a person is providing service to a family member that would be remunerated if provided by a third party. *See* *Züchner v. Handelskrankenkasse (Ersatzkasse) Bremen*, Case C-77/95, [1996] E.C.R. I-5689, ¶ 16.

131. *See* *Nolte v. Landesversicherungsanstalt Hannover*, Case C-317/93, [1995] E.C.R. I-3723; *Johnson v. Chief Adjudication Officer*, Case C-410/92, [1994] E.C.R. I-5483.

132. *See* *Richards v. Sec'y of State for Work & Pensions*, Case C-423/04, [2006] E.C.R. I-3585; *K.B. v. Nat'l Health Serv. Pensions Agency*, Case C117/01, [2004] E.C.R. I-541.

133. Equal Treatment in Social Security Directive, *supra* note 29, art. 4, at 25.

& *Cotter v. Minister for Social Welfare*, the CJ found that paying different rates of unemployment benefits to men and women violated the principle of equal treatment.<sup>134</sup> *Teuling v. Bestuur van de Bedrijfsvereniging voor de Chemische Industrie*<sup>135</sup> concerned a system of supplements for incapacitated workers that were calculated based not on the claimant's sex, but rather on his or her marital status or family situation. The result was that considerably fewer women than men were entitled to such supplements. The CJ found this to be discriminatory and contrary to the provisions of the directive unless objectively justified. The CJ found in its early case law on the directive that Article 4(1), which lays down the principle of equal treatment, to have direct effect. It is by virtue of this quality that equal treatment has largely been achieved, given the fact that even after a six-year implementation period, many Member States had not taken steps to transpose the directive into their national legal systems.

Shortly after the directive's implementation date, women began to invoke it to claim equal treatment before their national social security authorities and courts. Uncertain of whether and if so, how, in practical terms, equality of treatment could derive directly from the directive, courts made a number of preliminary rulings to the CJ that took a robust view of the effects of the directive.

*Netherlands v. Federatie Nederlandse Vakbeweging* was the first case to come before the Court on the issue of the directive's direct effect.<sup>136</sup> It concerned a provision of the Dutch law on unemployment benefits. The relevant provision excluded from entitlement to benefits married female workers who lived with their husbands, on the grounds that they were not the main breadwinners. This provision remained in force after December 23, 1984 when the directive came into effect. FNV, the Dutch Trades Union Federation, brought an action alleging that the

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134. See *McDermott & Cotter v. Minister for Soc. Welfare*, Case 286/85, [1987] E.C.R. 1453.

135. *Teuling v. Bestuur van de Bedrijfsvereniging voor de Chemische Industrie*, Case 286/85, [1987] E.C.R. 1453.

136. *Netherlands v. Federatie Nederlandse Vakbeweging*, Case 71/85, [1986] E.C.R. 3855.

Dutch government had acted unlawfully in maintaining this provision in force after that date.

*McDermott & Cotter* concerned a claim by two Irish women alleging breach of the principle of equal treatment in the Irish unemployment benefit scheme. Both the duration for which benefits were paid and the rate of benefits were less than those awarded to men under similar circumstances. The directive had not been implemented in Ireland.<sup>137</sup>

Both cases raised the issue of whether reliance could be placed on Article 4(1) to claim equal treatment. The CJ found that provision to be directly effective:

[S]tanding by itself, and in the light of the objective and contents of the directive, Article 4(1) is sufficiently precise to be relied upon in legal proceedings and applied by a court. Moreover, that article in no way permits Member States to restrict or place conditions on the application of the principle of equal treatment in its particular area of application . . . It follows from the foregoing that Article 4(1) is sufficiently precise and unconditional to allow individuals, in the absence of implementing measures, to rely upon it before national courts as from 23 December 1984, in order to preclude the application of any national provision inconsistent with that article.<sup>138</sup>

In subsequent proceedings brought by Mrs. McDermott and Mrs. Cotter, the Court ruled that in the absence of any implementing legislation, the principle of equal treatment as set out in the directive meant that women must be paid the same benefits as men.<sup>139</sup> Thus, in a single stroke, the directive gave rise to real and enforceable rights.

The directive contains a number of exceptions and permitted derogations from its provisions. It neither applies to occupational social security schemes, nor to family and survivors' benefits. Member States are allowed to derogate from the principle of nondiscrimination with respect to a number of old age benefits. These derogations generally concern

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137. See *McDermott & Cotter*, [1987] ECR 1453.

138. *Id.* ¶ 14 (following the holding in *Netherlands v. Federatie Nederlandse Vakbeweging*).

139. See *Cotter & McDermott v. Minister for Soc. Welfare*, Case C-377/89, [1991] E.C.R. I-1155.

advantages given to women but denied to men in the same circumstances. The CJ has found that “the legislature intended to allow the Member States to maintain temporarily the advantages accorded to women in order to enable them to adapt their schemes progressively without disrupting the complex financial equilibrium of those systems.”<sup>140</sup> These derogations have been interpreted restrictively by the CJ.<sup>141</sup>

The Equal Treatment for the Self-Employed Directive applies the principle of equal treatment to the self-employed, thus extending that principle to all those in economic activity, regardless of their status.<sup>142</sup> It also extends to spouses of the self-employed or life partners (recognized as such by national law) who are “contributing to the pursuit of such an activity,” insofar as such persons and their circumstances are not covered by the Equality of Treatment in Social Security Directive or the Goods and Services Directive. Such persons may not be employees or business partners but may be actively engaged in the business activity of the self-employed person.

Where a Member State has a system of social protection for the self-employed, it may provide that such protection should extend to spouses or life partners on a “mandatory or voluntary basis.”<sup>143</sup> Member States must take the necessary measures to ensure that the female self-employed and female spouses and life partners have the right, either on a mandatory or voluntary basis, to a “sufficient maternity allowance enabling interruptions” to their activity for reason of pregnancy or motherhood for at least fourteen weeks.<sup>144</sup> Article 8(3) sets out the method for calculating this allowance.<sup>145</sup>

140. *Richards v. Sec’y of State for Work & Pensions*, Case C-423/04, [2006] E.C.R. I-3585, ¶ 35; see *Ex parte* Equal Opportunities Commission, Case C-9/91, [1992] E.C.R. I-4297. Although ostensibly temporary, these derogations are of an indefinite duration. As such, these derogations’ validity appears questionable following the March 1, 2011 judgment in *Test-Achats*. See generally Philippa Watson, *Equality, Fundamental Rights and the Limits of Legislative Discretion: Comment on Test-Achats*, 36 EUR. L. REV. 896 (2011).

141. See *Brachner v. Pensionsversicherungsanstalt*, Case C-123/10, [2011] E.C.R. I-\_\_\_\_ (delivered Oct. 11, 2011) (not yet reported); *Ex parte* John Henry Taylor, Case C-382/98, [1999] E.C.R. I-8955; *Sec’y of State for Soc. Security v. Thomas*, Case C-328/91, [1993] E.C.R. I-1247.

142. Equal Treatment for the Self-Employed Directive, *supra* note 92.

143. *Id.* art. 7, at 4.

144. *Id.* art. 8(1), at 4.

145. *Id.* art. 8(3), at 4.



The Pregnancy Directive is designed to promote the welfare of pregnant workers and those who have recently given birth.<sup>146</sup> Such women are viewed as a particularly vulnerable group of workers, given the potential health risks to their children and themselves in certain workplace environments. The directive provides for a minimum fourteen weeks of maternity leave, during which new mothers must receive an allowance.<sup>147</sup> The directive prohibits pregnant women from performing night work, and stipulates that pregnant women may not be exposed to certain substances and materials.<sup>148</sup> Where a work environment poses a risk to a pregnant woman, employers are required to obviate such risk by changing her job or, if necessary, giving her leave from work.<sup>149</sup> The directive applies to pregnant workers who have informed their employer of their pregnancy.

In *Kiiski v. Tampereen Kaupunki*,<sup>150</sup> the question arose as to whether the directive applied to a woman who claimed maternity leave and was not actually working when she became pregnant because she was on child care leave looking after another child. The woman was therefore not in a position when she was exposed to risks in the workplace. The CJ held, however, that the directive was applicable in such a situation. The provisions of the directive did not make the right to leave subject to the condition that the pregnant woman should actually be in a situation where she was exposed to risks. The worker, therefore, could not be denied rights under the directive because, when she became pregnant, she had left her job temporarily to enjoy another period of leave to which she was entitled. *Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG*<sup>151</sup> held that a woman undergoing in vitro fertilisation

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146. See Pregnancy Directive, *supra* note 34.

147. See *id.* art. 11, at 4. This allowance is not to be regarded as pay and need not relate to normal levels of pay. See *Gassmayr v. Bundesminister für Wissenschaft und Forschung*, Case C-194/08, [2010] E.C.R. I-6277; *Parvianinen v. Oyj*, Case C-471/08, [2010] E.C.R. I-6529.

148. See Pregnancy Directive, *supra* note 34, arts. 6–7, at 3–4.

149. *Id.* art. 5, at 4.

150. *Kiiski v. Tampereen Kaupunki*, Case C-116/06, [2007] E.C.R. I-7643, ¶ 58.

151. *Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG*, Case C-506/06, [2008] E.C.R. I-1017, ¶ 41.

could not be regarded as pregnant if her ova had not been transferred to her uterus.

The Goods and Services Directive<sup>152</sup> marks the first directive on gender discrimination outside the sphere of employment and employment-related matters. The purpose of the directive, as stated in Article 1, is to lay down a framework for combating discrimination based on sex in the access to and supply of goods and services. Its legal basis lies in Article 19 of the TFEU. Differences in treatment between men and women may be allowed if the provision of goods or services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The directive as expressed does not apply in the areas of employment and occupation or to matters of self-employment, insofar as such matters are covered by other EU legislative acts. It does not cover education, media content, or advertising. It applies to all persons, both in the public and private sector, who provide services that are available to the public and that “are offered outside the area of private or family life.”<sup>153</sup> In addition to these generally applicable exceptions, Article 5(2) permits the Member States to derogate from the provisions of Article 5(1), which prohibits all new insurance contracts concluded after December 21, 2007, and to use sex as a factor in the calculation of premiums and benefits. Article 5(2) states that Member States may decide before December 21, 2007 “to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.”<sup>154</sup> In *Association Belge des Consommateurs Test-Achats ASBL v. Conseil des ministres* (“*Test-Achats*”)<sup>155</sup> the CJ found Article 5(2) to be invalid. The possibility of the Member States maintaining for an undefined period of time—possibly indefinitely—an exemption from the requirement in Article 5(1) of unisex premiums and benefits, was contrary to the

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152. Goods and Services Directive, *supra* note 92.

153. *Id.* art. 3(1), at 40.

154. *Id.* art. 5(2), at 41.

155. *Test-Achats*, Case C-236/09, [2011] E.C.R. I\_\_\_\_, ¶ 34 (delivered Mar. 1, 2011) (not yet reported).

principle of equal treatment, and must therefore be regarded as invalid “upon the expiry of an appropriate transitional period,” which the CJ laid down as ending on December 21, 2012.<sup>156</sup> The Commission issued a Communication in December 2011, setting out guidelines aimed at facilitating compliance by the insurance industry with this ruling.<sup>157</sup>

### V. THE RACE DIRECTIVE

The Race Directive<sup>158</sup> was adopted on June 6, 2000. It was fast tracked through the legislative process achieving final adoption in a record six-month period. The speed with which the proposal was adopted can be attributed to three factors. First, the lengthy period of preparation prior to the introduction of the proposal that dated back to, and gathered momentum from, a number of soft law measures and other initiatives adopted throughout the 1990s. Second, the growing concern amongst the Member States about increased and perceptible levels of overt racial discrimination within their national territories and in particular the entry into government in Austria of the far right Freedom Party.<sup>159</sup> Finally, the adoption of the directive ahead of the forthcoming enlargement of the European Union would indicate to the candidate Member States the European Union's commitment to equality of treatment.<sup>160</sup>

The purpose of the directive, as expressed in Article 1, is to lay down a framework for combating discrimination on the

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156. *Id.* ¶¶ 32–34. For a detailed discussion of this case and in particular its wider implications, see Christa Tobler, *Case C-236/09: Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres, Judgment of the Court of Justice (Grand Chamber) of 1 March 2011*, 48 COMMON MKT. L. REV. 2041, 2041–60 (2011). See generally Watson, *supra* note 140.

157. See Commission Communication to Member States on Guidelines on the Application of Council Directive 2004/113/EC to Insurance, in the Light of the Judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), 2011 O.J. L 9497.

158. See generally MARK BELL, *RACISM AND EQUALITY IN THE EUROPEAN UNION* (2009).

159. See Gráinne de Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 EUR. L. REV. 126, 136 (2001).

160. Christopher Brown, *The Race Directive: Towards Equality for All Peoples of Europe?*, 21 Y.B. EUR. L. 195, 196–204 (2001).

grounds of racial or ethnic origin with a view to putting into effect in the Member States the principle of equal treatment.<sup>161</sup>

The Race Directive applies, within the limits of the powers conferred upon the European Union, to both employment-related issues and to matters unrelated to employment such as social protection, including health care and social assistance, education, housing, and other goods and services provided to the general public. In this respect the directive is much broader in scope than the other equality directives discussed in this Essay.

The Race Directive, therefore, in principle, extends to discrimination in matters such as educational fees, restrictions on the production and sale of foodstuffs, such as halal meat or kosher products, the allocation of housing (an area in which discrimination is traditionally rife), and bans of the wearing of clothing with religious significance, such as certain types of headwear.<sup>162</sup> The extent of the right to equal treatment with regard to matters unconnected with employment may in reality be constrained given that such a right is coterminous with the extent of the EU's competence.<sup>163</sup> Thus its scope of application with respect to, for example, housing and health care, may be limited. It is also uncertain to what extent the directive applies to the provision of services by the private sector in, for example, banks, shops, and hotels.<sup>164</sup> The lack of any general provision imposing an obligation to eliminate discrimination in general public services, such as policing, is also a matter of concern.<sup>165</sup>

The Court in *Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija*<sup>166</sup> held that national rules that provide that a person's surname and forename may be entered on a certificate of civil status of that state only in a form that complies with the rules governing the spelling of the official national language do

161. Race Directive, *supra* note 93, art. 1, at 24.

162. Damian Chalmers, *The Mistakes of the Good European?*, in *DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM* 215 (Sandra Fredman et al. eds., 2001).

163. See generally Lisa Waddington, *Testing the Limits of the EC Treaty Article on Non-Discrimination*, 28 *INDUS. L.J.* 133 (1999).

164. DAMIEN CHALMERS ET AL., *EUROPEAN UNION LAW: TEXT AND MATERIALS* 913 (2006).

165. Brown, *supra* note 160, at 215.

166. *Runevič-Vardyn v. Vilniaus miesto savivaldybės administracija*, Case C-391/09, [2011] E.C.R. I \_\_\_\_ (delivered May 12, 2011), ¶ 45 (not yet reported).

not fall within consideration of the Race Directive. Article 3(1)(h) of the Race Directive refers to the access and supply of goods and services that are available to the public; in *Runevič-Vardyn* this did not mean that the national rules in issue came within the meaning of that provision.<sup>167</sup>

The Race Directive applies to all persons regardless of their nationality.

Whilst the directive refers only to discrimination on grounds of racial or ethnic origin, it has been argued that it also encompasses discrimination on the grounds of skin color even if this is not expressly articulated.<sup>168</sup>

In *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV*,<sup>169</sup> the CJ gave a broad interpretation to the types of acts that may be deemed discriminatory within the meaning of the directive. It held that a public statement by an employer that it will not recruit persons of certain ethnic or racial origin, which is likely to dissuade strongly certain candidates from submitting their candidature, and accordingly to hinder their access to the labor market, constitutes direct discrimination within the meaning of Article 2(2)(a) of the Race Directive. In *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV*, Firma Feryn was seeking to recruit fitters to install doors at its customers' houses. It placed a large vacancy sign alongside its premises but made it clear in a public statement to the press that persons of Moroccan origin would not be recruited. The Court stated that:

By publicly stating his intention not to hire persons of a certain racial or ethnic origin, the employer is, in fact, excluding those persons from the application process and from his workforce. He is not merely talking about discrimination, he *is* discriminating.<sup>170</sup>

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167. See *Runevič-Vardyn*, [2011] E.C.R. I\_\_\_\_ (delivered May 12, 2011), ¶¶ 44–45.

168. See Mark Bell, *A Patchwork of Protectionism: The New Anti-Discrimination Law Framework*, 67 MOD. L. REV. 465, 467 (2004).

169. *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryn NV (Feryn)*, Case C-54/07, [2008] E.C.R. I-5187.

170. See Opinion of the Advocate General Maduro, *Feryn*, [2008] E.C.R. I-5187, ¶ 16.

The CJ further held that the effectiveness of the Race Directive requires that prohibited discriminatory acts must not be confined to those where there is an identifiable complainant.

Differences of treatment based on nationality are excluded.<sup>171</sup> The Race Directive is expressed to be without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons onto the territory of the Member States and to any treatment that arises from the legal status of such third-country nationals and stateless persons<sup>172</sup> This exception is probably designed to avert any challenge to the policies of the Member States on work permits as being indirectly discriminatory. Whilst the Member States are in agreement about the application of the principle of equal treatment as laid down in the directive, within their national territory they wish to retain control over the entry of nonnationals onto their territory. In other words, the principle of equality of treatment is to apply to those who are lawfully present and resident according to the legal system of each Member State, regardless of their nationality.

Ascertaining whether discrimination has occurred because of nationality, and therefore outside the Race Directive, or race, which is covered by the directive, may be problematic.<sup>173</sup> The dividing line between discrimination based on race, and discrimination based on nationality, is often unclear.

## VI. *THE FRAMEWORK EMPLOYMENT DIRECTIVE*

The purpose of the Framework Employment Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment or occupation.<sup>174</sup> The directive has been described as performing an “exclusionary function”: it excludes religious belief, age, disability, and sexual

171. Member States thus retain their exclusive competence with respect to the treatment under their national legal systems of third-country nationals. This reflects the traditional approach of the European Union.

172. See Race Directive, *supra* note 93, art. 3(2), at 24.

173. See generally Fernne Brennan, *The Race Directive, Institutional Racism and Third Country Nationals*, in 2 *EUROPEAN UNION LAW FOR THE TWENTY-FIRST CENTURY* 371 (Takis Tridimas & Paolisa Nebbia eds., 2004).

174. See Framework Employment Directive, *supra* note 94, art. 1, at 18.

orientation from the range of permissible reasons upon which an employer may legitimately rely in treating one employee less favorably than another.<sup>175</sup>

No definition or guidance is given of any of these concepts within in Article 19 of the TFEU itself or in the Framework Employment Directive. Thus far, only the concept of “disability” has been an issue before the CJ. In *Chacón Navas v. Eureka Colectividades SA*<sup>176</sup> the Court adopted a restrictive approach to the meaning of “disability,” drawing a distinction between it and “sickness.” “Disability,” it held, must be understood as “referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” and it must be “probable that [this limitation] will last for a long time.”<sup>177</sup> No indication was given as to what might constitute “a long time.” Ms. Chacón Navas had been certified as unfit to work, in the short term, on grounds of sickness in October 2003, and dismissed by her employer in May 2004. There was no information available to the Court on the nature of Ms. Chacón Navas’s illness. The Court appeared simply to accept that she was suffering from sickness as opposed to disability simply because the term “sickness” seems to have been used by both her medical advisors and her employer. No attention was paid to the fact that her medical advisors certified that she was unfit to work in the “short term,” which seems to imply that her condition was ongoing and not just an illness of finite duration.

Article 2(1) of the Framework Employment Directive prohibits direct discrimination. In *Mangold v. Helm* the Court found that a provision of German law permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of fifty-two “introduces a difference of treatment on the grounds directly of age.”<sup>178</sup> Similarly, in *Hennigs v. Eisenbahn-Bundesamt* the Court held that

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175. See Opinion of the Advocate General Maduro, *Coleman v. Law & Law*, Case C-303/06, [2008] E.C.R. I-5603, ¶ 17.

176. *Chacón Navas v. Eureka Colectividades SA*, Case C-13/05, [2006] E.C.R. I-6467, ¶ 44.

177. *Chacón Navas*, [2006] E.C.R. I-6467, ¶¶ 43, 45.

178. See *Mangold v. Helm*, Case C-144/04, [2005] E.C.R. I-9981, ¶ 57.

a provision in a collective agreement providing that, within each salary group, basic pay was to be determined by reference to age was directly discriminatory.<sup>179</sup>

*Coleman* raised the issue of whether the directive protects from discrimination and harassment persons who are not disabled themselves but are treated less favorably and harassed on the ground of their association with a person who is disabled.<sup>180</sup> The Court held that the directive was applicable in a situation where an employee suffers direct discrimination on the grounds of the disability of her child. The Court stated that an interpretation of the directive limiting its application only to people who are themselves disabled “is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.”<sup>181</sup> Therefore, “[w]here it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment.”<sup>182</sup>

The Court thus adopted the same approach as it did in *Drake v. Chief Adjudication Officer*,<sup>183</sup> where it looked at the risk to which the social security benefit was addressed rather than the recipient of that benefit.

The Framework Employment Directive is without prejudice to national laws on marital status and the benefits dependent thereon.<sup>184</sup> In *Maruko v. Bühnen*,<sup>185</sup> Mr. Maruko was refused a widower’s pension when his same-sex life partner died in January 2005. He and his partner had entered into the life partnership in November 2001. His claim was refused on the ground that the pension scheme did not provide for survivors’ pension for life partners. Entitlement was confined to surviving spouses. In 2001, Germany had altered its legal system to allow persons of the same sex to live in a union of mutual support and

179. See *Hennigs v. Eisenbahn-Bundesamt & Berlin v. Mai*, Joined Cases 297–98/10, [2011] E.C.R. I\_\_\_\_ (delivered Sept. 8, 2011).

180. See *Coleman*, [2008] E.C.R. I-5603.

181. See *id.* ¶ 51.

182. *Id.* ¶ 59.

183. See *Drake v. Chief Adjudication Officer*, Case 150/85, [1986] E.C.R. 1995.

184. See Framework Employment Directive, *supra* note 94, pmbl. ¶ 22, at 17.

185. *Maruko v. Bühnen*, Case C-267/06, [2008] ECR I-1757.



assistance that is normally constituted for life. Having chosen not to permit persons of the same sex to enter into marriage, Germany created for same sex couples an equivalent regime, the life partnership, the conditions of which were made equivalent to those applicable to marriage. In these circumstances, the CJ held that if the national court found that surviving spouses and surviving life partners are in a comparable situation in so far as concerns the survivors' benefits at issue, life partners who are in a situation comparable to spouses must therefore be treated in the same way.

The principle of equal treatment laid down by the directive is subject to five exceptions. Additionally, Member States are permitted to make a number of derogations from some of its provisions. Such exceptions or derogations are subject to the principle of proportionality.

"With regard to disabled persons, the principle of equal treatment shall not prejudice the right of Member States to maintain or adopt provisions on the protection of health and safety at work or measures aimed at promoting their integration of the disabled into the working environment."<sup>186</sup> The employer "is obliged, with respect to persons having a particular disability, under national legislation, to take particular measures" to provide reasonable accommodation for disabled persons in order to facilitate their effective employment.<sup>187</sup>

As a general rule, the directive applies "without prejudice" to measures laid down by national law in the interests of public security, public order, and the prevention of criminal offences, for the protection of health, and the rights and freedoms of others.<sup>188</sup> No such exception figures in any of the gender discrimination directives or the Race Directive.<sup>189</sup> It appears to have been put in during the final negotiations of the text of the Framework Employment Directive, no evidence of it having

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186. Framework Employment Directive, *supra* note 94, art 7(2), at 20.

187. *Id.* art. 2(2)(b), at 18–19.

188. *See id.* art. 2(5), at 19.

189. *See id.* art. 3(1), at 19. But it appears that in the legislative process leading to the adoption of the Race Directive, the Council was unwilling to take into account an amendment proposed by the European Parliament whereby the exercise by any public body, including the police, immigration, criminal and civil justice authorities, of its functions would be included the activities specified in Article 3(1) to which the directive applies.

appeared in prior drafts. “It was thought necessary to prevent members of harmful cults, paedophiles, and people with dangerous physical and mental illnesses from gaining protection from the Directive.”<sup>190</sup>

A further rationale behind this provision may possibly be found in Recital 18 of the Preamble, which refers to the right of the armed forces and the prison and emergency services not to recruit or maintain in employment persons who do not have the required capacity to perform the function necessary to preserve the occupational capacity of those services, thereby putting at risk beneficiaries of those services.<sup>191</sup> The breadth of the wording of this exception is a cause of concern: “It is . . . an extremely broadly drafted provision, especially given that the Framework Directive covers only workplace discrimination. The CJ will have to patrol its boundaries carefully.”<sup>192</sup>

The directive provides for two other specific exceptions to the principle of equal treatment. First, it has no application to differences in treatment based on nationality or conditions relating to the entry and residence of third-country nationals and stateless persons. The directive is expressed not to have any impact on the legal status of such persons.<sup>193</sup> It therefore respects the confines of Article 19 of the EC Treaty: discrimination based on nationality remains subject to Article 18 of the TFEU and the rights of third country nationals to enter and remain in a Member State are within the exclusive competence of that state. Second, it does not apply to payments of any kind by state schemes “or similar,” including state social security or social protection schemes.<sup>194</sup>

Member States can provide that the directive does not apply to several situations. First, it does not apply to the armed forces

190. EVELYN ELLIS, *EU ANTI-DISCRIMINATION LAW* 291 (2005) (citation omitted).

191. See Framework Employment Directive, *supra* note 94, pmbl. ¶ 18, at 17.

192. ELLIS, *supra* note 190, at 291.

193. See Framework Employment Directive, *supra* note 94, art. 3(2), at 19.

194. See *Maruko v. Bühnen*, Case C-267/06, [2008] E.C.R. I-1757. The CJ held that the directive must be understood as excluding social security and social protection schemes which were not “pay” within the meaning of Article 157 of the TFEU or payments of any kind made by the state with the aim of providing access to employment or maintaining employment. In that case, the Court found that the characteristics of the survivors’ pension at issue qualified it to be classified as pay within the meaning of EC Treaty Article 141; therefore, it fell within the scope of the Framework Employment Directive.

in so far as it relates to discrimination on the grounds of disability and age.<sup>195</sup> This derogation is broad in scope. It is intended to enable the Member States to safeguard the combat effectiveness of their armed forces. The Member States who avail themselves of this derogation have complete discretion to determine what constitutes “combat effectiveness” and what is required to maintain it and accordingly to determine the employment rights of the disabled and the elderly. Given the record of some Member States in granting access to women to employment in the armed forces,<sup>196</sup> this is a matter of concern. That said, the exception to the right to equal treatment is subject to the general principle of proportionality, which should provide some level of guarantee that national measures will go no further than a minimal erosion of the right of equal treatment in employment in the armed forces.

Second, the directive does not apply to:

[T]he fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees and the use of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided it does not result in discrimination on the grounds of sex.<sup>197</sup>

Third, the directive does not apply to “occupational activities within churches and other public or private organizations the ethos of which is based upon religion or belief.” In such cases:

[D]ifference of treatment based upon a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or the context in which they are carried out, a person’s religion or belief constitutes a

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195. See Framework Employment Directive, *supra* note 94, art. 3(1), at 19.

196. *Int'l Power & Others v. NALOO*, Joined Cases C-172/01 P, C-175/01 P, C-176/01 P & C-180/01 P, [2003] E.C.R. I-11473; *Kreil v. Bundesrepublik Deutschland*, Case C-285/98, [2000] E.C.R. I-69; *Sirdar v. Army Board*, Case C-273/97, [1999] E.C.R. I-7403; *Dori v. Recreb Srl*, Case C-91/92, [1994] E.C.R. I-3325.

197. Framework Employment Directive, *supra* note 94, art. 6(2), at 20.

genuine, legitimate and justified occupational requirement.  
having regard to the organization's ethos.<sup>198</sup>

Such organizations can "require individuals working for them to act in good faith and with loyalty to the organization's ethos."<sup>199</sup>

Fourth, the directive does not apply to differences in treatment on the grounds of age, provided there are objective reasons for the differential treatment and it is reasonably justified, within the context of national law, by a legitimate aim relating to "employment policy, labor market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."<sup>200</sup>

Such differences in treatment may include . . .

(a) the setting of special conditions on access to employment and vocational training, employment, and occupation, including dismissal and remuneration conditions for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.<sup>201</sup>

These exceptions and derogations must be interpreted strictly and confined to the precise objectives for which they are allowed.<sup>202</sup>

In the case of *Palacios de la Villa v. Cortefiel Servicios SA*,<sup>203</sup> the Court found that the absence of a specific reference to a

198. *Id.* art. 4(2), at 19.

199. *Id.* art. 4(2), at 19.

200. *Id.* art. 6(1), at 19–20.

201. *Id.* art. 6(2), at 20.

202. *Cf.* *Sirdar v. Army Bd.*, Case C-273/97, [1999] E.C.R. I-7403; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, [1986] E.C.R. 1651; *see also Prigge v. Deutsche Lufthansa AG*, Case C-447/09, [2011] E.C.R. I\_\_\_\_ (delivered Sept. 13, 2011) (not yet reported) (holding that air traffic safety did not fall within the aims referred to in Article 6 (1)).

203. *See Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05, [2007] E.C.R. I-8531.

particular policy objective in a collective agreement that was discriminatory but allegedly justifiable under Article 6(1) as being necessary to achieve that objective “alone was not decisive.” A national employment policy of the kind envisaged by Article 6(1) need not be articulated in each and every measure that, although discriminatory within the meaning of Article 2 of the directive, seeks to implement that policy. “It cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the national legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision.”<sup>204</sup>

However, it is necessary from the general context of the measure to enable its underlying aim to be identified. This principle was confirmed in *Age Concern England v. Secretary of State*.<sup>205</sup>

Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chose are suitable for achieving that aim . . . .<sup>206</sup>

In the absence of any precise indication of the objective of a particular piece of legislation as to its aims, other elements, taken from the general context of the measure concerned, enable the underlying aim of the measure to be identified for the purposes of review by the courts whether it is legitimate and whether the measures put in place to achieve that aim are appropriate and necessary. Policy statements and travaux préparatoires, parliamentary debates, or statements of reason for the measure in question could be relevant.<sup>207</sup> Article 6(1)

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204. See *Palacios de la Villa*, [2007] E.C.R. I-8531, ¶ 56.

205. *The Queen, on the Application of Incorp. Trs. of the Nat'l Council for Ageing v. Sec'y of State for Bus., Enter. & Regulatory Reform (Age Concern England)*, Case C-388/07, [2009] E.C.R. I-1569.

206. *Id.* ¶ 51.

207. See, e.g., *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] E.C.R. I-47, ¶ 40; *Age Concern England*, [2009] E.C.R. I-1569, ¶ 45; *Palacios de la Villa*, [2007] E.C.R. I-8531, ¶ 57; see also *Georgiev v. Tehnicheski Universitet-Sofia filial Plovdiv*, Joined Cases C-250 & 268/09, [2010] E.C.R.

“imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification.”<sup>208</sup>

The Member States enjoy broad discretion in their choice of social and employment policy objectives but also in the definition of the measures capable of achieving them.<sup>209</sup>

Most of the cases that have come before the CJ under this directive have been concerned with age discrimination. In all of these cases, the Court found discriminatory conduct but proceeded to consider whether it fell within any of the exceptions or derogations provided for in the directive. These cases mainly concerned Article 6(1), although Articles 2(5) and 4(1) have also been invoked. Only one case concerns access to employment; the others are all related to dismissal and compulsory retirement issues.

In *Wolf v. Stadt Frankfurt am Main*,<sup>210</sup> Mr. Wolf applied for a position in the fire services of the City of Frankfurt. His application was turned down on the ground that he was over thirty years of age. There was an age limit of thirty years on recruitment for the particular category of job, an intermediate career post, for which Wolf had applied. Although the national court referred nine questions on the compatibility of the age limit with Article 6(1), the Court chose to consider the issue under Article 4(1) of the directive: was the statutory age limit for access to an intermediate career in the fire service a “genuine and determining occupational requirement” within the meaning of Article 4(1)?<sup>211</sup> The Court found that it was.

I\_\_\_\_ (delivered Sept. 2, 2010) (not yet reported). At issue in *Georgiev* was a provision of Bulgarian law providing for the compulsory retirement of university professors at the age of sixty-eight but that, at the same time, made their employment after the age of sixty-five subject to fixed one-year contracts renewable only twice, such contracts being less favorable than the contracts of tenured professors. Whilst the CJ was prepared to accept that these arrangements could be justifiable in the interest of maintaining the quality of university teaching and the allocations of academic posts amongst the generations, it could find no evidence that this was in fact the objective of such measures. See *Georgiev*, [2010] E.C.R. I\_\_\_\_ (delivered Sept. 2, 2010).

208. *Age Concern England*, [2009] E.C.R. I-1569, ¶ 67.

209. See Opinion of Advocate General Mazak, *Palacios de la Villa*, [2007] E.C.R. I-8531, ¶ 74 (stating that only a “manifestly disproportionate national measure should be censured” by the Court of Justice).

210. *Wolf v. Stadt Frankfurt am Main*, Case C-229/08, [2010] E.C.R. I-1.

211. See *id.* ¶¶ 24–47.

Employees in intermediate career paths in fire services carry out tasks such as fighting fires, rescuing persons, and dealing with dangerous animals. Such tasks require exceptionally high physical strength and can only be performed by young persons. According to the Court, “the need to possess full physical capacity to carry on the occupation of a person in the intermediate career of the fire services is related to the age of the persons in that career.”<sup>212</sup>

In *Seda Küçükdeveci v. Swedex GmbH & Co. KG*,<sup>213</sup> the claimant had been employed from the age of eighteen by Swedex. She was dismissed after ten years of service. Her notice period was calculated as if she had been in employment for three years instead of ten years. This was in accordance with German law under which periods of employment before the age of twenty-five years are not taken into account in calculating the notice period for dismissal. The Court held that such a provision must be regarded as relating to conditions of dismissal. It was discriminatory in that it afforded less favorable treatment between persons with the same length of service. As to whether the difference in treatment could be justified, it appeared that the objective of the legislation, adopted in 1926, was to lighten the burden on employers imposed by lengthy notice periods and to introduce some fluidity into the labor market. The legislation reflected the legislature’s assessment that younger workers react more rapidly to the loss of their jobs, and greater flexibility may be demanded of them. A shorter period of notice for young workers also facilitates their recruitment by increasing the flexibility of personnel management. However the Court was not impressed with this argument pointing out that the legislation applies to all employees who joined their employing organization before the age of twenty-five regardless of when they were dismissed—they could have in fact completed a long period of service and might not therefore be young workers. Accordingly, it ruled that the legislation was not appropriate for achieving its purported aim.

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212. *Id.* ¶ 41.

213. *Küçükdeveci v. Swedex GmbH & Co. KG*, Case C-555/07, [2010] E.C.R. I-365.

In *Andersen v. Region Syddanmark*,<sup>214</sup> Andersen worked for the Region of Southern Denmark from 1979 until 2006 when he was sixty-three years old. Danish law grants a severance allowance to workers employed in the same undertaking for at least twelve years. The allowance is not payable to workers who, on termination of their employment relationship, are entitled to an old age pension under an occupational pension scheme. Mr. Andersen was entitled to such a pension but he wished to remain on the labor market and registered as a job seeker with the relevant employment services. He intended to waive his pension rights. The Court found that the Danish law was discriminatory: it treated persons in the same situation, that is those who had worked for twelve years with the same employer, differently. It then went on to consider whether such a difference in treatment could be justified under Article 6(1).

The objective of the severance allowance was to facilitate employees who had worked for an employer for a long period of time to move jobs by providing them with the means to acquire new skills to get a new job. This, the Court found, was a legitimate employment policy and labor market objective within the meaning of Article 6(1). Generally those who were entitled to an old age pension left the job market. They were not therefore in need of the severance allowance. Although the exclusion of those who left the labor market from entitlement to the severance allowance was not manifestly inappropriate to the attainment of the objective of the legislation, the exclusion of workers who were eligible for a pension was disproportionate. By precluding payment of the allowance to workers who, although eligible for an old age pension from their employer, nonetheless intended to waive the right to a pension and continue working, went beyond what is necessary to achieve the objective of the legislation governing the severance allowance.

There have been a number of cases on compulsory retirement age requirements that either require a worker to leave the labor market at a given age or that alter the arrangements under which they continue working, such as

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214. *Andersen v. Region Syddanmark*, Case C-499/08, [2010] E.C.R. I\_\_\_\_ (delivered Oct. 12, 2010) (not yet reported).



moving from tenured posts or indefinite contracts of employment to short term fixed contracts.

In *Mangold v. Helm*<sup>215</sup> the Court held that a provision of German law whereby all workers who had reached the age of fifty-two “without distinction . . . may, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which could be renewed an indefinite number of times,” could not be objectively justified.<sup>216</sup> The age of the worker was the only criterion for the application of fixed-term contracts of employment. It had not been shown that the “fixing of an age threshold, as such, regardless of any other consideration linked to the structure of the labour market or the personal situation of the person concerned, [was] objectively necessary to attainment of the objective which is the vocational integration of the unemployed older worker,” as had been argued by the German government.<sup>217</sup> The Court found that the consequence of the law was:

This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.<sup>218</sup>

In *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*,<sup>219</sup> Mrs. Petersen was refused authorization to practice as a panel dentist after the age of sixty-eight. Panel dentists were obliged to retire at the age of sixty-eight in order to protect the health of patients insured under the statutory health scheme since it was believed that the performance of those dentists declined from that age. The Court found that because ninety percent of patients in Germany are treated by panel dentists, the inability to practice under the panel scheme affected conditions of access to employment and was discriminatory in the sense that panel dentists are treated less

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215. *Mangold v. Helm*, Case C-144/04, [2005] E.C.R. I-9981.

216. *Id.* ¶ 64.

217. *Id.* ¶ 3.

218. *Id.* ¶ 64.

219. *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] E.C.R. I-47.

favorably than other persons practicing on the panel scheme solely because of their age. The referring Court mentioned several objectives for this rule but it was unclear as to precisely which of these objectives the rule was meant to address. No reference was made to *travaux préparatoires*, parliamentary debates, or any statement of reasons that might offer assistance as to what the rule was meant to achieve. The Court, therefore, whilst acknowledging that it was for the national court to discern the objective of the rule, proceeded to examine its legitimacy in the light of its three purported objectives. The first objective was that the law was supposedly designed to protect public health—an objective which the Court found to be a legitimate social policy objective both on the basis of Article 2(5) of the directive and the general rule that Member States have a broad discretion in organizing their social security and health care schemes. The Court, however, found that the legislation lacked a consistency in the sense that nonpanel dentists were not required to retire at sixty-eight years: “A measure to which there is so broad an exception as that for dentists practising outside the panel system cannot be regarded as essential for the protection of public health.”<sup>220</sup>

*Prigge v. Deutsche Lufthansa AG*<sup>221</sup> and *Fuchs & Köhler v. Hessen*<sup>222</sup> may be compared and contrasted with *Petersen*. *Prigge* concerned a collective agreement applicable to the crew of Deutsche Lufthansa, which prohibited pilots from working as such after the age of sixty years. Both national and international law provided that pilots should retire at the age of sixty-five but that between the ages of sixty and sixty-four they should work as part of a multi-pilot crew and the other members of that crew should be under sixty. These rules were designed to ensure air traffic safety in that airline pilots must possess particular physical capabilities that might diminish with age. As such, these rules could be considered a “genuine and determining” occupational requirement within the meaning of Article 4(1). The CJ found that the compulsory retirement age of sixty laid down in the

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220. *Id.* ¶ 61.

221. *Prigge v. Deutsche Lufthansa AG*, Case C-447/09, [2011] E.C.R. I \_\_\_\_ (delivered Sept. 13, 2011) (not yet reported).

222. *Fuchs & Köhler v. Hessen*, Joined Cases 159–60/10, [2011] E.C.R. I \_\_\_\_ (delivered July 21, 2011) (not yet reported).

collective agreement to be disproportionate given that both national and international law set the age of compulsory retirement at sixty-five.

*Fuchs & Köhler* concerned the retirement age of civil servants, in this case public prosecutors, in Germany. The retirement age was set at sixty-five but, exceptionally, a civil servant could continue to work until the age of sixty-eight if he so requested, and his continued employment was in the interests of the service. In the case of a public prosecutor, it might be in the interest of the service if he were allocated a case in which proceedings were not finished by the time he reached sixty-five. Rather than reallocate the case to another prosecutor, it might be more efficient for him to continue on the matter until proceedings had terminated. The Court found, in contrast to *Petersen*, that the rule in question did not lack coherence when contrasted with the general retirement scheme for civil servants. The compulsory retirement age was sixty-five and it was only in certain limited cases that civil servants could work beyond that age. The position in *Petersen* was otherwise in that where the retirement age of two groups of persons doing work of the same nature in the same profession differed according to whether they were employed in the private or public sector. In *Rosenblatt v. Oellerking Gebäudereinigungsges. mbH*, Mrs. Rosenblatt<sup>223</sup> worked as cleaner in a barracks for thirty-nine years—hardly a comfortable way of life, but she was no doubt a sturdy and reliable employee. She was entitled to a very low pension and so wished to remain employed. Her contract provided that it would terminate at the end of the calendar month in which the employee could claim a retirement pension or at age sixty-five, whichever was later. The German government argued that this rule was the

[R]eflection of a political and social consensus which ha[d] endured for many years in Germany. That consensus [wa]s based primarily on the notion of sharing employment between the generations. The termination of the

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223. See *Rosenblatt v. Oellerking Gebäudereinigungsges. mbH*, Case C-45/09, [2010] E.C.R. I \_\_\_\_ (delivered Oct. 12, 2010) (not yet reported).

employment contracts of those employees directly benefits young workers by making it easier for them to find work.<sup>224</sup>

The Court accepted that this practice of automatic retirement, which it observed, had been a feature of employment law in many Member States, could be regarded as objectively and reasonably justified within the meaning of Article 6(1) of the directive. As to whether it was appropriate and necessary, the Court stated that legislation such as that in issue in *Rosenbladt* takes account of the fact that persons concerned are entitled to financial compensation by means of a replacement income in the form of a retirement income. Thus it was not unreasonable for a Member State to take the view that a measure such as the authorization of clauses on automatic termination of employment contracts at a given age was justified. However, such a measure could be regarded as disproportionate given the fact that the termination of employment contracts at a given age could cause financial hardship, precisely as in the circumstances of Mrs. Rosenbladt, and indeed others in low-paid jobs whose pension entitlement was poor.

Given the fact that German employment legislation does not prevent a person who has reached retirement age from continuing to work—there is no obligation to exit the labor market—coupled with the protection from discrimination from age, the Court found that the legislation in question did not go beyond what is necessary to achieve the aims it is designed to pursue. This reasoning, however, may be queried. Although theoretically a person can reenter the labor market after retirement, just how easy is it to get employment after retirement age in an employment culture that provides for automatic termination of employment at a given age? What about loss of seniority and other employment rights following the rupture of an employment relationship? What about the consequences for pension entitlement? These are issues that may place a person retired compulsorily in a much less favorable position than before retirement.

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224. *Id.* ¶ 43.

*CONCLUSIONS: WHERE DOES EUROPE STAND NOW?*

From the original, somewhat arid and generally formulated provisions of the EEC Treaty drafted more than half a century ago, we have seen a gradual commitment on the part of the European Union to achieving equality amongst its citizens. Nationality and gender were the first grounds on which discrimination was prohibited. The past fifteen years have seen an expansion of the prohibition on discrimination into other areas where it is most commonly found: race, religion or belief, age, disability, and sexual orientation.

Although the principle of equality is now enshrined in the treaties and the Charter of Fundamental Rights, as well as in discrimination-specific legislation, equality rights have been—and continue to a large extent to be—developed through the case law of the CJ. This case law has created a corpus of equality rights, influencing both treaty and legislative developments, which has had a profound impact upon the lives of the people of Europe. For all the rhetoric—and considerable this rhetoric has been—emanating from politicians and lawmakers, it is not from them that equality has come. It has come essentially from citizens themselves, insisting on their rights and bringing legal proceedings to enforce them the length and breadth of Europe, and from a Court willing to assume the responsibility of putting flesh on skeletal legal provisions to bring them to life in a manner that will achieve their declared objectives. The Court's approach has been functional; it has looked at the objectives of rules upon which it is asked to adjudicate and interpreted them according to what they were designed to achieve as well as wider EU objectives. Exceptions and derogations have been required to be proportionate and appropriate to the objectives that they seek to achieve. All types of discriminatory conduct have been prohibited regardless of to whom that conduct has been addressed.

At the same time, both in legislation and case law, we see differences in the application of the principle of equality. A hierarchy of norms can be detected.<sup>225</sup> Whilst employment-related discrimination is prohibited in all the spheres to which discrimination legislation is addressed, it is only in the case of

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225. See generally Bell & Waddington, *supra* note 95.

gender discrimination and racial and ethnic discrimination that nonemployment related discrimination is addressed, and even then it is more widely prohibited on racial and ethnic grounds than on the basis of gender. The Race Directive and the Recast Directive impose a duty on the Member States to designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, but there is no comparable obligation in the Framework Employment Directive. Under the Race Directive, direct discrimination can be justified on two grounds only: genuine and determining occupational requirements and positive action. The Framework Employment Directive, however, allows many more exceptions and derogations and the Court has adopted a fairly nonrestrictive approach to them, being particularly deferential to Member States' social and employment policies where such policies are invoked to justify discrimination. Within the gender discrimination directives, disparities can also be noted, particularly in the sphere of indirect discrimination, where age related discrimination in social security can result in the prejudicial treatment of women. The attainment of equal treatment in occupational social welfare schemes is similarly constrained.

The end result is a fragmentation of equality rights with variable standards of protection. This in itself leads to inequalities and, moreover, makes it difficult to bring claims of multiple types of discrimination or intersectional discrimination where disparity of treatment is alleged on more than one ground. This has been the subject of criticism<sup>226</sup> but whether it should be so or not is debatable.<sup>227</sup>

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226. See generally Mark Bell, *Advancing EU Anti-Discrimination Law: The European Commission's 2008 Proposal for a New Directive*, 3 *EQUAL RTS. REV.* 7 (2009); Lisa Waddington, *Future Prospects for EU Equality Law: Lessons to be Learnt from the Proposed Equal Treatment Directive*, 36 *EUR. L. REV.* 163 (2011).

227. See Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Non-Discrimination and Equal Opportunities: A Renewed Commitment*, COM (2008) 420 Final, at 5 (July 2008) ("The various grounds of discrimination differ substantially, and each demands a tailored response. This is not a question of creating a hierarchy between various grounds but of delivering the most appropriate form of protection for each of them.").

The proposed directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation<sup>228</sup> may go towards reducing the disparities current in the equality area. The purpose of this instrument is to supplement the Framework Employment Directive, but by a separate instrument. The object is to extend the principle of equal treatment beyond the sphere of employment by prohibiting discrimination based on religion or belief, disability, age, or sexual orientation in both the public and private sectors in social protection, social advantages, education, and access to the supply of goods and services that are available to the public including housing. Only goods and services provided on a commercial basis are covered by the proposal as it now stands. This proposal, however, will not bring the protection offered to victims of discrimination of the grounds of age, religion or belief disability, or sexual orientation on all fours with victims of racial or ethnic discrimination. The scope of the proposed directive is narrower than that of the Race Directive and so inequalities between victims of discrimination may continue.<sup>229</sup>

The proposed directive is in the mold of the existing directives in that it does not provide any definition of what constitutes the various grounds of discrimination. This leaves the extent of the rights and obligations set out in them uncertain and generally undermines their effectiveness. It is not easy for individuals, their employers, and others upon whom obligations are imposed. Ultimately, in the absence of more precise definitions in legislation, individuals may have to resort to legal proceedings and it will be left to the CJ to define the meaning of key concepts. This has caused difficulties with respect to the definition of “disability” adopted by the Court in *Chacón Navas*, which is somewhat narrower than that envisaged by the legislator and fits ill with the definition of disability in the United Nations Convention on the Rights of Persons with Disabilities to which the European Union acceded at the end of

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228. Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM (2008) 426 Final (July 2008).

229. For a detailed analysis see Erica Howard, *EU Equality Law: Three Recent Developments*, 17 EUR. L.J. 785, 788 (2011).

2010. Although the European Parliament has proposed inserting a definition based on that set out in the Convention into the proposed directive, this has not as yet happened.

The proposed directive has also been criticized on the ground that it does not address discrimination based on an assumption or assumptive discrimination. This occurs where a person is assumed to have certain characteristics, which in fact he or she does not have, and is subject to discriminatory treatment because of that assumption. This omission may not in fact be too serious since the approach of the CJ to associative discrimination in *Coleman* might also encompass assumptive discrimination as indeed might the broad view of what constitutes discriminatory conduct in *Feryn*.

Moving away now from the minutiae of legislation, let us consider two general developments that might have an impact on that legislation. Mention has been made of the general principle of equality in the introductory section of this Essay, and it has been pointed out that that principle has now been enshrined in the Charter of Fundamental Rights, which now has treaty status. Articles 21 and 23 of the Charter of Fundamental Rights state specifically that any discrimination based on a wide variety of grounds is prohibited and equality between men and women must be ensured in all areas.<sup>230</sup> In *Test-Achats* the CJ found that derogation from the principle of equality of treatment in the insurance sector, which Member States were entitled to avail themselves of on an indefinite basis, was unlawful. What are the implications of that ruling for other directives on equality all of which have provisions that bear a similarity to that in issue in *Test-Achats*? The Race Directive permits Member States to allow for differential treatment where a characteristic related to racial or ethnic origin constitutes a “genuine and determining occupational requirement” provided that the objective is legitimate and proportionate. The Framework Employment Directive contains the same possible exception. Both directives allow for positive action. Article 157(4) of the TFEU allows for positive action in the sphere of equal pay. The Recast Directive also provides for positive

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230. Charter of Fundamental Rights, *supra* note 64, arts. 21, 23, 2010 O.J. C 83, at 396.



measures “with a view to ensuring full equality in practice between men and women in working life.”<sup>231</sup>

As we have seen, the Framework Employment Directive allows for numerous other exceptions and derogations to the principle of equal treatment, notably in the case of differences of treatment on the grounds of age. All of these exceptions relate to situations of direct discrimination and all give Member States the possibility of derogating from the principle of equal treatment for an indefinite period of time. None of the directives requires, as the Goods and Services Directive does, that the measures for which an exemption or derogation may be claimed be in place at the time of the adoption of the directive, and none prohibits the permitted differential treatment measures from being introduced after the date of the adoption of the directive or required date of transposition of the directive. None requires, as the Goods and Service Directive does, specific regular reporting on the operation of the derogations, in particular, the premises upon which they are permissible. All suffer from the defect, which influenced the Advocate General in *Test-Achats* in forming her view of the invalidity of Article 5(2), that it may lead to differential treatment in some Member States depending on whether or not a Member State has chosen to avail itself of the derogation or exemption in question. This in turn creates differences between the laws of the Member States themselves.

The Equal Treatment in Social Security Directive is even more to the point. The directive was required to be transposed into national law by December 23, 1984—that is some twenty-seven years ago. It allows Member States to derogate from the principle of equality in five sets of circumstances—all related to retirement—in which traditionally women have been treated more advantageously than men. In *Richards v. Secretary of State for Work & Pensions*,<sup>232</sup> the Court held that this possibility of derogation was intended “to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension

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231. Recast Directive, *supra* note 91, art. 3, at 27.

232. *Richards v. Sec’y of State for Work & Pensions*, Case C-423/04, [2006] E.C.R. I-3585.

systems . . . without disrupting the complex financial equilibrium of those systems”<sup>233</sup>

What is interesting is that the Court pointed to the temporary nature of the permitted derogations in a judgment handed down in 2006, in the case of a directive adopted on December 23, 1978, which was required to be implemented by the Member States by December 23, 1984. It seems difficult to reconcile this situation with that prevailing in *Test-Achats*. The Equal Treatment in Social Security Directive appears to allow Member States to derogate from the principle of equal treatment in the specified situations on an indefinite basis. Although exceptions and derogations are often spoken of in the same breathe and the term used interchangeably, or collectively referred to as “exemptions,” it seems that after *Test-Achats* they are two quite different concepts. Exceptions—applicable throughout the European Union to the principle of equal treatment—appear to be permissible. Advocate General Kokott, in Paragraph 34 of her opinion stated that: “Within the limits of the prohibition on taking arbitrary measures the Council could therefore in principle also have exempted some services like insurance entirely from the scope of [the Goods and Services Directive].”<sup>234</sup>

However, where the Council has acted, the possibility of allowing Member States at their discretion to derogate from the provisions of a directive laying down equal treatment seems, after *Test-Achats*, to be limited. Derogations can be allowed but only for limited and relatively short periods of time. This must have implications for the validity of provision in other equality directives allowing derogations for indefinite periods of time.

The second development that is significant is the ruling in *Mangold* to the effect that the Framework Employment Directive did not in itself lay down the principle of equal treatment. The principle of equal treatment on grounds of age was a “general principle of Community law,” the directive being a specific expression of it. The CJ confirmed this view in *Kücükdeveci* and more recently in *Prigge*.

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233. *Id.* ¶ 35.

234. Opinion of Advocate General Kokott, *Test-Achats*, Case C-236/09, [2011] E.C.R. I\_\_\_\_, (delivered Mar. 1, 2011) (not yet reported).

Two Advocates General have expressed doubts on whether such a general principle exists. In *Lindorfer v. Council*,<sup>235</sup> Advocate General Sharpston states that it was reasonable to read *Mangold* as referring to the general principle of equality, the specific prohibition of age discrimination, in both national and international law, being “too recent and uneven to meet such a description.”<sup>236</sup> In *Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*<sup>237</sup> she reiterated her view, reasoning it at length and with conviction. Subsequently, in *Palacios de la Villa*, Advocate General Mazák pointed out that although reliance had been placed by the CJ in *Mangold*<sup>238</sup> on various international instruments and constitutional traditions common to the Member States from which it could conclude that there was a general principle of nondiscrimination on the grounds of age, those instruments referred for the most part to the general principle. The Advocate General, therefore, did not find the conclusion drawn in *Mangold* to be “particularly compelling.” He concluded that if the reasoning in *Mangold* were followed to its logical conclusion, then not only the prohibition on the grounds of age, but all the specific prohibitions of the types of discrimination referred to in Article 1 of the Framework Employment Directive would have to be regarded as general principles of EU law.

There is no doubt that progress has been made in achieving equality between the European Union's citizens, particularly in the last fifteen years. However, much remains to be done. Legislation continues to be drafted in terms that are vague, notably in the failure to define key concepts that determine the effectiveness of directives. The result is confusion as to the exact scope and content of rights and obligations, which may only become clear following legal proceedings. It is then left to the CJ to try and discern what concepts such as “disability” or “religion or belief” might mean—a challenging task that, arguably, should never have been imposed upon it.

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235. *Lindorfer v. Council*, Case C-227/04, [2007] E.C.R. I-6767.

236. *Id.* ¶ 55.

237. *Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, Case C-427/06, [2008] E.C.R. I-7245.

238. Opinion of Advocate General Mazák, *Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05, [2007] E.C.R. I-8531.

The proposal for a directive made in 2008 to extend the principle of nondiscrimination articulated in the Framework Employment Directive to nonemployment matters is making little progress. In its absence sharp differences will remain in the level of protection against discrimination on the grounds of gender, race, and the other prohibited grounds.

To end on a general note, the exact implications of the *Mangold* case law, in which the CJ found that there was a general principle against age discrimination in EU law, and the case of *Test-Achats*, which could be seen to throw into doubt many of the provisions in the equality directives providing for derogations from the principle of equality, remain inconclusive. If pushed to their outer limits, these cases could prove seismic for EU equality law, as indeed could the Charter of Fundamental Rights, which contains many provisions on equality, the status of which is, at the time of writing, uncertain. If these are ultimately found to have horizontal direct effect,<sup>239</sup> with the result that they may be invoked in proceedings between private parties, then perhaps we can speak of true equality amongst Europe's citizens.

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239. See Opinion of Advocate General Trstenjak, *Dominguez v. Centre informatique du Centre Ouest Atlantique & Préfet de la région Centre*, Case 282/10, [2012] ECR I\_\_\_ (delivered Jan. 24, 2012) (not yet reported); see also *Reimann v. Philipp Halter GmbH & Co. Sprengunternehmen KG*, Case C-C-317/11 (pending case).