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Equal Treatment of People with Disabilities in the EC:
What does "Equal" mean?

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ABSTRACT

Expecting the elaboration of national legislation to implement Directive 2000/78/EEC prohibiting, inter alia, discrimination on the grounds of disability in employment and occupation, and the consequent arise of judicial litigation, this paper attempts to contribute to a better understanding of this legislative instrument. To achieve this purpose, it is assumed that equality is generally perceived in two competing and at the same time complementary ways. In its traditional formal sense, it has been linked to state neutrality and procedural justice. In its modern, substantive sense, equality has a remedial role to play, requiring a cautious examination of societal reality and collective anticipation of discriminatory phenomena. In this pattern, individual and social differences and the right to dignity are particularly significant. It is subsequently examined to what extent and in what way the most crucial provisions of Directive 2000/78/EEC on disability discrimination fit in each of the above-mentioned equality models.

It is submitted that, in the context of disability, the Framework Directive embodies a notion of equality that tends to go beyond the traditional structure of the anti-discrimination principle. Indications of this tendency are located in the title, the preamble and the first article of this Directive. Whilst formalism clearly prevailed where major political decisions on the scope of application of the Framework Directive had to be made, some of the rights to which this instrument gives rise lose the nature of comparative negative rights and become positive ones. Moreover, the way the concept of discrimination is defined indicates that dignity and difference are recognised as autonomous values deserving respect and protection. Areas such as positive action around which there has been a lot of controversy in the past, seem to now reconcile both the claims of traditional and modern equality patterns. In addition, the procedural provisions of the Framework Directive, although mainly based on the mechanisms of individual justice, do provide for organisational involvement in legal proceedings.

"Disability" itself, the central notion in this analysis, as if it was meant to play a symbolic role, seems to embrace both approaches to the equality principle.

Rather than adding to the complexity of delicate questions that have to be answered while implementing and interpreting disability equality law in the European Union, this analysis is made with a view to detect some of the dilemmas that national legislators and, more crucially, judges will soon have to face. In this process, the room for discretion left to national administrative authorities will have to be defined, in order to become clear which provisions of the Framework Directive allow for such room, what are the boundaries of the discretion left and which provisions do not allow for any discretion at all. This discussion on the equality models that the Directive embodies is not, therefore, a fruitless theoretical approach to equality issues. Some practical value may emerge firstly for national administrators while formulating national implementing legislation and secondly for practitioners while arguing disability discrimination cases before national courts and the European Court of Justice.

Equal Treatment of People with Disabilities in the EC: What does "Equal" mean?

By *Zoe Apostolopoulou*[*]

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[*] Barrister, LLM on International Studies, University of Athens, LLM on European Law, College of Europe, Member of the Association Bar of Athens and Member of the Board of Advisors of the non - governmental organization «Information Society Open to Impairments - ISOTIS". This essay is based, in part, on an LLM thesis, completed at the College of Europe, Law Department, in June 2004. Grateful acknowledgments to my supervisor, Prof. J.H.H.Weiler, for his wise guidance. I am also particularly grateful to my husband Nikos Floratos for being a source of motivation and for stimulating discussions on the issues covered. The views expressed in this paper are strictly personal and do not necessarily reflect those of the institution the author advices. Responsibilities for any weaknesses naturally rest with the author.

INTRODUCTION

In 2000, the Council of the European Community adopted Directive 2000/78/EC laying down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation[†]. Its provisions should be transposed into national law by December 2, 2003. In relation to disability and age, however, article 18 allows Member States an additional implementation period of three years, elapsing in 2006. Since implementation is not yet completed, several Member States as well as the recently acceded ones will soon have to decide on the most appropriate means for delivering equal treatment. Similarly, national judges will have to choose among diverse possible interpretations of the implementing legislation in the light of the Framework Directive. In making these choices, the Framework Directive leaves them with a great margin of discretion, as there is little consensus on the appropriate model of equality to apply.

Disability calls for particular attention. Taken into consideration that Member States are less familiar with this ground of discrimination than they are with several others[‡], both legislators and national courts may feel bewildered while tackling disability issues in decision-making. To examine, therefore, what is the concept of equality incorporated in the Framework Directive in the specific context of disability, would be a useful tool for understanding the essential function of this legislative instrument. In addition, such an attempt may reveal to what extent the law addressing discrimination on the grounds of disability represents a shift from the traditional approach to equality towards the values of equality in its substantive sense.

In the absence of any guidance from the jurisprudence of the European Court of Justice in this specific field, to identify the concepts of equality underlying the provisions of this legal instrument is not a simple task. Some provisions seem to bear, if any, a very remote relation to the conceptual framework of equality as a legal principle, so that they force any argumentation to remain focused on those provisions

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[†] Council Directive 2000/78/EC of November 27, 2000, establishing a general framework for equal treatment in employment and occupation, O.J. L303/16. Herein after, the Framework Directive.

[‡] M. BELL, L. WADDINGTON, Reflecting on inequalities in European equality law, (2003) 28 *ELR*,

that offer themselves, albeit in a variable degree, to conceptual readings. Moreover, the fact that the Framework Directive addresses discrimination in a horizontal way renders inappropriate an exhaustive consideration of every single provision. Provisions referring in particular to disability, such as articles 2 (2) b (ii), 3 (4), 5 and 7 (2) are, however, crucial in such an analysis.

In this context, after discussing the dual meaning of the principle of equality (Chapter I), the formal and the substantive one, I will argue that the Framework Directive tends to embrace the latter, without, however, completely denying the former. The legal basis, the preamble and the first article of the Framework Directive presage a substantive approach to equality (Chapter II). Nevertheless, specific provisions in the main corpus of the Directive seem to indicate that the first impression is misleading. Its exclusive application in the area of employment, as well as certain explicit exemptions from its scope reaffirm that it remains faithful to the traditional, formal equality model. Formalism is however proposed in a moderate way, since where it prevails Member States are also left with alternative options (Chapter III). On the contrary, the legal construction of the concept of discrimination points to the opposite direction : it is substantive equality that apparently inspired the EC legislator and little room for discretion is left to national actors (CHAPTER IV). The final part will focus on those provisions that remain ambiguous. Positive action owes both to substantive and formal equality; the use of the term “disability” is susceptible to both symmetric and asymmetric readings, and the procedural provisions of the Framework Directive, although based on the mechanisms of individual justice, may, when applied, equally promote the values of equality in its substantive sense. Arguably, in relation to them, implementing authorities at national level will play a crucial role (CHAPTER V).

CHAPTER I

THE DUAL MEANING OF THE EQUALITY PRINCIPLE

i) The concept of formal equality

In its abstract, theoretical form, the principle of equality is commonly described as the right to treat like cases alike and different cases differently. A formal approach is generally understood as the right to treat like cases alike, whereas a substantive approach further concentrates on the second part which concerns the unlike treatment of cases because of their inherent unlikeness.

In its concrete legal form, the principle of equality is usually narrowed down to the formal component[§]. To explain this tendency in the context of EC equality law[**] it would be useful to try to locate it in its economic context[††], since the entire Community legal system is based upon the economic goal of the creation and expansion of the single market, by means of market forces[‡‡]. For this purpose, one should keep in mind that formal equality in its legal construction serves the purposes of liberalism[§§]. In capitalistic societies, the organising principle for contractual relationships is the free play of the market forces. Individuals are treated as equivalent factors of production, comparable in all relevant respects. This argument lays on the assumption that individuals in the employment market act autonomously and make free choices. It is therefore considered that their position in the market resulting from

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[§] This statement is often exemplified with reference to international and EC anti-discrimination legal instruments. *See,* in this respect, K. WENTHOLT, "Formal and Substantive Equal Treatment: The limitations and the potential of the legal concept of equality"*, in* LOENEN, RODRIGUEZ, *Non Discrimination Law: comparative perspectives*, Kluwer, 1999, p. 54-55 and U. O'HARE, "Enhancing European Equality Rights: A New Regional Framework"**,** (2001) 8 *MJ*, p.144.

[**] That such a tendency does indeed exist in EC anti – discrimination law is commonly accepted in literature. In this regard, *see*, for example, C. BARNARD, "Article 13: Through the looking glass of Union Citizenship", *in* D. O' KEEFFE, P. TWOMEY (eds), *Legal Issues of the Amsterdam Treaty*, Hart publishing, Oxford – Portland Oregon, 1999, p. 385 - 387.

[††] C. McCRUDDEN, "The new concept of equality*"*, paper presented at the Conference "Fight against Discrimination: The Race and Framework Employment Directives", June 2003, Academy of European Law, p. 12 – 13.

[‡‡] H. FENWICK, T. K. HERVEY, "Sex equality in the Single Market: New directions for the European Court of Justice", (1995) 32 *CMLR*, p. 443 – 444.

[§§] G. MORE, "The principle of Equal Treatment: From Market Unifier to Fundamental Right?", *in* P.

competition depends on their individual merit. Inequality of capabilities, efficiency and ultimately bargaining power between employees justifies inequality of treatment

Formal equality fits well in this context, for it does not identify factors other than the personal qualities of individuals that may have an impact on their position in the market and subsequently, it allows but it does not require intervention to tackle such factors. Since active treatment is seen as derogation from the principle of equality, it has to be construed narrowly[***]. This concept is not, therefore, gravely disruptive of market forces[†††]. This is not to say that formal equality has no impact on the market at all. On the contrary, if fully established, it induces the market forces not to act in an arbitrary and inefficient fashion. In so far as it disallows the individual biases of employers to feed into the market, formal equality may admittedly promote genuine competition based on individual merit. However, its effect will hardly go beyond that.

The ideological foundation of formal equality is traced back on the Aristotelian philosophy. To sum up its conceptual construction one could refer to only one sentence: "Things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness" [‡‡‡]. In the formal approach, the general assumption is one of the sameness of subjects of law[§§§]. Able and disabled persons, for instance, are considered as comparable in all respects and therefore entitled to equal treatment. To a great extent, individual and societal differences, as a result of which people find themselves differently situated, are ignored[****]. Under this model the protection of the non - discrimination legislation is therefore located beyond the reach of those who for social or personal reasons fail to pass the test of sameness.

Difference is not, however, completely meaningless under the formal equality model. As it is clear that equal treatment cannot mean that all people, regardless of their circumstances, should be treated identically, it is accepted that existing differences between these persons may also justify a difference in their treatment. Applied in full, the principle would not only allow but also require unequal treatment

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[***] K. WENTHOLT, *supra* note §, p. 55.
[†††] H. FENWICK and T. K. HERVEY, *supra* note ‡‡, p. 443 - 450.
[‡‡‡]ARISTOTLE, *Ethnica Nichomachea*, V.3 1131a – 1131b (E. Ross trans. 1925)
[§§§] E. ELLIS, *EC Sex Equality Law*, Clarendon Press, Oxford, 1998, p. 322.
[****]

of unequal subjects of law. Obviously, difference calls for attention only to the extent that it may be used to justify unequal treatment. As a result, formal equality manifestly disregards the central assumption of equality as a human right, firmly grounded on the idea that all persons are of equal value and importance despite their differences[††††]. Pursuant to this interpretation of equality, each person is entitled to and should be afforded equal concern and respect or, as stated in article 1 of the Universal Declaration of Human Rights (1948): "All human beings are born free and equal in dignity and rights…".

Yet, what the formal approach has been mainly criticised for[‡‡‡‡] is its failure to respond to the demands of realism. Formal equality is necessarily symmetric[§§§§], as it is irrelevant for the purpose of applying the legal norm whether a certain practice detriments, for instance, disabled or non-disabled persons. It suggests that different treatment of persons with different abilities is as detrimental to those considered as able as it is to those considered as disabled. In social reality, however, inequality involves social disadvantage, which is not spread evenly between these groups.

The potential of the formal approach to achieve a genuine equality between the subjects of law is further considered with scepticism, for it only offers assimilation to a standard, dominant in law. It is designed to produce like consequences only for those placed in like situations. The principle itself does nothing to dismantle the obstacles faced by those subjected to discrimination, since the social standards are essentially left untouched. Obviously, what formal equality actually does is to encourage the subjects of law to strive for the dominant societal patterns and to conform to existing values. It struggles to force them into a stereotypical role model[*****]. By promoting assimilation, it gradually renders illusive the formation of inclusive societies[†††††].

Inclusion may be further hindered, since equality in this sense embodies a notion of procedural justice and does not guarantee any particular outcome. So, there is no violation of this principle if an employer treats disabled and non – disabled

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[††††] L.WADDINGTON, A. HENDRIKS, "The expanding concept of employment discrimination in Europe: From Direct and indirect discrimination to reasonable accommodation discrimination", (2002) 18/3 *IJCLLIR*, p. 403 at 406.
[‡‡‡‡] K. WENTHOLT, *supra* note 3, p. 56-57.
[§§§§] D. SCHIEK, "A new framework on equal treatment of persons on EC Law?*"* (2002) 8/2 *ELJ*, p. 290 at 304.
[*****] E. ELLIS, *supra* note §§§, p. 323.

employees equally badly. A claim to equal treatment in this sense can be satisfied by depriving both persons compared of a particular benefit (levelling down) as well as by conferring the benefit on them both (levelling up)[‡‡‡‡‡]. The right to equal treatment therefore, whilst usually linked to a substantive claim, does not actively promote the interests of the disadvantaged persons in and of itself. Such a promotion rather depends on an assessment of social, political and financial costs that a levelling up or a levelling down practice might entail. The treatment finally reserved for the disadvantaged persons depends on the treatment afforded to those perceived as non-disadvantaged. This, in turn, reveals the significance of the right comparator. Indeed, to argue on the basis of the most appropriate comparator may prove to be the most determinative choice for a successful claim to equal treatment under the formal equality model.

This is even more so, since formal equality usually employs the mechanisms of the individual justice model[§§§§§] in order to be established. Eliminating discrimination in the formal sense depends in a high degree upon responding to a complaint or assertion of a right by an individual[******]. That response may be defensive and adversarial, especially when legal proceedings are brought or threatened. Crucially, litigation produces effects on the situation of the litigants only, so as further discrimination may be anticipated only if successful litigation has a dissuasive impact on employers. Cost assessment will arguably play a central role again. Processes, attitudes and behaviour within social structures which lead to prejudice and stereotyping or to practices which unwittingly have the effect of putting persons at a disadvantage, will possibly remain untouched.

ii) The concept of substantive equality

These limitations of the principle of formal equality have led to attempts to develop the concept of substantive equality. The point of departure of the substantive approach of equality is the second component of the formal one: unlike cases should be dealt with in a manner, which reflects their unlikeness[††††††]. When identifying

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[†††††] D. SCHIEK, *supra* note 15, p. 304.
[‡‡‡‡‡] C.BARNARD, B.HEPPLE, "Substantive Equality",(2000) 59/3 *CLJ*. p. 563.
[§§§§§] C. McCRUDDEN, *supra* note 4, p. 17.
[******] C.BARNARD, B.HEPPLE, *supra* note ‡‡‡‡‡, p. 564.
[††††††] That is often mentioned in the relevant literature, as the "equality paradox", for unequal treatment

unlikeness, substantive equality takes a closer look to social reality, with a view to point out the factors that determine the position of persons in their social environment. It is, therefore, deeply concerned with the construction of social conditions needed to ensure that people are treated equally[‡‡‡‡‡‡].

Three different, but overlapping approaches are identified under this concept[§§§§§§]. The first suggests that equality law should be sensitive to results equal or unequal treatment may have. Apparently consistent treatment infringes the goal of substantive equality if it produces unequal results on individuals or groups or where it has an outcome, which is not equal in a redistributive sense. Redistribution suggests that equality should be defined in terms of full participation of groups in the work force and fair access to education, training, goods facilities and services. Equality of results in its redistributive sense aims to overcome under-representation of disadvantaged groups in the workplace and to ensure their fair share in the distribution of benefits. It may involve special measures to overcome disadvantage.

Equality of opportunity is the second approach to substantive equality. This concept brings in mind the graphic metaphor of competitors in a race and asserts that true equality cannot be achieved if individuals begin the race from different starting points. An equal opportunities approach therefore aims to equalise the starting points, either by requiring a range of special measures usually referred to as "positive action" to compensate for disadvantages or by removing individual and environmental barriers which inhibit societal participation. By focusing on positive duties to promote equality, this approach encourages integration and takes a proactive stance towards discrimination practices.

Both equality of results and equality of opportunity acknowledge diversity[*******]. They assume that existing differences in social reality explain why unequal results may be the outcome of equal treatment as well as why individuals have unequal opportunities in the labour market. Obviously, realism underpins these assumptions and forces the adoption of an asymmetric approach to discrimination. The starting point of such an approach lies in the recognition of a critical difference

[‡‡‡‡‡‡] Such an approach is often traced back to the United Nations' Conventions on personal equality, the CEDAW and the CERD. *See,* in this respect, D. SCHIEK, *supra* note §§§§, p. 303 and K. WENTHOLT, *supra* note §, p. 55.

[§§§§§§] For an analysis of these approaches and specific examples in the national, international and EC legal order modeled upon them, *see*, C.BARNARD, B.HEPPLE, *supra* note 18, p. 564 – 567.

between classifications intending to exclude a member of certain groups because of a specific characteristic and classifications aiming to include members of these groups into society[†††††††]. Inclusion does not call for legislative attention, while exclusion does. Substantive equality, therefore, suggests that diversity should be taken into account and dealt with accordingly. It requires some kind of positive treatment to accommodate and integrate existing differences, seeking, however, to confine mandatory protective treatment to as narrow a scope as possible[‡‡‡‡‡‡‡]. In other words, substantive equality recognizes difference of situation but demands that no adverse consequences should flow from such recognition.

The way difference is treated under the substantive equality model seems to imply that no matter how different, persons are of equal value and they deserve equal care and respect. It is not, therefore, without reason that the third approach to substantive equality is based on the broad values of dignity, autonomy and worth of every individual[§§§§§§§]. This approach assumes that at the heart of the prohibition of unfair discrimination lays the recognition that all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against.

It should be further stressed that the substantive, asymmetric notion of equality is based on a group sensitive model of justice, as opposed to a purely individualistic one[********]. This model purports that discrimination is group related: persons are grouped into a collective and disadvantaged as members of such collective. Since equality law needs to be sensitive to this group dimension, supporters of this model often seek to redress past discrimination or redistribute resources from the advantaged to the disadvantaged groups, their basic aim being the improvement of the relevant position of the latter[†††††††††]. Group based remedies such as positive and collective action are also used for this purpose. Contrary to the individual justice model that relies on passive and defensive responses to individual complaints of discrimination,

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[*******] L.WADDINGTON, A. HENDRIKS, *supra* note ††††, p. 407.
[†††††††] K. WENTHOLT, *supra* note 3, p. 61.
[‡‡‡‡‡‡‡] H. FENWICK and T. K. HERVEY, *supra* note ‡‡, p. 455 - 456.
[§§§§§§§] S. FREDMAN, *supra* note ****, p. 159.
[********] D. SCHIEK, *supra* note §§§§, p. 304.
[*********]

the group justice model suggests that discrimination should be addressed primarily by collective anticipation[‡‡‡‡‡‡‡‡].

Although the substantive approach of equality appears, to remedy to a certain extent the shortcomings of the formal one, it is not totally unproblematic. The main issues that it has to face may be summarised in two fundamental questions: firstly, on what basis should one differentiate and secondly, how far should the difference be accommodated[§§§§§§§§]. Arguably, in order to avoid a paralysing complexity, it is not possible to take into consideration every individual characteristic of a person. This approach would lead to the formation of a limitless and evolving number of minority groups with unclear boundaries. In turn, shifting to the second question, if the needs of all those differentiated groups should be treated, accommodation would go on to an endless extent. It becomes evident, therefore, that some parameters must be drawn. This raises the problem of justifying and rendering commonly acceptable the parameters chosen.

[‡‡‡‡‡‡‡‡] R. WHITTLE, "Disability rights after Amsterdam – The way forward", (2000) 1 *EHRLR*, p. 33 at 45.

[§§§§§§§§] For a discussion of this question, *see* L. MULDER, "How Positive Can Equality Measures Be?" *in* LOENEN, RODRIGUEZ, *Non Discrimination Law: Comparative Perspectives*, Kluwer, 1999, p.

CHAPTER II:

THE CONCEPTUAL DYNAMICS OF THE FRAMEWORK DIRECTIVE

i) Title and purpose of the Framework Directive: from formalism to substance

Granted that the Framework Directive provides for a legal guarantee of equality, it then automatically triggers the question "equality of what?" The answer might at least at first sight be that the Framework Directive guarantees equality of treatment, equality in law, as opposed, one would further submit, to equality of outcome or equality in fact. It is for this reason that in legal theory equality of treatment is often equated to the formal concept of equality. According to this view, the first element that hints towards a formal conception of equality is already identified in the title of the Framework Directive. The wording of this title illustrates the argument that, although the European Court of Justice held that the equality principle in EC law requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified[*********], in practice there is a strong focus on equal treatment of comparable situations. Whether consciously or not, the Community legislator seems to indicate the formal approach of equality, incorporated in the first part of the equality principle, as an eloquent expression of what the Framework Directive operates in essence.

This kind of equation, although reflecting to some extent the reality of legal thinking, is nevertheless challengeable on the grounds that it oversimplifies the content of the principle of equal treatment. By attempting to define in a clearer way its purpose, the Framework Directive seems to acknowledge that inherent misconception. Aiming to lay down a general framework for *combating* discrimination on the grounds referred therein and in its sphere of application, with a view to *putting into effect* in the Member States the principle of equal treatment[†††††††††], this instrument

[*********] Joined cases 117/76 and 16/77, *Ruckdeschel & Co. v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker,* [1995] ECH I-225, Case C-243/95, *Hill and Stapleton v The Revenue Commissioners and Department of Finance*, [1998] ECH I-3739.

implies that it is not merely concerned with equality in law but also with equality in fact. To this extent, the first article of the Framework Directive supports the view that it rests on a concept of substantive equality[‡‡‡‡‡‡‡‡‡].

ii) Article 13 TEC: a wide legal basis

A similar wording is also found in the Framework Directive's legal basis. The insertion of article 13 TEC in the Treaty of Amsterdam raised a considerable amount of comments in academic literature[§§§§§§§§§]. The first paragraph reads: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.". For our concerns, the critical aspect of this provision is that its wording employs the terms "… *appropriate* action to *combat* discrimination …". Interestingly, the initial draft of this article employed the phrase "prohibit discrimination"[**********]. The use of the term "combat" in the finalised version of article 13 TEC indicates that its potential is not restricted to the prohibition of discrimination through the adoption of negative rights alone, but instead it considerably opens up its field of application and the impact of measures to be adopted on this basis. This view is further supported by the fact that article 13 TEC seems to allow for the adoption of a broad range of Community instruments, both in terms of legal form and substantial content, for the achievement of its objectives. The words "appropriate action" clearly indicate this. In the light of the above considerations, the legal basis of the Framework Directive seems also to allow for the

[‡‡‡‡‡‡‡‡‡] D. SCHIEK, *supra* note §§§§, p. 295 and 305.

[§§§§§§§§§] C. BARNARD, *supra* note **, L. FLYNN, "The implications of article 13 EC - After Amsterdam will some forms of discrimination be more equal than others?", (1999) 36 *CMLR*, p. 1127, L.WADDINGTON, "Article 13: Setting Priorities in the Proposal for a Horizontal Employment Directive", (2000) 29 *ILJ*, p. 178, L. WADDINGTON, "Testing the Limits of the EC Treaty Article on Non- discrimination", (1999) 28 *ILJ,* p. 133, L.WADDINGTON, "Article 13 EC: Mere Rhetoric or a harbinger of change?", (1998) 1 *CYELS*, p. 175, L.WADDINGTON, "Throwing some light on article 13 EC Treaty", (1999) 6 *MJ*, p. 1, M. BELL, "The new article 13 EC Treaty : a sound basis for European Anti – discrimination law?", (1999) 6 *MJ*, p. 5, M. BELL, "Article 13 EC: The European Commission's Anti-discrimination Proposals", (2000) 29 *ILJ*, p. 79, M. BELL, L.WADDINGTON, "The 1996 Intergovernmental Conference and the prospects of a non discrimination Treaty article", (1996) 25 *ILJ*, p. 332.

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adoption of positive action measures, in order to combat de facto forms of discrimination[††††††††††]. It should not be surprising, therefore, to argue that whilst it does not necessarily force a substantive approach to the principle of equal treatment, the legal basis of the Framework Directive undoubtedly leaves this possibility open.

In this respect, the choice of this legal basis might equally provide a second indication regarding the concept of equality incorporated in the Framework Directive. Granted that the substantial equality model is concerned with removing structural inequalities that exist in social reality, it could be argued that such equality requires normative intervention in a whole range of activities intrinsically linked with the employment market. In the context of disability based discrimination, the potential application of article 13 TEC clearly extends beyond issues that are solely concerned with employment and occupation[‡‡‡‡‡‡‡‡‡‡]. On the contrary, article 137 TEC offers itself precisely for the adoption, with qualified majority vote, of a non - discrimination measure that is limited to the context of employment and occupation alone. In this specific context, it provides, therefore, an alternative legislative basis to article 13 TEC. Arguably, the very fact that the Community legislator opted for a more enabling legal basis at the expense of less stringent conditions in the decision making process indicated the will to go beyond the sole legislative remit of article 137 TEC. Thus far, it seemed to promise that the new legislative instrument would address equality in its substantive sense, equalising opportunities in additional employment-related areas of activity and therefore efficiently equalising opportunities in the field of employment as well.

iii) Tools of interpretation in the Preamble

Especially as regards the asymmetric dimension of equality law, arguments can be drawn from the Human Rights' basis of the Framework Directive[§§§§§§§§§§]. As is apparent from the preamble of the Directive, the international human rights

[††††††††††] L. WADDINGTON, "Testing the Limits …", supra note §§§§§§§§§, p. 138.

[‡‡‡‡‡‡‡‡‡‡] The far wider material scope of the Council Directive 2000/43/EC of June 29, 2000, implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin, 0.J. L180/22, which was adopted under article 13 EC as well, undoubtedly supports this view. For a thorough discussion of the potential of article 13 EC, *see* M. BELL, "The new article 13 EC…", *supra* note §§§§§§§§§, p. 5.

[§§§§§§§§§§] [illegible]

instruments which address the situation of persons perceived as belonging to a disadvantaged group are used as a conceptual landmark. Recital 4 reads:

"The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation".

The UN Convention on the Elimination of all forms of Discrimination against Women defines equality by reference to the social exclusion of women:

"For the purpose of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field".

Since the above mentioned international law instrument deals exclusively with the disadvantaged group, one could argue that it helps derive a concept of asymmetric discrimination from the relevant provisions of the Framework Directive**********.

Similar conclusions may be drawn from the reference to the Community Charter of the Fundamental Social Rights of Workers††††††††††. The 11 Member States who agreed on the Social Charter in 1989 explicitly declared in the recitals that, in order to ensure equal treatment, it is important to combat every form of discrimination as well as it is important to combat social exclusion in a spirit of solidarity‡‡‡‡‡‡‡‡‡‡. In the context of disability, the Social Charter itself strengthened the claim to equality in law, stating that:

"All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the

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********** C. TOBLER, "How to use the experience with sex discrimination for the other grounds", *in Uniform and Dynamic interpretation of EU Anti-Discrimination law: The role of specialized bodies,* Report of the second experts' meeting, 21-21 May 2003, p. 14 at 18 and 23.

†††††††††† P. WATSON, "The Community Social Charter", (1991) 28 *CMLR*, p. 37.

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beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing"[§§§§§§§§§§].

Although this approach did not envisage a right to equality of treatment for persons with disabilities, it was nonetheless premised on the assumption that these individuals are entitled to equality, such, that provision reflecting their specific situation should be made. In this sense, the Charter implicitly endorsed a position of substantive rather than formal equality[**********].

To what extent the above mentioned references may have an impact on the implementation and interpretation of the Framework Directive remains unclear. It is, however, beyond the boundaries of possibility that basic presumptions of the formal equality model will be totally displaced. Recital 17 of the Framework Directive clearly states that the legal instrument at issue is designed to operate within a system of meritocracy, that is to say a system that will still demand that the most qualified and suitable person will be selected while employment decisions are made. It thus does not provide people with disabilities with any special advantages simply because they have a specific impairment. Meritocracy being the underlying value of the Aristotelian approach to equality, it lends itself as evidence that the Framework Directive does not represent a major departure from equality in its formal sense.

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§§§§§§§§§§ Community Charter of the Fundamental Social Rights of Workers, article 26.

********** L. FLYNN, *supra* note §§§§§§§§§, p. 1144. The same applies with respect to the Charter of Fundamental Rights of the European Union, although the latter did not receive an explicit reference in the preamble of the Framework Directive. Article 26 of the Charter guarantees the right of disabled persons to enjoy their independence, integration and participation in Community life. For a discussion of equality rights under the Charter, *see* U. O'HARE, *supra* note §, p. 159-164 and C. BARNARD,

CHAPTER III:

CHALLENGING FORMALISM THROUGH DISCRETION

i) Applicability of the equality principle in the employment context and beyond

Although the choice of article 13 TEC as legal basis indicated a favourable attitude towards equality in its substantive sense, the actual use of its potential did not fully confirm those expectations. Political opposition[††††††††††††] is highlighted as the main reason for the limitation of the material scope of the Framework Directive in employment issues, within narrowly defined parameters. As to its scope of application, article 3 (1) states :

"Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment 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 and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations."

Other areas that may affect long term prospects for labour market participation[‡‡‡‡‡‡‡‡‡‡‡‡], such as social protection, including social security and healthcare, social advantages, education, including grants and scholarships, and access to and supply of goods and services, are not located within its remit of application. The term "goods and services" must be understood to encompass the areas of transport, education, physical access to the public arena, telecommunications and new technologies. Only through the provision of these key goods and services on a non

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[††††††††††††] R. WHITTLE, "European Communities and EEA. Disability Discrimination and the Amsterdam Treaty", (1998) 23 *ELR*, p. 50 at 53.

[‡‡‡‡‡‡‡‡‡‡‡‡] P. SKIDMORE, "EC Framework Directive on Equal Treatment in Employment: Towards a

discriminatory basis, can the potential benefits of any non discrimination law in the field of employment be fully realised[§§§§§§§§§§§§]. The limited material scope of the Directive falls therefore short of achieving substantive equality, since equal opportunities in the employment field necessitate equal opportunities in a far wider spectrum of the social life.

In particular, it is submitted that the exclusion of payments made by state schemes or similar, including state social security or social protection schemes from the remit of the Directive is detrimental to the integration of people with disabilities into the employment market[**********]. The removal of state funding from the scope of the Directive, will prevent challenging the direction of such funding where it is unnecessarily aimed at segregation as opposed to integration. In this respect, the material scope of application of the Framework Directive represents a lost opportunity to promote equality in its substantive sense.

However, there still remains some scope for arguing that the Framework Directive is not totally indifferent to the objectives of an inclusive, substantive approach to equality. In the process of transposing the Framework Directive, national authorities are explicitly left with the power to go beyond the minimum standards set out in this instrument. In this respect, article 8 states that Member States may introduce or maintain provisions which are more favorable to the protection of the principle of equal treatment than those laid down in this Directive. Indeed, the Commission in its recently published Green Paper on equality and non-discrimination in the enlarged European Union[††††††††††††††] welcomes the fact that several Member States have banned discrimination outside of employment on the grounds enumerated in the Framework Directive, disability included. Admittedly, the EU legislator left the door open for substantive equality to be achieved, the final decision being dependent on the political will of national actors. Crucially, however, substantive equality is allowed but not forced.

In response to the former line of criticism, the Directive's scope of application encompasses matters of access relating to all types and to all levels of vocational

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§§§§§§§§§§§§ R. WHITTLE, "Why is a European law on disability discrimination important?", paper presented at Inclusion - Europe's Dialogue Meeting, Brussels, 22-23 November 2001, p. 15.

********** R. WHITTLE, "The framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective", (2002) 27 *ELR*, p. 303 at 321.

†††††††††††††† Commission, Green Paper, Equality and non- discrimination in an enlarged European

guidance, vocational training, advanced vocational training and retraining including practical work experience. It is arguable that this particular phrasing extends the coverage of the Directive to any training providers, including higher educational establishments, insofar as they provide courses that can be classified as vocational training under EC law. This is all the more significant, since the duty to provide reasonable accommodation does not extend beyond employers and will not therefore apply to training providers[‡‡‡‡‡‡‡‡‡‡‡‡‡]. To the extent that this provision guarantees equal access to qualification and therefore purports to equalise the starting points in the labour market, it seems to reflect a substantive notion of equality. It is albeit doubtful to which extent this reading would encourage Member States' authorities to extend the scope of application of the implementing rules beyond the remit of the Framework Directive.

ii) Mainstreaming: turning discretion into positive duty

The absence in the Framework Directive of an explicit prohibition of discrimination on the grounds of disability in areas other than employment is to some extent counterbalanced by the adoption of a mainstreaming approach in specific Community instruments. Mainstreaming provides for the inclusion of specific measures in general instruments to ensure that certain groups are able to benefit equally from Community policies. It means that equality is not just an add - on or after - thought to policy, but is one of the factors taken into account in every policy and executive decision. The reactive and negative approach of anti-discrimination is replaced by proactive, anticipatory and integrative methods[§§§§§§§§§§§§§]. In so far as it appears in Community legislation, although in a fragmented and still disparate way, such an approach renders less necessary both the extension of the material scope of application of the existing framework Directive as well as the adoption of a separate legislative instrument addressing exclusively disability discrimination.

[‡‡‡‡‡‡‡‡‡‡‡‡‡] R. WHITTLE, *supra* note **********, p. 320.

Community legislation in the fields of transport and telecommunications expressly takes into account the needs of people with disabilities[**********]. Directive 2001/85/EC relating to special provisions for vehicles[††††††††††††††] provides technical prescriptions to allow accessibility of vehicles to persons with reduced mobility, either by technical solutions applied to the vehicles covered by the Directive or by combining them with appropriate local infrastructure. Moreover, Directive 2002/21/EC on information technology[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] explicitly refers to the needs of disabled users and Directive 2002/22/EC[§§§§§§§§§§§§§§] on telecommunications networks and services contains a specific provision in order to ensure access of public and private telephone services for such users. The establishment of disability standards in the context of a "design for all" approach[**********] in these fields, turns out to remove the barriers to participation in the labour market as well as in the social, cultural and economic life in the European Community and it, therefore, represents an alternative method for achieving substantive equality in practice.

Specific provisions in the Treaty, it is suggested, further enhance the possibilities of disability mainstreaming in Community instruments[††††††††††††††]. Article 95 TEC, which allows for the introduction of Directives to harmonise national measures directly affecting the functioning of the internal market, is vested with a key role in ensuring that the needs of disabled people are not marginalised in the drive towards harmonisation of technical standards and the functioning of the market[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. Although this provision is not applicable to areas related to the free movement of persons or to the rights and interests of employed persons, it may be used in order to tackle discriminatory barriers in the area of access to services and

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[**********] Legislative progress in this field can be followed by referring to the regularly updated website of the European Disability Forum at http://www.edf-feph.org/en/welcome.htm.

[††††††††††††††] European Parliament and Council Directive 2001/85/EC of November 20, 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 70/156/EEC and 97/27/EC, O.J. L042/1 (recital 11, article 3 and Annex VII). *See*, A. R. SARAPAS, « Les droits des personnes handicapées dans le domaine des transports européens », (2000) 439 *RMCetUE*, p. 395.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] European Parliament and Council Directive 2002/21/EC of March 7, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. L108/33 (recital 8 and article 8(2)).

[§§§§§§§§§§§§§§] European Parliament and Council Directive 2002/22/EC of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), O.J. L108/ 55 (article 7).

[**********] For the additional benefits that can emerge from such an approach, *see* R. WHITTLE, *supra* note [‡‡‡‡‡‡‡‡], at 43

[††††††††††††††] L. WADDINGTON, "Testing the Limits …", *supra* note [§§§§§§§§§], p.142-147.

[**********]

goods and subsequently enhance employment opportunities. The above mentioned Directives clearly indicate this possibility. Besides, the Declaration attached to article 95 TEC by the Treaty of Amsterdam, stating that account should be taken of the needs of people with disabilities when measures are adopted under this provision, points to the direction of further promoting a mainstreaming approach in the disability context[§§§§§§§§§§§§§§§].

Admittedly, national administrators enjoy no discretion as far as the transposition of the Directives adopted under the mainstreaming approach is concerned. This being so, they are actually obliged to achieve what they would achieve by making use of their discretion to extend the scope of application of the Framework Directive outside the employment field. The difference is that this is done in a less obvious albeit equally efficient way. From this point of view, mainstreaming at EU level bears the potential to deprive Member States from their decisional freedom and renders illusive the discretion explicitly attributed to them by the Framework Directive. Indeed, the relation between mainstreaming and discretion of national actors as to the remit of the Framework Directive is one of reverse analogy. In such a context, simplification of equality law in national legal orders and strengthening of its enforcement might be persuasive arguments for extending the implementing legislation beyond employment and occupation.

iii) The field of the armed forces

Alternatives to compensate for the Framework Directive's limited scope of application, are not, however, always available. This is arguably the case as far as the exceptions from the principle of equal treatment provided for in this instrument are concerned. Among them, both articles 3 (4) and 2 (5) call for particular attention, the first because of its specific reference to disability, the second due to its novelty.

Apparently, at the insistence of the British government[**********], article 3 (4) allows Member States to exclude the armed forces from the application of the Framework Directive, in so far as it relates to discrimination on grounds of disability

[§§§§§§§§§§§§§§§] The implications of this declaration for people with disabilities are thoroughly discussed by R. WHITTLE, *supra* note §§§§§§§§§§§§§, p. 3 - 5.
[**********]

and age. Member States' competence in this area has been traditionally particularly important. Yet, it does not flow from this that the whole field of the armed services should be exempted from the application of the EC anti-discrimination law[††††††††††††††††]. Recital 19 of the preamble explains that Member States may decline to apply the equal treatment principle on those grounds to all or part of their armed services in order to safeguard the combat effectiveness of their armed forces[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. Crucially, however, the text of article 3 (4) of the Directive does not restrict this exemption to combat-ready posts only. The justification for such a blanket exemption for the armed services, especially given the proportion of service personnel disabled in the line of employment whose valuable experience may be usefully deployed in non-combat positions, remains unclear[§§§§§§§§§§§§§§§§]. In case the Directive does apply, the armed forces, like any other employer could anyway take advantage of the occupational requirements derogation. Rather than adopting an inclusive approach, involving assessment of the specificities of each case, this exemption arbitrarily favours segregation and exclusion. Obviously, general presumptions, biases and fears are to be blamed for this. One could reasonably, therefore, argue that little if any attention has been paid to the claims of the substantive equality model. Instead, an ex ante comparison of all people with disabilities with the non-disabled ones seems to have already taken place at the stage of law-making, from which the conclusion has been drawn that the former are not comparable to the latter in this particular field, and as such, they may well be excluded from the protection afforded by the Framework Directive. The rationale underlying this exemption is evidently close to the basic assumptions of the formal equality model.

[††††††††††††††††] The case-law of the Court of Justice in the area of sex discrimination supports this view. In this respect, *see* Case C- 273/97, *Sirdar v The Army Board*, [1999] ECR I-7403 and Case C- 285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-69. Yet, in its recent judgment in the case C-186/01, *Alexander Dory v Germany* [2003] ECR I-02479, the Court of Justice emphasized that the organization of the armed forces is a matter of national competence.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] The same line of thought is reflected in Recital 18 of the Framework Directive.

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iv) Measures necessary in a democratic society

The necessity of the exception contained in article 2 (5) of the Framework Directive was similarly considered with scepticism[**********]. The relevant provision, unique in EC anti-discrimination law[††††††††††††††††††], states that the Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Arguably, the reference to the protection of the rights and freedoms of others may undermine the application of the duty to accommodate under article 5 of the Framework Directive[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. Claiming protection of their right to property, employers may seek to circumvent their obligation to adapt the working environment to specific needs of disabled employees[§§§§§§§§§§§§§§§§§§]. The insertion of this way-out in the text of the Framework Directive constitutes an attempt to alleviate frequently expressed worries about the financial burdens that the duty to accommodate will probably entail for employers. By doing so, however, article 2 (5) sits uneasily with the substantive equality model: it allows judicial acceptance of market forces to justify discrimination, while the very purpose of the law under this model is to counter such forces[**********].

Moreover, it is submitted that historically the interests of public security, public order and public health have served so as to cover stereotypical assumptions about disabled people and other sensitive groups and justify their exclusion from the employment market[††††††††††††††††††]. To the extent that article 2 (5) of the Framework Directive provides a legal basis for the reproduction and perpetuation of social stereotypes, obviously contradicts the ambitions of the substantive equality model. The target of this model is precisely the elimination of deep-seated prejudice, since it is due to them that the most indirect forms of discrimination take place. Not

[**********] P. SKIDMORE, *supra* note ‡‡‡‡‡‡‡‡‡‡‡, at 129, D. SCHIEK, *supra* note §§§§, at 302, L. WADDINGTON, M. BELL, "More equal than others: Distinguishing European Union Equality Directives", (2001) 38 *CMLR*, p. 587 at 598.

[††††††††††††††††††] M. BELL, "Sexual Orientation Discrimination in Employment: An evolving Role for the European Union", *in* R. WINTEMUTE, M. ANDENAES (eds), *Legal recognition of same – sex partnerships*, Oxford, Hart, 2001, p. 666.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Infra*, page 26.

[§§§§§§§§§§§§§§§§§§] R. WHITTLE, *supra* note **********, p. 318.

[**********] H. FENWICK, T. K. HERVEY, *supra* note ‡‡, p. 443 – 470.

surprisingly, the European Court of Justice will have to adjudicate on the boundaries of the provision at issue and define its function in the Community's legal order. It is, however, unclear whether the fact that the wording of this provision is closely modelled upon article 8 (2) of the European Convention on Human Rights, will encourage the Court of Justice to interpret the derogation at issue as narrowly as the European Court of Human Rights did, in interpreting the similarly worded limitation on the right to private and family life‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡.

It is worth making a final remark. Although both articles 3 (4) and 2 (5) represent an unquestionable expression of formalism, this is not an absolute one. It is apparent that national authorities enjoy discretion on the application of the above mentioned provisions. They are allowed but not required to exempt the armed forces from the scope of application of the Framework Directive as well as to adopt or maintain measures necessary for public security, public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others. Therefore, substantive equality may still prevail when it comes to the implementation of the Framework Directive. Discretion of administrators at national level seems to compensate for an arguably unjustifiable adherence to formalism at the EU level. To what extent this is going to be the case remains to be seen.

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CHAPTER IV

THE MANDATORY NATURE OF THE SUBSTANTIVE MODEL

Crucially, article 2 of the Framework Directive employs an imperative language while defining the notion of discrimination. Thus, direct and indirect discrimination *shall* be taken to occur in particular circumstances and harassment *shall* be deemed a form of discrimination. Similarly, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation *shall* be provided, according to article 5. Apart from this obvious remark, a closer examination of the relevant provisions may reveal that their mandatory nature has been combined with the incorporation in their letter of the substantive approach to the equality principle. In what way this is done, will be thoroughly discussed below.

i) Multiplicity of comparators in the notion of direct discrimination

The definition of direct discrimination in article 2 (2) (a) of the Framework Directive firmly establishes the need to find a comparator. It states that for the purposes of paragraph 1, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1. Requiring a comparator, however, falls short of avoiding the problems immanent to the Aristotelian conception of equality[§§§§§§§§§§§§§§§§§§]. If one proceeds from a substantive and asymmetric approach to equality, it becomes evident that comparability is not an indispensable prerequisite for the finding of an alleged discrimination. This is perfectly illustrated by the European Court of Justice's case law on pregnancy. In a rather consistent line of cases[**********] it did not require a male comparator in order to detect discrimination to the detriment of women. Instead, it considered discrimination because of pregnancy, the most obvious female difference, to be sex

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[§§§§§§§§§§§§§§§§§§] S. FREDMAN, *supra* note ****, p. 145.

[**********] Case C-177/88, *Dekker v VJV-Centrum*, [1990] ECR I-3941, Case C-342/93, *Gillespie and others v Northern Health and Social Services Boards*, [1996] ECR I-475, C-207/98 *Silke-Karin*

discrimination. These judgments grant women the right not to be discriminated against despite they differ from men in biological terms. Comparable issues of biological sameness and difference arise in the context of disability discrimination. Where an appropriate comparator will be difficult to be found, the new concise definition of direct discrimination may prove to be inadequate to respond to the demands of modern equality law.

Although not abolishing the need for a comparator and therefore based on sameness, the new definition of direct discrimination, still marks a shift towards a model of equality that respects diversity. In that regard, the definition suffers from an inherent inconsistency: it undermines the Aristotelian model, while formally proclaiming it. Apparently, the definition of direct discrimination, allows for the adoption not only of an actual or past comparator but equally of a hypothetical one. A wider range of comparators, among which one can make the most appropriate choice in order to increase the possibilities of a successful claim, is therefore likely to arise. Multiplicity of comparators seems to indicate that the assimilationist adherence to existing social norms gives its way to the creativity of legal imagination. Thus, a comparison can be drawn not only between a disabled person and a non-disabled one, but also between individuals with different disabilities[††††††††††††††††††]. Arguably, an inclusive approach towards the so far segregated groups may well be the result.

The introduction of a hypothetical comparator may also have more far reaching implications on the notion of disability. As comparison is no more exclusively based on what is commonly perceived to be the normative case, numerous groups of comparators may arise. The existence of numerous comparators may lead to the subdivision, in legal thought and practice, of people with disabilities into smaller and interconnected groups of persons with special abilities. To realise how this may happen, one should be aware of the fact that disability is in part an ascription. In other words, disability as such does not exist, but it is the product of a constant interaction between an individual and his environment[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. Whose ability builds the yardstick against which others' abilities are characterised as disability, is often a random choice. In such a context, the lack of a definition for the concept of

[††††††††††††††††††] R. WHITTLE, *supra* note 49, p. 306.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] A. HENDRIKS, "Health Inequalities", *in* LOENEN, RODRIGUEZ, *Non*

disability§§§§§§§§§§§§§§§§§§§§ will no more represent a weakness of the Framework Directive, but a legislative choice allowing for more flexibility in defining the appropriate comparator.

ii) Promotion of the rights to dignity and diversity through the definition of indirect discrimination

The concept of indirect discrimination links anti-discrimination law with social practice********** and therefore it has been characterised as an important step away from formal equality towards a substantive notion and an essential tool for achieving equality of opportunity††††††††††††††††††††. This consideration was furthermore supported by the judicial and the subsequent legislative definition given to the concept of indirect discrimination in the context of EC sex equality law‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡. As with the concept of substantive equality, the notion of indirect discrimination is primarily concerned with the outcome of a form of treatment. Under this notion, when the treatment leads to unequal results, measured in terms of members of one group being placed at a particular disadvantage or being excluded from participation compared with others, where both groups are treated similarly, a closer look must be taken at the treatment and the differences between the groups. The prohibition of indirect discrimination thus allows for consideration of individual or environmental differences, which, in a particular situation, due to the position in which people find themselves, result in denying equal opportunities to individuals pertaining to a protected group§§§§§§§§§§§§§§§§§§§§.

In defining indirect discrimination, in divergence from sex equality law, the Framework Directive addresses the situation where "an apparently neutral provision, criterion or practice would put persons having […] a particular disability […] at a

§§§§§§§§§§§§§§§§§§§§*Infra*, page 33.

**********An interesting view on this link focusing on how the concept of indirect discrimination shows the hidden bias to the dominant societal patterns, is discussed by K. WENTHOLT, *supra* note §, p. 62-64.

†††††††††††††††††††† M. BARBERA, "Not the same? The judicial role in the New Community Anti Discrimination Law Context", (2002) 31 *ILJ*, p. 90, D. SCHIEK, *supra* note §§§§, p. 295 and 305, R. WHITTLE, *supra* note **********, p. 307.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡L. WADDINGTON, M. BELL, *supra* note **********, p. 592 - 595.

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particular disadvantage compared with other persons […]"[**********]. Commentators have in many occasions stressed that by introducing the "particular disadvantage" test the Community legislator has undoubtedly sought to avoid the need for statistical evidence[††††††††††††††††††††], following the case law of the European Court of Justice on nationality discrimination against migrant workers[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡].

But the relevant provision is also significant for it appears to mark a shift closer to the concept of substantive equality. Three arguments may be advanced in support of this view. First, since the definition adopted by the Framework Directive requires that a given rule or practice would put persons of the considered group at a particular disadvantage, the complainant does not need to have actually suffered the disadvantage in order to come within the definition[§§§§§§§§§§§§§§§§§§§§]. Law takes a proactive stance towards discrimination, in so far as it allows a violation of the principle of equal treatment to be established before it produces specific results. Dignity, that is to say the right not to be disadvantaged or humiliated by virtue of one's subjective characteristics, is apparently afforded absolute protection. Secondly, as was the case with direct discrimination, the new definition permits the comparator to be not only a real one situated in the past, but also a hypothetical one[**********]. Thirdly, and this is of particular importance in the context of disability, due respect seems to be paid to diversity. More specifically, the traditional definition of indirect discrimination incorporates the group justice model, since, in order to fall foul of it, the challenged provision or practice must affect members of a group and not simply an individual. This is also the starting point of the new definition. If one perceives the use of the word "persons" as indicating members of a group[††††††††††††††††††††], then automatically the need to identify a particular group

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[**********] Framework Directive, article 2 (2) b.

[††††††††††††††††††††] For example, *see* P. SKIDMORE, *supra* note [‡‡‡‡‡‡‡‡‡‡], p. 126 and L. WADDINGTON, M. BELL, *supra* note [**********], p. 592 - 595.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Case C-237/94, *O' Flynn v Adjudication Officer,* [1996] ECR I-1607.

[§§§§§§§§§§§§§§§§§§§§] C. BARNARD, *supra* note [**********], p. 969.

[**********] L. WADDINGTON, A. HENDRIKS, *supra* note [††††], p. 421, M. BARBERA, *supra* note [††††††††††††††††††††], p. 90.

[††††††††††††††††††††] An argument that supports this point of view is provided by the Commission's original proposal for the Framework Directive. The proposed definition of indirect discrimination was phrased: "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely *a person or persons* …". (Commission, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation

that is disadvantaged comes up. Yet, with respect to disability, as there are many different forms of impairments, each demonstrating large variations as to their nature and severity, the composition of groups sharing in the same manner and to the same extent common features, will be often an extremely difficult task. To address this difficulty, the adopted text of the Framework Directive allows at least an individual to establish a claim by reference to tightly defined sub-groups within the larger ground of disability, by referring to persons with a *particular* disability[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. Depending on how broadly the term "particular" will be interpreted, the rule prohibiting indirect discrimination and the subsequent benefits arising from the litigation may arguably both be applied on a more individualized basis. The wording of the provision on indirect discrimination, while not losing the crucial objective of equality of results in favour of the notion of formal equality between individuals, it nevertheless leaves plenty of room for differences to be taken into account. By doing so, it seemingly promotes equality in its substantive sense.

iii) Harassment: the monopoly of substantive values

The prohibition of harassment as a form of discrimination is deemed to be an important respect in which the Framework Directive moves beyond a formal notion of equality and explicitly links equality to the value of dignity. Harassment is defined as an unwanted conduct related to any of the grounds referred to in Article 1 that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degradating, humiliating or offensive environment[§§§§§§§§§§§§§§§§§§§§§§§§]. A first hint towards the substantive equality model is the fact that, in order to establish this form of discrimination, no comparator is necessary. In addition, this provision clearly shares the concerns of the substantive approach to equality, since it aims to subvert social stereotypes and conducts that reproduce themselves and lead to further exclusion from the working environment. Its repairing character will be further demonstrated if it receives an expansive

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reference to "a person or persons" (Report of the European Parliament on the proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation A5-0264/2000 Final). *But see* C.BARNARD, B. HEPPLE, *supra* note 18, p. 568.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡R. WHITTLE, *supra* note **********, p. 309.

§§§§§§§§§§§§§§§§§§§§§§§§

interpretation so as to impose liability on third parties to take steps to prevent harassment taking place in their working environments**********. In any case, the attachment of the force of the remedial provisions included in the Framework Directive strengthens the effectiveness of the anti- harassment provision†††††††††††††††††††††††† and, therefore, manifestly displays a serious commitment to the achievement of de facto equality. It should be kept, however, in mind that whilst this provision circumvents the weakness of the Harassment Recommendation‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ and the Code of Conduct§§§§§§§§§§§§§§§§§§§§§§ in this respect, its effectiveness remains to a certain extent disputable. The claimant may still face difficulties in bringing a successful action, for the test adopted in article 2 (3) is subjective. By referring to *unwanted* conduct********** the definition of harassment is made responsive to the victims' perception of their experience rather than by reference to objective standards.

It is unclear to what extent a uniform approach to harassment will be promoted for the additional reason that the Framework Directive permits Member States to define the concept of harassment in accordance with their own national codes and practices†††††††††††††††††††††††. At this point national implementing legislation may have a crucial role to play. Although administrative authorities throughout the EU are bound to establish harassment as a form of discrimination, they are left with a considerable margin of discretion while defining it. Both the explicit reference to national codes and, more significantly, practices and the vague formulation of the terms employed by the Directive itself in article 2 (3), support this view. Therefore, substantive equality may be efficiently promoted through the harassment provision only in so far as appropriate implementing legislation will be elaborated.

**********R. WHITTLE, *supra* note §§§§§§§§§§§§, p. 10.

†††††††††††††††††††††††C. BARNARD, *supra* note **********, p. 973.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Commission Recommendation 92/131/EEC of November 27, 1991 on the protection of the dignity of women and men at work O.J. L 49/1.

§§§§§§§§§§§§§§§§§§§§§§Commission, Code of Practice on Measures to combat sexual harassment, (1991) O.J. C 305/36.

**********Unwanted conduct is defined in the Commission's Code of Practice as including physical, verbal or non-verbal conduct. Further directions are given in the Commission's proposal for the Framework Directive, where it states that such conduct can take different forms, ranging from spoken words and gestures to the production, display or circulation of written words, pictures or other material. This behavior must be of a serious nature and create an overall disturbing or hostile environment. *Supra* note †††††††††††††††††††††††, p. 9.

iv) The duty to provide reasonable accommodation

In the 1996 Communication on equal opportunities for disabled people[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡], the Commission made clear that the old medical-centred approach is now giving place to a social one[§§§§§§§§§§§§§§§§§§§§§§§§] which puts much stronger emphasis on identifying and removing the various barriers to equal opportunities and full participation in all aspects of life for people with disabilities. While the medical approach is often characterised as locating the particularity of disability within the person, the social approach is often characterised as locating the problem in the environment, which fails to accommodate difference. Arguably, it is the interaction between the physical or social environment and an individual's inherent characteristics, such as impairment, that usually result in the inability to perform a particular function or job in the conventional manner.

Reflecting the above mentioned rationale, the Framework Directive introduces the duty to accommodate, as an additional form of discrimination[**********]. Whilst this duty is located outside the concept of discrimination as defined in article 2, it is clear, in view of the opening sentence to article 5 and article 2 (2) b (ii), that the two are inextricably linked[††††††††††††††††††††††††]. Article 5 states that "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]Draft Resolution of the Council and of representatives of the Governments of the Member States meeting within the Council on equality of opportunity for people with disabilities COM (1996), 406 Final of 30 July 1996.

[§§§§§§§§§§§§§§§§§§§§§§§§]L. WADDINGTON, "Evolving Disability Policies: From Social-Welfare to Human Rights. An International Trend from a European Perspective", (2001) 19/2 *NQHR*, p. 141.

[**********]The introduction of this provision is not a completely novel one, as, for instance, Annex 1.20 of the Council Directive 89/654/EEC of November 30, 1989 concerning the minimum safety and health requirements for the workplace O.J. L393/1, already provides for such a duty. It states that "workplaces must be organized to take account of handicapped workers, if necessary. This provision applies in particular to the doors, passageways, staircases, showers, washbasins, lavatories and workstations used or occupied directly by handicapped persons". Further examples in EC, national and international legislation providing for reasonable accommodation, *see* L.WADDINGTON, A. HENDRIKS, *supra* note ††††, p. 403.

Member State concerned". A concept of discrimination against persons with disabilities which encompasses a failure to make reasonable accommodation essentially provides for the identification of barriers to the participation of individuals with disability in the labour market and imposes an obligation on employers to adapt the workplace or time[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] to ensure that an individual with a disability can participate on an equal basis. In this context, the new framework could even be praised for respecting diversity. The obligation to adapt to specific needs of disabled persons could be seen as an employers' obligation to respond to difference in order to avoid discrimination[§§§§§§§§§§§§§§§§§§§§§§§§§]. The relevant provision creates a positive duty for employers[**********] except where to do so would impose a disproportionate burden on them. Identifying the reality of the labour market and calling for attention on difference and active treatment, article 5 clearly falls in line with the imperatives of the substantive justice model.

This reading of the relevant provision modelled upon the substantive notion of equality is admittedly based on an individualistic approach to justice. Its legislative construction makes it clear that this duty will not impose a normative obligation to make the workplace accessible for all potential employees and it may be even questioned whether the actual need of an individual should be accommodated in an anticipatory manner[††††††††††††††††††††††††††]. In most instances, an individual accommodation leaves unchallenged and unaffected the underlying discriminatory policy, which resulted in the initial exclusion, and, therefore, it does not address existing structural inequalities. Conceived of in this way, it is argued, accommodation is assimilationist, so that this approach to dealing with discrimination might serve to legitimize systematic discrimination[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. It is highly doubtful, however, that collective and anticipatory accommodation could be a realistic objective of the law, since disability has many variations and employers need to be aware of the

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[††††††††††††††††††††††††††] L.WADDINGTON, "Article 13: Setting Priorities…", *supra* note §§§§§§§§§, p. 178 and L.WADDINGTON, A. HENDRIKS, *supra* note ††††, p. 420 - 426.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] For further examples on what accommodation may stand for, *see* Recital 20 of the Framework Directive and R. WHITTLE, *supra* note §§§§§§§§§§§§, p. 10.

[§§§§§§§§§§§§§§§§§§§§§§§§§] D. SCHIEK *supra* note §§§§, p. 306.

[**********] It is, however, debatable that reasonable accommodation amounts to positive action, as it is often perceived in academic literature. For the discussion of this issue, *see* L.WADDINGTON, A. HENDRIKS, *supra* note ††††, p. 410.

[††††††††††††††††††††††††††] R. WHITTLE, *supra* note **********, p. 312.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] L.WADDINGTON, A. HENDRIKS, *supra* note ††††, p. 414-415.

specificities of each case and even test the possible adaptation to the existing working environment before they are expected to make any arrangements.

The focus of article 5 clearly remains on substantive equality. In contrast with formal equality, which assumes that non-discrimination law is about comparatively equal treatment, independent of the level of that treatment, article 5 of the Framework Directive, though vaguely formulated and conditional, seems to envisage substantial specific rights for people with disabilities. Apparently, in view of the obligations imposed on employers, a certain level of treatment has to be ensured for disabled employees, with a view to levelling up rather than levelling down. Thus, one could validly argue that article 5 of the Framework Directive is consistent with the values underpinning the substantive justice model, primarily the primacy of individual dignity and worth as a foundation for equality rights.

Nevertheless, once again, national legislators while transposing the Directive and administrative authorities while implementing it, may play a crucial role in achieving substantive equality. Article 5 employs several quite flexible terms which offer themselves to more than one readings. For instance, which are the *appropriate* measures that the employers will have to take, when such measures are indispensable in a particular case, as well as what constitutes a *disproportionate burden,* are all questions that will have to be answered at a national level. Diverse approaches are arguably permitted. It is however obvious that Member States are bound to establish the right to reasonable accommodation, so as their discretion ends where this right risks seriously to loose its substantial content.

CHAPTER V

COMPROMISES AND AMBIGUITIES

It is suggested that the most suitable method for tackling discrimination, at least within the employment context, would be to combine positive action measures with justiciable individual rights[§§§§§§§§§§§§§§§§§§§§§§§§§§§§]. This combined approach would achieve a suitable compromise between the two distinct legislative approaches to disability discrimination currently operating at a national level throughout the European Union[**********]. Providing both for positive action and individualistic-based remedies, the Framework Directives draws the balance between distinct models of equality. A similar balance is to be found between the legal construction and the potential function of each of the relevant provisions, as well as in the term "disability" itself. Thus far, articles 7, 9 and 10, and the above terminology remain conceptually ambiguous.

i) Positive action: exception or component of the equality principle?

If disability as a ground of discrimination is linked to the existence of real differences, the aim of achieving factual equality in working life easily justifies differentiation in treatment to take into account specific needs of differently situated persons. In this connection, the Commission's explanatory memorandum to the Framework Directive recognizes that "equal treatment by itself may not be enough if it does not lead to real equality" and "does not overcome the weight of accumulated disadvantage suffered by discriminated groups"[††††††††††††††††††††††††††††]. Article 7 (1) of the Framework Directive, therefore, explicitly provides for positive action, stating that : "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific

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§§§§§§§§§§§§§§§§§§§§§§§§§§§§R. WHITTLE, *supra* note ‡‡‡‡‡‡‡‡, p. 45-46.

**********_____*Report on Member States' legal provisions to combat discrimination*, European Commission, Brussels, 2002, L.WADDINGTON, "Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws" (1996) 18 *CLLJ*, p.62.

measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1".

The mere fact that positive action receives an explicit reference in the new framework hints towards a substantive conception of equality law[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]. Three characteristics of positive action measures may be highlighted to support this view. Firstly, it is obvious that in the context of positive action difference plays a crucial role, for difference has to be identified and paid due respect before positive action is required. Secondly, positive action aims to address in a structural manner the under-representation in the employment market of disadvantaged groups such as people with disabilities. Thirdly, in holding society collectively responsible, this approach -through the imposition of quotas or the employment of other forms of incentive measures such as tax and other concessions - adopts a proactive stance in addressing this type of under-representation. Difference, structural remedies, group-based notion of justice and anticipation constitute all key notions of the substantive equality concept.

Yet, from the textual structure of the Framework Directive flows that the provisions on affirmative action are formulated as derogations from the general principle of equality[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§]. The wording of article 7 (1), stating that the principle of equal treatment *shall not prevent* any Member State from maintaining or adopting specific measures of positive action, further supports this impression. Positive action is clearly formulated in negative terms; it is allowed but not required. The use of the phrase "… the principle of equal treatment shall be without prejudice…" in par. 2 of the same article has a similar effect. Such an approach to positive action is, however, conceptually consistent with the formal notion of equality[**********]. In contrast, in the substantive approach, positive action is not seen as an exception, but as a component of the principle of equality that forces the establishment of equality as a result. In the light of this, unequal treatment of unequal cases, since fully able and disabled people are not equally placed in the labour market, can be necessary to attain genuine equality.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]D. SCHIEK, *supra* note §§§§, p. 306.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§]P. SKIDMORE, *supra* note ‡‡‡‡‡‡‡‡‡‡‡‡, p. 131, U. O'HARE, *supra* note §, p.151.

[**********]H. FENWICK, "From Formal to Substantive Equality: the Place of Affirmative

Two major limitations as to the scope of positive action derive from this textual formulation of the Framework Directive. Firstly, according to the Court's case-law, derogations from the fundamental principle of equality "remain within the limits of what is appropriate and necessary for achieving the aim in view"[†††††††††††††††††††††††††††] and therefore the provisions on positive action, as derogations, should be interpreted strictly. Secondly, given that the positive action infringes the right of each individual to be treated equally, justification for such an infringement becomes not only necessary but also difficult. The difficulty is in some way inherent in the structure of the positive action measures, for such measures take into account group characteristics rather than individual ones[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡].

However, despite its formulation in negative terms and its location in the Framework Directive, a more detailed analysis of the text of the positive action provision suggests that allowing some scope for positive action is more a question of balancing different aspects of the principle of equality with each other than of exceptions from its application[§§§§§§§§§§§§§§§§§§§§§§§§§§§§]. The relevant provision, embracing the language of de facto equality, is modelled upon article 141 (4) TEC[**********]. According to this pattern, article 7 (1) does not use the term "equal opportunity", which led Advocates General Tesauro and Jacobs in their conclusions on *Kalanke*[†††††††††††††††††††††††††††] and *Marschall*[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] respectively to assume that positive action measures aiming at results are inadmissible[§§§§§§§§§§§§§§§§§§§§§§§§§§§§]. On the contrary, aiming to ensure full equality in practice, this instrument appears to envisage results-

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[†††††††††††††††††††††††††††]Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651 par. 38 and Case C -285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-69 par. 42.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]K. WENTHOLT, *supra* note §, p. 60.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§]D. SCHIEK, *supra* note §§§§, p. 306.

[**********]U. O'HARE, *supra* note §, p.152.

[†††††††††††††††††††††††††††]Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3069.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]Case C-409/97, *Marschall v Land Nordrhein Westfalen*, [1997] ECR I-6363.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§]For further discussion of these cases, *see* L. SENDEN, "Positive Action in the EU Put to the Test. A negative score? " (1996) 3 *MJ*, p. 146, U. O'HARE, "Positive Action before the European Court of Justice: Case C-450/93 *Kalanke v Freie Hansestadt Bremen*", (1996) 2 *WJCLI*, A. PETERS, "The Many Meanings of Equality and Positive action in Favor of Women under European Community Law – A Conceptual Analysis", (1996) 2/2 *ELJ*, p. 177, S. FREDMAN, "After *Kalanke* and *Marschall*: Affirming affirmative action", (1998) 1 *CYELS*, p. 200, S. FREDMAN "Affirmative Action and the European Court of Justice. A critical analysis" *in* J. SHAW (ed), *Social law and policy in an evolving EU*, Hart publ., Oxford – Port. 2000, p. 171 - 195, H. FENWICK, "From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law", (1998)

oriented as well as procedural measures[*]. Arguably, it acknowledges the limitations of the formal concept of equality.

To the extent that analogies may be drawn from the Court's case law on article 141 (4) TEC, it is arguable that this construction of article 7 (1) favors a wider scope for positive action measures. Admittedly, the Court's initial interpretation of article 141 (4) in *Abrahamsson*[†] suggested that the new formulation of the positive action provisions although increasing the scope for positive action, did not do so to a significant extent[‡]. However, in both *Badeck*[§] and *Abrahamsson* the Court held that positive action measures are first to be tested for compatibility with Directive 76/207/EEC[**] and only subsequently with the Treaty, arguably implying that article 141 (4) TEC may be broader and more permissive than article 2 (4) of the above mentioned Directive[††]. The closely similar wording of article 7 of the Framework Directive clearly allows for analogous considerations.

Despite the fact that the Framework Directive does not allow the conferral of specific advantages, in deviation from article 141 (4) TEC, it is submitted that this instrument is unlikely to prevent measures aimed at assisting persons with disabilities. Article 7 (2) of the Framework Directive, in its latter part, expressly permits "… measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting disabled workers' integration into the working environment". Apparently stemming from proposals of the Dutch delegation[‡‡], this wording is designed to cater for the use of employment quotas and similar schemes[§§]. Such schemes would naturally fall foul of the narrow interpretation given by the European Court of Justice to the scope of positive action[***]. However, political considerations as well as the specificities of the social context for disabilities may justify a change in the case -

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[*] D. SCHIEK, *supra* note §§§§, p. 298-299.

[†] Case C-407/98, *Katarina Abrahamsson v Elisabet Fogelqvist,* [2000] ECR I-5539. For a commentary, *see* A. NUMHAUSER - HENNING, "Swedish sex equality law before the European Court of Justice", (2001) 30 *ILJ*, p.121.

[‡] L. WADDINGTON, M. BELL, *supra* note 76, p. 604.

[§] Case C-158/97, *Badeck v Hessischer Ministerprasident,*[2000] ECR I-1875. For a commentary, *see*, K. KUCHHOLD, "*Badeck*- the third German reference on positive action", (2001) 30 *ILJ*, p.116

[**] Council Directive 1976/207/EEC of February 9, 1976 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 O.J. L39/40.

[††] P. CRAIG, G. DE BURCA, *EU Law. Text, Cases and Materials*, 3rd ed., Oxford University Press, 2003, p. 892.

[‡‡] L. WADDINGTON, M. BELL, *supra* note **********, p. 603.

[§§] For a more detailed comment on European quota systems *see* L. WADDINGTON, *supra* note **********

law[†††]. The insertion of this provision, aimed at disabled people only, may therefore be perceived to send a clear signal to the European Court of Justice that positive action measures for people with disabilities must be treated differently to those in respect of gender[‡‡‡].

However, the way the first part of article 7 (2), which allows Member States to maintain or adopt provisions on the protection of health and safety at work, is related to positive action, is less clear. Compared to the second part and the whole logic of article 7 of the Framework Directive, this clause appears to achieve just the opposite result, by permitting Member States to derogate from the equality principle to the detriment of the protected group[§§§]. They may maintain health and safety provisions, which discriminate against disabled workers, for instance, by requiring, minimum standards of vision or hearing. In this connection, no duty has been imposed on the national legislator to consider whether the same result could be achieved in a less discriminatory fashion. Another reading suggests that Member States are encouraged to adapt their health and safety regimes to take account of the particular situation of disabled workers, the added value of the provision being that it reinforces certain existing obligations imposed on employers under health and safety Directives[****]. However, there is also a risk that excessively protectionist measures ostensibly designed to guarantee the health and safety of workers with disabilities, could in fact result in the exclusion and denial of equal treatment to disabled people[††††].

ii) The undefined notion of "disability"

In the framework of a closed system prohibiting discrimination, such as this established by the Framework Directive, it is crucial to know what is meant by the existing notions, such as "disability". This is not only in order to determine the personal scope of application of the legislative instrument at issue, but also in order to detect the extent to which the existing notions offer themselves to flexible

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[***] L. SENDEN, *supra* note §§§§§§§§§§§§§§§§§§§§§§§§§§§§§.
[†††] L. WADDINGTON, M. BELL, *supra* note *****************, p. 602 - 603.
[‡‡‡] R. WHITTLE, *supra* note *************, p. 320.
[§§§] P. SKIDMORE, *supra* note ‡‡‡‡‡‡‡‡‡‡‡‡‡, p. 126, C. BARNARD, *supra* note ************, p. 973.
[****] R. WHITTLE, *supra* note *************, p. 320.
[††††]

interpretation. Litigation has shown that concepts, over which there is often much agreement, may turn out to be contested and less clear than originally assumed[‡‡‡‡]. Of the grounds listed in article 1 of the Framework Directive, disability appears from the outset to be ripe for conflicting interpretations, since it arguably raises the most complicated questions[§§§§]. EC law, as it currently stands, permits to each Member State to promote freely in its internal legal order its own perception of what constitutes a disability. It is suggested, therefore, that disability will necessitate the adoption of complementary legislative and /or judicial criteria in EC level that will both inform debate in the national forums as well as identify an appropriate and common standard for defining the relevant notion[*****].

In the absence of such criteria for the moment, it is only the term "disability" that may provide some indications on the concept of equality envisaged by the Community legislator. "Disability" is not a wholly neutral term, such as "sex", "religion" and "belief". The above mentioned grounds of discrimination state nothing on whether the protection is to be afforded to minority or to majority groups, nor do they imply that equal treatment is to be ensured for a certain sex, religion or belief. "Disability", on the contrary, clearly reflects the lack of some ability and it, therefore, implies a differentiation in treatment between disabled and non-disabled persons. This formulation of the relevant ground of discrimination does not operate in a symmetrical fashion, since it admits that disabled and fully able individuals do not equally suffer from social disadvantage. Therefore, only the former are entitled to the protection afforded by the Framework Directive.

Yet, the wording employed by the Framework Directive falls short of avoiding the fundamental assumptions of formalism. Disability automatically calls for an apparently inevitable comparison with able persons, since the very word incorporates the antithesis to ability. Thus, it triggers a negative definition of what may constitute a disability, based upon the contrast with a completely healthy individual. From this perspective, the term "disability" seems to embrace the assimilation claim of formal equality. The variety of abilities and impairments identifiable to persons generally perceived as disabled, in other words difference, seems to be ignored. To this extent,

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[‡‡‡‡] This is perfectly illustrated by reference to the notion of "sex". In this respect, the judgments *P v S* (Case C-13/94, *P v S and Conwall County Council*, [1996] ECR I -2143) and *Grant* (Case C-249/96, *Lisa Grant v South West Trains Ltd*, [1998] ECR I -621) are the best known examples.

[§§§§] R. WHITTLE, *supra* note **********, p. 321.

the employed terminology could even be charged with the symmetry of generalisation.

iii) Procedural provisions: a rough path to substance

With regard to the procedural provisions of the Framework Directive, it is submitted that whilst premised on an essentially individualistic approach to equality and equality litigation, they may equally promote the values of equality in its substantive sense. Article 9 on the defence of rights supports the first part of this argument, whilst article 10 on the burden of proof, conceptually neutral itself, provides a good illustration of the second part.

The latter rule of procedure provides for a shift in the burden of proof from the plaintiff to the respondent, where persons who consider themselves wronged because the principle of equal treatment has not been applied to them[†††††], establish before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination[‡‡‡‡‡]. The reversal of the burden of proof in equality cases is generally intended to compensate for the burdens on individual litigants in terms of access to resources, expertise and information[§§§§§]. Agencies involved in litigation of equality claims are also entitled to benefit from the reversal of the burden of proof[******], since such bodies, like courts, may be equally unable to compel the production of information from undertakings under investigation[†††††††].

What is of particular significance, however, is the qualification to the burden of proof provision that the Framework Directive contains in its preamble. Recital 31 states that it is not for the respondent to show that the plaintiff has a particular

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[*****] R. WHITTLE, *supra* note **********, p. 322 – 323.

[†††††] For the debate on whether this wording covers also harassment and the duty to accommodate, so as the requirement laid down in article 10 for a reversal in the burden of proof applies to these concepts as well, *see* R. WHITTLE, *supra* note **********, p. 316.

[‡‡‡‡‡] Framework Directive, article 10.

[§§§§§] It does not, however, compensate for the absence of a requirement on undertakings to compile monitoring data that may be used as evidence in equality litigation. This proposal was put forward by the European Parliament. *Supra* note ††††††††††††††††††††††, proposed amendment 43.

[******] Framework Directive, article 10 (4).

[†††††††]

disability. Although establishing a disability may prove particularly burdensome[‡‡‡‡‡‡], difficulties for individual litigants are counterbalanced by the still undefined and therefore arguably flexible notion of disability. Recital 31 in combination with the lack of a legislative definition at EC level will allow the interested parties, making a claim for being discriminated against before the national courts, to actively participate in defining the notion of disability, while proving that they fall within the personal scope of the Framework Directive and the subsequent implementing legislation. This will primarily be the case in those national legal orders where there is no strict legislative definition of what constitutes a disability. Provided that litigants receive appropriate legal advice, so as to argue successfully their case before the courts, they may exert considerable influence in judicial decision - making either by advancing a self - perception of disability corresponding to their personal experience or shifting the focus of the legal argumentation from their disability to their abilities. Thus, a more heterogeneous, and therefore more realistic and clearer picture of the social reality will emerge before the judges, increasing their sensitivity to disability discrimination issues. Rather than supporting the view that a better protection of people with disabilities will be the result of increased judicial sensitivity, the above-mentioned assertion purports to illustrate that courts may in this way become gradually familiar with difference. Highlighting difference instead of assimilation to the dominant norm will in turn enable them to overcome the boundaries of the formal concept of equality and may have an important impact on formulating judgements with a view to further integrate marginalised individuals in the social environment. Both respect for difference and social inclusion represent major concerns of the substantive equality model.

One could go on to argue that active participation in judicial decision-making through litigation will also constitute a valuable means to combat structural inequalities in the long run. Since judicial interpretation of the law lends itself as an indirect yet powerful instrument in driving societal reform, involvement of people with disabilities in judicial litigation claiming protection of their right to equality amounts to the attribution of a crucial role. It is while playing this role that disabled persons may challenge well-established inequalities in their social environment, mainly by bringing into the judicial process the experience and views of those directly

[‡‡‡‡‡‡] For the relative experience under disability anti-discrimination law in UK and the US, *see* L.

affected. In this process, resistance driven by political, ideological and social stances as well as economic interests will be fragmented and therefore substantially lessened. Whether this will be an adequately effective way to promote substantive equality in practice, remains subject to considerable reservations: time, limited resources, emotional costs, inadequately specialised legal advice, uncertainty for the outcome of litigation and protection granted on a case-to-case basis represent major indications of ineffectiveness.

As individual enforcement of equality legislation may prove to be slow path to enacting the principle of equal treatment, it is often argued that individual litigation needs to be backed up by modern enforcement mechanisms[§§§§§§]. In this regard, the Framework Directive proposes a cautious progress[*******]. It obliges Member States to ensure[†††††††] that, associations, organisations or other entities, which have a legitimate interest in ensuring that equality law is complied with, may engage either on behalf or in support of the complainant, with his or her approval in any judicial and or administrative procedure provided for the enforcement of equality law[‡‡‡‡‡‡‡]. This provision obviously constitutes a step towards a more substantive, group-based concept of equality. On one hand, it authorises collective bodies to provide courts with a clearer, more complete and better construed idea of what social reality is like and, on the other hand, partially shifts the responsibility for the successful protection of equality in a specific case from the individual alone to the collective body as well.

However, this formula still incorporates a pattern of judicial protection focused on the individual justice model, for it goes only for the single-case-support approach. In this regard, it has to be mentioned that the European legislator has chosen only one out of at least three available options in this field. Opting for the provision of support to individual victims of discrimination, he did not entitle the above-mentioned bodies to watch over equality rights in the public interest, without having an individual case to deal with or to bring a collective action, which has often

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WADDINGTON, M. BELL, supra note **********, p. 607.
[§§§§§§] D. SCHIEK, *supra* note §§§§, p. 306.
[*******] M. BELL, "Article 13 EC …" *supra* note §§§§§§§§§, p. 80.
[†††††††] It is to a certain extent controversial to that wording the fact that the Framework Directive does not require Member States to provide adequate funding for such agencies, since insufficient financial resources largely restrict the fulfilment of the agencies' tasks.
[*******]

been argued to provide a more effective means of pursuing equality claims[§§§§§§§]. As it is highly disputable that the entitled bodies will be able to deal with all the individual cases which may be brought following implementation of the Framework Directive in national laws, a broader approach to organisational involvement in legal proceedings, would arguably increase the number of successful claims in discrimination cases and therefore it would be more efficient in achieving equality in practice. This is especially true, as regards both cases involving discrimination based on disability, with which national judicial and legal practice is less familiarised and cases requiring elaboration of delicate arguments for the establishment of indirect discrimination. If in such cases, the way to substance is through procedure[********], the Framework Directive's procedural provision on the defence of rights falls short in facilitating the achievement of substantive equality.

It is arguable that this is also a valid finding as far as alternative mechanisms to support individual litigation are concerned. In spite of the efforts by the European Parliament[††††††††], according to the example of several national legislations[‡‡‡‡‡‡‡‡], to incorporate an article for the establishment of equal treatment bodies into the Framework Directive, the latter does not contain any such provision[§§§§§§§§]. In the context of disability, this type of body would analyse the problems faced by disabled people, study possible solutions thereto, and provide concrete assistance for victims of discrimination[*********]. Acting in such a manner, an equal treatment body would not only transfuse social reality into judicial thinking, but, most importantly, it would also act in a pre-judicial stage, rendering employers and employees in the public and private employment sectors aware of existing discriminatory practices to be avoided or eliminated. It would, therefore, contribute essentially, in a short term, to the prompt

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§§§§§§§ Report of the European Parliament on the proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation A5-0264/2000 Final, proposed amendment 42.

******** U. O'HARE, *supra* note §, p.147.

†††††††† *Supra* note §§§§§§, proposed amendment 52.

‡‡‡‡‡‡‡‡ Mainly the legislation of Ireland, the UK, Netherlands and Sweden.

§§§§§§§§ This omission has been extensively criticized in the relevant literature. *See*, for example, P. SKIDMORE, *supra* note ‡‡‡‡‡‡‡‡‡‡‡‡, p. 129, R. WHITTLE, *supra* note **********, p. 325, U. O'HARE, *supra* note §, p.155-156, L. WADDINGTON, M. BELL, *supra* note **********, p. 608.

********* To draw parallels on the function of such an agency in the context of disabilities, one should read article 13 (1) of the Council Directive 2000/43/EC, *supra* note ‡‡‡‡‡‡‡‡‡. This article requires Member States to establish bodies, able, as a minimum, to provide independent assistance to victims of discrimination in pursuing their complaints, conduct independent surveys concerning discrimination

settlement of arising disputes and, in the long term, to the removal of stereotypes and structural inequalities.

Nevertheless, the above mentioned remarks as to the shortcomings of the EC legislation in achieving substantive equality should be completed by a final one. In transposing the procedural provisions of the Framework Directive, Member States enjoy a considerable margin of discretion. Firstly, national implementing authorities are obliged to introduce provisions that will allow collective entities to engage in any judicial and or administrative procedure provided for the enforcement of equality law. Obviously, how far they will go, remains a matter of free choice. In other words, the way they are going to *ensure* effective involvement of such bodies in equality litigation is left to their own judgment. What is only required is the result. Secondly, there is nothing that would oppose to their decision to introduce a wider authorisation for collective bodies to argue equality cases. Actions by such bodies in the public interest as well as collective ones are neither permitted nor forbidden by the Framework Directive. Thirdly and similarly, the establishment of equal treatment bodies remains still an issue of free political choice.

CONCLUSION

In the context of disability, the Framework Directive clearly embodies a notion of equality that tends to go beyond the traditional structure of the anti-discrimination principle. Indications of this tendency are located within the very first recitals and provisions of this instrument. While the language of the relevant provisions is still to a great extent the language of formalism, and this model clearly prevailed where major political decisions on the scope of application of the Framework Directive had to be made, some of the rights to which this instrument gives rise lose the nature of comparative negative rights and become positive ones. Moreover, the way the concept of discrimination is defined indicates that dignity and difference are recognised as autonomous values deserving respect and protection. Areas such as positive action around which there has been a lot of controversy in the past, seem to now reconcile both the claims of traditional and modern equality patterns.

A closer examination of the Framework Directive as a whole may provide us with an additional argument to support its orientation towards substantive equality. Those provisions that remain to a great extent modelled upon formalism leave Member States with the discretion, while transposing the Directive into national law, either to adopt them or not. Article 3 (4) allowing to exempt the field of armed forces from the principle of equal treatment and article and 2 (5) permitting the adoption of measures necessary in a democratic society are good illustrations of this assertion. On the contrary, where substantive equality seems to have inspired the EU legislator, no such discretion exists. Both the notions of direct and indirect discrimination as well as harassment and the duty to provide reasonable accommodation are formulated in a peremptory language. Member States are bound to adopt those provisions and their discretion lies only in specifying the content of the relevant rights, for example, to define harassment according to national rules and practices. Arguably, formalism is still prevalent but optional, whilst substantive equality is a less clear objective albeit imperative in nature.

The consequence of these changes in the existing patterns of Community anti - discrimination law is that the distance between the two models described at the

beginning is getting shorter, with a consequent change in the character of anti-discrimination scrutiny. Legislative institutions, national courts and, eventually, the European Court of Justice will have to face a challenge, since tensions are very likely to arise between efficiency considerations and concerns directly based on social equity. While economic rationality, undoubtedly, up to a certain point, dictates integration of people with disabilities into the labour force and, more generally, into social life, beyond those points, a logic based on the market does not dictate equality. One must then look to particular conceptions of distributive justice in order to legitimise the decision to reduce inequalities. Such conceptions are notoriously extremely difficult to agree and to adjudicate upon explicitly.

Commentators on the Framework Directive have already talked about the dawn of an exciting time for the experts in these fields. It is, however, doubtful, that the other players in the game - the national legislators and judges and the European Court of Justice as the final arbiter - will share this enthusiasm. For them, it is more likely to be the beginning of hard times.

BIBLIOGRAPHY

Articles

A. HENDRIKS, "Health Inequalities", *in* LOENEN, RODRIGUEZ, *Non Discrimination Law: Comparative Perspectives*, Kluwer 1999, p. 181

A. NUMHAUSER - HENNING, "Swedish sex equality law before the European Court of Justice", (2001) 30 *ILJ*, p.121

A. PETERS, "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A conceptual Analysis", (1996) 2 *ELJ*, p. 177

A. R. SARAPAS, « Les droits des personnes handicapées dans le domaine des transports européens », (2000) 439 *RMCetUE*, p. 395

B. DOYLE, "Employment rights, equal opportunities and disabled persons", 22 (1993) *ILJ*, p. 89

B. HEPPLE, «Equality and Discrimination » in P. DAVIES et al. (eds), *European Community Labor Law: Principles and Perspectives*. Liber Amicorum Lord Wedderburn of Charlton, 1996, Clarendon Press, Oxford, p. 237 - 259

C. BARNARD, "Article 13: Through the Looking Glass of Union Citizenship", *in* D. O' KEEFFE, P. TWOMEY (eds), *Legal Issues of the Amsterdam Treaty*, Hart, Oxford – Portland Oregon, 1999, p. 375 - 394

C. BARNARD, "The Changing Scope of the Fundamental Principle of Equality?" 46 *McGill LJ*, p. 955

C. BARNARD, B. HEPPLE, "Indirect discrimination: Interpreting *Seymour Smith*" (1999) 58/3 *CLJ*, p. 399

C. BARNARD, B. HEPPLE, "Substantive Equality", (2000) 59/3 *CLJ*, p. 562

C. McCRUDDEN, "The new concept of equality", paper presented at the Conference "Fight against Discrimination: The Race and Framework Employment Directives", June 2003, Academy of European Law

C. TOBLER, "How to use the experience with sex discrimination for the other grounds", *in Uniform and Dynamic interpretation of EU Anti-Discrimination law: The role of specialized bodies,* Report of the second experts' meeting, 2003, p. 14

D. CARUSO, "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives", (2002) 10 *JMWP*

D. SCHIEK, "A new Framework on Equal Treatment of Persons on EC Law?"

(2002) 8/2 *ELJ*, p. 290

D. SCHIEK, "Sex equality after *Kalanke* and *Marschall*", (1998) 2 *ELJ*, p. 148

G. F. MANCINI, O'LEARY, "The new frontiers of sex equality law in the European Union" (1999) 24 *ELR*, p. 331

G. MORE, "Equal treatment" of the Sexes in European Community Law: What does "equal" mean?", (1993) 1 *FLS*, p.45

G. MORE, "The principle of Equal Treatment: From Market Unifier to Fundamental Right?" *in* P. CRAIG, G. De BURCA, *The evolution of EU law*, Oxford University Press, 1999, 517 - 533.

H. FENWICK, "From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law*"*, (1998) 4/4 *EPL*, p. 507

H. FENWICK, T. K. HERVEY, "Sex equality in the Single Market: New directions for the European Court of Justice", (1995) 32 *CMLR*, p. 443

J. COOPER, R.WHITTLE, "Enforcing the Rights and freedoms of disabled people: the role of transnational law (part I)" (1998) 2/2 *MJLS*, p. 1

K. KUCHHOLD, "*Badeck*- the third German reference on positive action", (2001) 30 *ILJ*, p.116

K. LENAERTS, "L'égalité de traitement en droit communautaire: un principe aux apparences multiples", (1991) *CDE*, p. 3

K. WENTHOLT, "Formal and Substantive Equal Treatment: The limitations and the potential of the legal concept of equality"*, in* LOENEN, RODRIGUEZ, *Non Discrimination Law: comparative perspectives*, Kluwer, 1999, p. 53

L. FLYNN, "The implications of article 13 EC - After Amsterdam will some forms of discrimination be more equal than others?", (1999) 36 *CMLR*, p. 1127

L. MULDER, "How Positive Can Equality Measures Be?*" in* LOENEN, RODRIGUEZ, *Non Discrimination Law: Comparative Perspectives*, Kluwer 1999, p. 65

L. SENDEN "Positive Action in the EU Put to the Test. A Negative Score?", (1996) 3 *MJ*, p. 146

L. WADDINGTON, "Evolving Disability Policies: From Social – Welfare to Human Rights. An International Trend from a European Perspective" (2001) 19/2 *NQHR*, p. 141

L. WADDINGTON, "Testing the Limits of the EC Treaty Article on Non-discrimination", (1999) 28 *ILJ,* p. 133

L.WADDINGTON, “Article 13 EC: Mere Rhetoric or a harbinger of change?” (1998) 1 *CYELS*, p. 175

L.WADDINGTON, “Article 13: Setting Priorities in the Proposal for a Horizontal Employment Directive”, (2000) 29 *ILJ*, p. 178

L.WADDINGTON, “Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws” (1996) 18 *CLLJ*, p.62

L.WADDINGTON, “Throwing Some Light on Article 13 EC Treaty*”*(1999) 6*MJ*, p.1

L.WADDINGTON, A. HENDRIKS, “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination”, (2002) 18/3 *IJCLLIR*, p. 403

L. WADDINGTON, M. BELL, “More equal than others: Distinguishing European Union Equality Directives”, (2001) 38 *CMLR*, p. 587

M. BARBERA, “Not the same? The judicial role in the New Community Anti Discrimination Law Context”, (2002) 31 *ILJ*, p. 82

M. BELL, “Article 13 EC: The European Commission’s Anti-discrimination Proposals”, (2000) 29 *ILJ*, p. 79

M. BELL, “Equality and Diversity: Anti-discrimination Law after Amsterdam” *in* J. SHAW (ed), *Social law and policy in an evolving European Union*, Hart, Oxford – Portland, 2000, p.157 – 169

M. BELL, “Sexual Orientation Discrimination in Employment: An evolving Role for the European Union”, *in* R. WINTEMUTE, M. ANDENAES (eds), *Legal recognition of same – sex partnerships*, Oxford, Hart, 2001, p. 666

M. BELL, “The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?” (1999) 6 *MJ*, p. 5

M. BELL, L.WADDINGTON, “Reflecting on inequalities in European equality law”, (2003) 28 *ELR*, p. 349

M. BELL, L.WADDINGTON, “The 1996 Intergovernmental Conference and the prospects of a non discrimination Treaty article”, (1996) 25 *ILJ*, p. 332

P. SKIDMORE, “EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti – discrimination Policy?” (2001) 30 *ILJ*, p. 126

P. WATSON, “The Community Social Charter”, (1991) 28 *CMLR*, p. 37

R. WHITTLE, “Disability Rights after Amsterdam – The Way Forward*”*, (2000) 1 *EHRLR*, p. 33

R. WHITTLE, "European Communities and EEA. Disability Discrimination and the Amsterdam Treaty", (1998) 23 *ELR*, p. 50

R. WHITTLE, "The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective", (2002) 27 *ELR*, p. 303

R. WHITTLE, "Why is a European law on disability discrimination important?" paper presented at Inclusion - Europe's Dialogue Meeting, Brussels, 22-23 November 2001

R. WHITTLE, M. BELL, "Between Social policy and Union citizenship: the Framework Directive on equal treatment in employment", (2002) 27 *ELR*, p. 677

S. FREDMAN "Affirmative Action and the European Court of Justice. A critical analysis" *in* J. SHAW (ed), *Social law and policy in an evolving EU*, Hart publ., Oxford – Port. 2000, p. 171 - 195

S. FREDMAN, "After *Kalanke* and *Marschall*: Affirming affirmative action", (1998) 1 *CYELS*, p. 200

S. FREDMAN, "Equality: A new generation?*"* (2001) 30 *ILJ*, p. 145

S. FREDMAN, "European Community Discrimination Law: A critique", (1992) 21 *ILJ*, p. 119

U. O'HARE, "Enhancing European Equality Rights: A New Regional Framework"**,** **(**2001) 8/2 *MJ*, p.133

U. O'HARE, "Positive Action before the European Court of Justice: Case C-450/93 *Kalanke v Freie Hansestadt Bremen*", (1996) 2 *WJCLI*, p. 1

Books

A. DASHWOOD, S. O' LEARY (eds), *The Principle of Equal Treatment in EC Law*, Sweet and Maxwell, 1997

ARISTOTLE, *Ethnica Nichomachea*, V.3 1131a – 1131b (E. Ross trans. 1925)

E. ELLIS, *EC Sex Equality Law*, Clarendon Press, Oxford, 1998

J. DINE, B. WATT (eds), *Discrimination Law: Concepts, Limitations and Justifications*, Longman, London, 1996

M. BELL, *Anti-discrimination law and the European Union*, Oxford University Press, 2002

P. CRAIG, G. DE BURCA, *EU Law. Text, Cases and Materials*, 3rd ed., Oxford Un. Press, 2003

T. TRIDIMAS, *The general principles of EC Law*, Oxford, Oxford University Press, 1999

Institutional Studies

Analysis of the EU Directive on equal treatment in employment and occupation, European Disability Forum, 01/8, July 2001

Equality, Diversity and Enlargement, European Commission, Brussels, 2003

Report on Member States' legal provisions to combat discrimination, European Commission, Brussels, 2002

European Community Legislation

European Parliament and Council Directive 2001/85/EC of November 20, 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 70/156/EEC and 97/27/EC, O.J. L042/1

Council Decision 2000/750 of November 27, 2000 establishing a Community action programme (2001 to 2006) to combat discrimination, O.J. L303/23

Council Directive 1976/207/EEC of February 9, 1976 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 O.J. L39/40

Council Directive 1989/654/EEC of November 30, 1989 concerning the minimum safety and health requirements for the workplace O.J. L393/1

Commission Recommendation 92/131/EEC of November 27, 1991 on the protection of the dignity of women and men at work O.J. L 49/1

Council Directive 2000/43/EC of June 29, 2000, implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin, 0.J. L180/22
Council Directive 2000/78/EC of November 27, 2000, establishing a general framework for Equal Treatment in employment and occupation, O.J. L303/16

European Parliament and Council Directive 2002/22/EC of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), O.J. L108/ 55

European Parliament and Council Directive 2002/21/EC of March 7, 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), O.J. L108/33

European Community Documents

Commission, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation COM (1999), 565 final

Commission, Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001 – 2006 COM (1999), 567 final

Commission, Green Paper, Equality and non- discrimination in an enlarged European Union, COM (2004) 379 final

Commission, Code of Practice on Measures to combat sexual harassment, (1991) O.J. C 305/36

Draft Resolution of the Council and of representatives of the Governments of the Member States meeting within the Council on equality of opportunity for people with disabilities COM (1996), 406 Final of 30 July 1996

Report of the European Parliament on the proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation A5-0264/2000 Final

Case law of the European Court of Justice

Case C- 273/97, *Sirdar v The Army Board*, [1999] ECR I-7403

Case C -285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-69

Case C-13/94, *P v S and Conwall County Council*, [1996] ECR I -2143

Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011

Case C-158/97, *Badeck v Hessischer Ministerprasident,* [2000] ECR I-1875

Case C-177/88, *Dekker v VJV-Centrum*, [1990] ECR I-3941

Case C-186/01, *Alexander Dory v Germany* [2003] ECR I-02479

Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549

Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651

Case C-237/94, *O' Flynn v Adjudication Officer,* [1996] ECR I-1607

Case C-243/95, *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance*, [1998] ECH I-3739

Case C-249/96, *Lisa Grant v South West Trains Ltd*, [1998] ECR I-621

Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker,* [1995] ECR I-225

Case C-342/93, *Joan Gillespie and others v Northern Health and Social Services Boards*, [1996] ECR I-475

Case C-407/98, *Katarina Abrahamsson v Elisabet Fogelqvist,* [2000] ECR I-5539

Case C-409/97, *Marschall v Land Nordrhein Westfalen*, [1997] ECR I-6363

Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3069

Joined cases 117/76 and 16/77, *Albert Ruckdeschel & Co. v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753