On the Impact of the Amended Equal Treatment Directive and the Issue of Equally Adequate Working Conditions for Men and Women

By Ann Numhauser-Henning[1]

It is a great pleasure for me to have been given this opportunity to address you on the subject of the new – amended – Equal Treatment Directive.[2]

The Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (hereafter the New Equal Treatment Directive and the Equal Treatment Directive, respectively) is due for implementation by 5 October 2005.

To address the impact of the new Equal Treatment Directive, it *must be assessed against some background developments*.

It was adopted in view of Article 6 of the Treaty on the European Union, addressing the fundamental rights as guaranteed by the European Convention and recognised by the Union Charter of Fundamental Rights,[3] the new provisions under Articles 2, 3(2) and 141 of the EC Treaty,[4] the European Court of Justice's case law on discrimination on the grounds of sex,[5] the new Article 13 Directives[6] and the Directive 97/80/EC on the Burden of Proof in Cases of Discrimination Based on Sex[7].

It is common knowledge that the non-discrimination principle enshrined in the Treaty of Rome already back in 1957 has grown into a normative core of the utmost importance for the totality of Community law – not least in the area of equality between men and women and through the case law of the European Court of Justice. Our theme concerns the interrelation between these achievements and the ongoing development and expansion of the notion of discrimination.

After Amsterdam, Community law can be said to have moved from formal to substantive gender equality.[8] The new Treaty provisions proclaim equality between men and women as a

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[2] OJ 2002 L 269/15.

[3] The preamble paragraphs 1 and 3.

[4] The preamble paragraphs 4 and 5.

[5] The preamble paragraphs 10 *et seq*.

[6] I.e. the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, the preamble paragraph 6.

[7] OJ 1998 L 14/6.

[8] See for instance Sophia Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality, The Proposed Amendment of Directive 76/207, Comments and suggestions,* Athens 2001.

'task' and an 'aim' of the Community and impose a positive obligation to 'promote' it in all its activities.[9] Articulating the need for eliminating existing inequalities and for promoting equality between men and women, they may in fact be said to represent *a shift in the Community law gender equality approach, from a negative ban on discrimination to a positive and proactive approach to promote substantive gender equality*.

The new Directive amending the Equal Treatment Directive is thus an initiative to implement the new EC Treaty provisions on gender equality just mentioned. The question we have to ask is whether the new proactive approach only just traced holds true also for the New Equal Treatment Directive?

The Amsterdam Treaty, and the introduction of the new Article 13 EC, gave the Community institutions the power to take appropriate action to combat discrimination – not only based on sex or nationality as before – but also on 'racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

Article 13 EC is a competence rule which has to be filled out. The European Commission's 'Anti-Discrimination Package' in 1999 was such an initiative, which has now resulted in the 'Article 13 Directives' – i.e. the Council's Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive)[10] and the Council's Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Framework Directive)[11] – as well as a Community Action Programme to combat discrimination 2001-2006, Council Decision 2000/750/EC[12].

At the European Law Conference, held in Stockholm 10-12 June 2001 to terminate the Swedish presidency of the European Union, one of the issues addressed was whether these new initiatives taken on the basis of Article 13 EC should be viewed as 'building on strength' from the gender perspective, or whether this should perhaps be called into question.

The wording of the Article 13 Directives explicitly takes account of the original Equal Treatment Directive and its interpretation by the European Court of Justice, of Directive 97/80 on the burden of proof in cases of discrimination based on sex and of the overall experience of fighting gender discrimination and pursuing gender equality. The Article 13 Directives, however, are also inspired by the European Court of Justice's case law on the free movement of workers; most notably its interpretation of the concept of indirect discrimination. *The Article 13 Directives can thus be said to draw from a wider scope of acquis communautaire than Community gender equality regulation so far*, considering experiences also from the area of the free movement of workers. Updating gender equality regulations to this new standard might actually be seen as 'building on strength' as regards gender equality, implying an instrumental and proactive approach.

It has already been indicated, though, whether the new Article 13 Directives are really building on strength can also be called into question. Article 13 and *the widened scope for the*

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[9] Articles 2 and 3(2) EC.

[10] OJ 2000 L 180/22.

[11] OJ 2000 L 203/16.

[12] OJ 2000 L 303/23.

non-discrimination principle to cover a number of new groups, further expanded by the Union Charter on Fundamental Rights[13] and a number of Community law instruments as regards atypical employment, *threatens to weaken the ban on discriminatory treatment, reducing it to the notion of formal equality* already at the heart of the European Court of Justice's case law[14].

I refer not only to the new Article 13 Directives, but also to new non-discrimination instruments such as the Council Directive 1997/80/EC on Part-time Work[15] and Council Directive 1999/70/EC on Fixed-term Work[16]. There is also the Commission's draft Directive concerning Temporary Work Agencies[17] and the European Social Partners' Agreement on Tele-work.

Professor Brian Bercusson, at the recent VII European Regional Congress of Labour Law and Social Security held in Stockholm 4-6 September 2002, in his oral comments to the general reports, referred to these new instruments *as a new right to equal treatment for workers* 'turning discrimination law inside out. It is now all about the justification of differential treatment…'

The contents of the New Equal Treatment Directive are well known and time does not permit us to really look into the new provisions. Nevertheless I will present a short list reflecting its contents, as well as the more specific subject given to me for this conference: working conditions.

The new Article 3 articulates the ban on discrimination covering both public and private sectors (including public bodies) concerning '(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, as well as pay as provided for in the Equal Pay Directive 75/117/EEC;* and (d) membership of, and involvement in, an organisation of workers or employees, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations'.

Among new provisions of special importance regarding working conditions are the new rules defining harassment related to sex and sexual harassment as discrimination (the new Article 2(2) and 2(3)).

There are also the new provisions regarding pregnancy and maternity rights (the new Article 2(7)). Women on maternity leave shall be entitled to return to the same or an equivalent job after pregnancy and maternity leave, with no less favourable working conditions, as well as

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[13] Article 21(1) the Charter.

[14] See, for instance, cases C-450/93 Eckhard Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051 and C-177/88 Elisabeth Johanna Pacifica Dekker v Stiching Vormingscentrum voor Jong Volwassenen [1990] ECR I-3941.

[15] OJ 1998 L 14/9.

[16] OJ 1999 L 175/43.

[17] COM(2002) 149 final.

benefit from any improvement in working conditions to which they would have been entitled during their absence. While less favourable treatment of a woman, related to pregnancy or maternity leave, shall constitute discrimination within the meaning of the New Equal Treatment Directive, these rules shall be without prejudice to the provisions of the Parental Leave Directive 96/34/EC[18] and the Pregnant Workers Directive 92/85/EC[19], respectively.

Moreover, the new Directive in Article 2(7) also provides an opportunity for the Member States to grant working men an individual and untransferable right to paternity leave while maintaining their rights relating to employment, thus recognising distinct rights to paternity.

However welcome such paternity rights may seem they can, in my opinion, also be criticised, though. While providing important social rights also for the fathers of small children, a different set of such paternity rights does perpetuate a distinction between maternity leave and paternity leave to the detriment of gender-neutral parental rights.[20]

'It is now all about the justification of differential treatment' said Brian Bercusson. *As regards justifications*, the traditional view is that direct discrimination can never be justified. However, in her report to the Stockholm Congress already mentioned, Tamara Hervey focused justifications of both direct and indirect discrimination on an 'uninterrupted scale'.[21] As for the justification of direct discrimination she argued that the former Article 2 rules of the Equal Treatment Directive shall be seen not as exceptions but as justifications within the discrimination concept.

The amended Directive contains a new rule on *bona fide* occupational quality defences in the new Article 2(6), referring to occupational activities which necessitate ('constitutes a genuine and determining occupational requirement') the employment of a person of one sex 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' provided that the objective sought is legitimate and subject to the principle of proportionality as laid down by the case law of the European Court of Justice. The new writings suggest an even stronger justification test than before.

However interesting the issue of justification of direct discrimination - especially in view of the new directives on atypical work, which do accept the justification of directly discriminatory treatment when objectively justified,[22] and the very extensive rule on

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[18] OJ 1996 L 145/4.

[19] OJ 1992 L 348/1.

[20] Compare McGlynn, Clare, Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy, in: The Columbia Journal of European Law, Vol. 7, No. 2, Spring 2001: 'Although there is a need to be sex specific when considering pregnancy, this should not extend to rights post-birth. These should be gender neutral'. For a discussion on the pros and cons related to alternate conceptions of discrimination as regards pregnancy, maternity and parenthood, see also Julén, Jenny, A Blessing or a Ban? About the Discrimination of Pregnant Job Seekers and McGlynn, Clare, Pregnancy Discrimination in EU Law, Comments, both in: Numhauser-Henning, Ann (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer, The Hague 2001. See also Hervey, below, note 14.

[21] Hervey, Tamara, *EC law on Justifications for Sex Discrimination in Working Life* at the Congress web-site http://www.labourlaw2002.org.

[22] See Directive 1997/80/EC Article 4.1 the attached Framework Agreement and Directive 1999/70/EC Article 4.1 the attached Framework Agreement, respectively.

acceptable differential treatment as regards age in the Framework Directive[23] - we will now turn to the concept of indirect discrimination.

Indirect discrimination and positive action are both concepts of special interest when it comes to substantive equality and equally adequate working conditions. Since positive action measures are the subject of Dr. Christa Tobler,[24] I will confine myself to indirect discrimination.

Whereas the ban on direct discrimination concentrates on what is to be regarded as alike[25] and not on the treatment as such – what I will call the reference norm - the concept of indirect discrimination has a special potential. Whereas the ban on direct discrimination aims at changing the group to which the reference norms apply, not the content of the – already and independently established – reference norms as such, the concept of indirect discrimination allows a court of law to scrutinise the actual content of the reference norm itself. The concept of indirect discrimination thus contains an enormous potential for bridging the gap between formal and substantive equal treatment. An apparently neutral reference norm with detrimental effects for a protected group must be objectively justified by a legitimate aim, represent a necessary means and be proportionate to its purpose.[26]

The concept of indirect discrimination in working conditions is reflected in the European Court of Justice's case law. The question is: to what extent has it hitherto been used to effectuate substantive equality, and what can we expect of the future? When are detrimental effects to a protected group regarded as justified?

Justifications can be job-related, enterprise related and public interest related. Tamara Hervey, in her report to the Stockholm congress, shows us in great detail how the strictness of the proportionality test applied by the European Court of Justice varies according to context.[27]

The conclusion is that there are different levels of justification, with regard to the concept of indirect discrimination. We can now expect even more diversified requirements due to the impact of the new instruments on non-discrimination already referred to above.

Another aspect of indirect discrimination is how to prove it. So far, when applying the concept of indirect discrimination in sex-discrimination cases, the European Court of Justice has required statistical evidence to the effect that the differential treatment is systematic and structural and not an occasional or random phenomenon. In these cases, so far, such evidence

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[23] See Article 6 the Framework Directive 2000/78/EC.

[24] See Dr. Tobler's contribution in this volume. In the New Equal Treatment Directive the former Article 2(4) is replaced by a reference to Article 141(4) EC, now contained in Article 2(8). According to Article 2(3) the New Equal Treatment Directive the Member States are to report positive action measures to the Commission every four years.

[25] I.e. what are to be regarded as similar cases.

[26] On this line of argument, see Christensen, Anna, Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change, both in: Numhauser-Henning, Ann (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer, The Hague 2001.

[27] Hervey, Tamara, *EC law on Justifications for Sex Discrimination in Working Life* at the Congress web-site http://www.labourlaw2002.org. To be published in Blanpain, Roger (ed.), *Labour Law & Social Security and the European Integration, Bulletin of Comparative Labour Relations*, Kluwer Law International (forthcoming).

must also refer to the practices of the actual employer.[28] Thus also indirect discrimination can be said to require proven 'responsibility' for discriminating practices on the part of the individual employer. Any comparison must refer to the practices of the employer himself, reflecting the whole 'pattern' of differential treatment – both the negative and the positive side. It is not enough that the differential treatment at issue is notorious throughout society in general.

The new Article 2(2) now contains the definitions of direct and indirect discrimination. Indirect discrimination is assumed to take place 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex …'. According to the New Directive national law or practice may provide in particular for indirect discrimination to be established by 'any means including on the basis of statistical evidence'.[29] The express definition here draws upon the wording of the new Article 13 Directives rather than the Burden of Proof Directive[30], and can be said to provide a somewhat wider scope of how to show a *prima facie* case of indirect discrimination.

Moreover, everything would change, should the European Court of Justice accept the ban on indirect discrimination to be used instrumentally to promote substantive equality between the sexes in parallel with the use of the indirect discrimination concept in 'free movement cases'.[31]

However, despite its potential the concept of indirect discrimination has been said to have basically failed to re-evaluate and change the underlying reference norms in working life to the benefit of substantive equality.[32] The potential of the concepts of indirect discrimination so far has thus been hampered in the process of application. *Anti-discrimination law not only needs to present a negative face, but also a positive one.*

Professor Bercusson, at the Stockholm conference, recalled how the issue of justifications is related to managerial prerogatives, at the heart of labour law. The requirements of justifications for differential treatment may well result in general just cause requirements on managerial decisions. Equal treatment law may also aim at formulating positive/substantial requirements on managerial decisions/working conditions.[33]

Professor Marie-Ange Moreau, also at the Stockholm conference, presented the very interesting idea of a widened scope for the requirement on adjustment measures now

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[28] Compare the recent case C-320/00 *Lawrence and Others* (judgment of 17 September 2002, not yet published).

[29] The preamble paragraph 10.

[30] '… *would* put… at a particular disadvantage' as in Article 2(2)(b) the Article 13 directives compared to '*disadvantages a substantially higher proportion* of the members of one sex' in Article 2(2) the Burden of Proof Directive. See also, for instance, Sophia Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality, The Proposed Amendment of Directive 76/207, Comments and suggestions,* Athens 2001 p. 41.

[31] See further Numhauer-Henning, Ann, Introduction, Equal Treatment – a Normative Challenge, in: Numhauser-Henning, Ann (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer, The Hague 2001 p. 8.

[32] *Ibidem* p. 2.

[33] See further, for instance, Rönnmar, Mia, The Right to Direct and Allocate Work – From Employer Prerogatives to Objective Grounds, in: Numhauser-Henning, Ann (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer, The Hague 2001.

applying to disabled people, to all underrepresented groups.[34] Such ideas relate in an interesting way to the amended Equal Treatment Directive's new rules on preventive measures, equality plans and special bodies to promote equality between men and women.[35]

There is, in my opinion, a considerable risk that an ever growing number of groups to be protected against discrimination will incline the notion of discrimination even closer to the Aristotelian concept of formal equal treatment as the least common denominator than hitherto. The Article 13 Directives here do build on a weaker ground than gender equality due to the new provisions after the Amsterdam Treaty, which in the area of gender equality thus demand a positive and proactive approach. However, as formal equal treatment has proven ineffective or at least insufficient to come to terms with substantive differential treatment in the real world *there is also the possibility that such a general development will open up for a more pro-active approach to tackle the real problems of labour-market and society*. As seen from a number of policy documents, the question of social inclusion – not least into the labour market – whether of women and the elderly, or of the citizens of new Member States or the disabled, must be considered a major concern for the future. To further such developments the Aristotelian concept of equality is clearly not enough but must be complemented by a plurality of different equality concepts and positive measures in the broadest definition.

[34] Moreau, Marie-Ange, Justifications of Discrimination, at the Congress web-site http://www.labourlaw2002.org. To be published in Blanpain, Roger (ed.), *Labour Law & Social Security and the European Integration, Bulletin of Comparative Labour Relations*, Kluwer Law International (forthcoming).

[35] As regards this line of argument, see also Neal, Alan, Disability Discrimination at Work, in: Numhauser-Henning, Ann (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer, The Hague 2001.