PROTECTION AGAINST DISCRIMINATION AND GENDER EQUALITY

HOW TO MEET BOTH REQUIRE-MENTS

THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LAW:
THE ROLE OF SPECIALISED BODIES REPORT OF THE SECOND EXPERTS' MEETING, 20-21 MAY 2003
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INTRODUCTION

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Both the Racial Equality Directive of 2000 (*Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*) and the 2002 amending Sex Equality Directive *(Directive 2002/73/EC 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*) require EU Member States to designate bodies for the promotion of equal treatment. Existing specialised bodies with this purpose differ in their structures and mandates, but each share the commonality that they must adhere to the requirements of EU anti-discrimination law. This is the starting point for the project *Towards the Uniform and Dynamic Implementation of EU Anti-discrimination Legislation: the Role of Specialised Bodies*, which is supported by the European Community Action Programme to Combat Discrimination 2001-2006. The project seeks to promote the dynamic interpretation of EU law. The commonalities of the grounds of discrimination must be identified, as must the differences.

This publication documents the second in the series of 7 experts' meetings organised under the specialised bodies project. The meeting was hosted by the Austrian Ombud for Equal Employment Opportunities on 20-21 May 2003 and discussed 'Protection against Discrimination and Gender Equality – how to meet both requirements'. The Austrian Ombud is the only partner in this project that specialises exclusively on gender issues, and we therefore wanted to focus attention on the overlaps in and the differences between gender equality on one hand and protection against discrimination of groups and minorities on the other.

While the link between the Racial Equality Directive, the Framework Directive (*Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, which prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation) and the EC sex equality directives is very close, gender experts have always maintained that differences must be drawn in the concepts, strategies and techniques devised to reach two separate goals: equality between the sexes and protection against discrimination for everybody who needs it.

As was to be expected, this topic generated a passionate debate reflecting a spectrum of viewpoints, fuelled by the experience of participants who represented specialised bodies from across Europe. The approaches taken by these bodies to combating discrimination on the different grounds of discrimination are not always the same, and their structural organisation differs as a result.

Three distinguished experts in the field of gender discrimination have contributed to this publication. Elisabeth Holzleithner, Christa Tobler and Anna Sporrer were asked to speak at the Vienna meeting and to consider how the experience of working towards gender equality can be drawn upon in the implementation of the EC Racial Equality and Framework Directives. Elisabeth Holzleithner, assistant professor at the University of Vienna, analyses how sex discrimination differs from discrimination on other grounds and how those grounds of discrimination relate to each other and what is special about the respective grounds. Christa Tobler, assistant professor at the University of Basel and lecturer at Leiden University, considers what lessons can be learned from EC sex equality law for the newer areas of discrimination covered by the Racial Equality Directive and the Framework Directive. Finally, Anna Sporrer, member of the European Commission's Network of Legal Experts on the application of Community law on equal treatment between women and men and former head of the Austrian Equal Treatment Commission, considers how best to implement EC law on protection against discrimination and gender equality into national law. An account of the exchange between the specialised bodies' staff present at the meeting and the conclusions from workshops on a series of themes is also provided.

FACES OF DISCRIMINATION: THE CASE OF SEX EQUALITY

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Historically, the European Union has focused on discrimination on grounds of nationality and gender.[1] Recent years, however, have witnessed a remarkable expansion of prohibited grounds of discrimination in European Union law. Article 13 of the EC Treaty lists 8 such grounds,[2] empowering the Council to take appropriate action to combat discrimination based thereon (therefore Article 13 does not outlaw discrimination on those grounds but is a norm that constitutes a basis for Community action). The Charter of Fundamental Rights of the European Union, after citing the principle of Equality before the law in Article 20, even quotes 17 prohibited grounds of discrimination in Article 21(1)[3] and adds the ground of nationality in Article 21(2).

It can be said that the expansion of the grounds of discrimination is nothing more than a differentiation of the principle of equality and a rejoinder to the fact that the human mind seems to be limitlessly inventive when it comes to treating fellow human beings badly.

The context of a growing body of anti-discrimination law provokes the question of how those grounds of discrimination relate to each other and what is special about the respective grounds. To set the pace, I want to introduce a concept of equality that is sphere-sensitive, which is important considering the complexity of the societies we live in. I want to elaborate what is at stake when it comes to equality and discrimination and how different kinds of discrimination can be dealt with.[4] In doing this, I focus on sex equality, this being the task of my paper. The aim is to analyse the special role sex discrimination plays within society's spheres, especially in the "public" and "private" spheres, and to demonstrate their interplay, which still constitutes a major obstacle to women's full equality.

The framework, however, is meant to be useful for conceptualising equality and discrimination as such. It is intended to meet the demands of an intersectional approach to equality. What do I mean by that? We have all learnt from the critique expressed by a multitude of voices.[5] They have warned of carelessly prioritising sex discrimination and thereby blinding out power vectors such as race, ethnicity, class, sexual orientation, age and ability, to name only some of them. These power vectors are neglected to the detriment of analytical clarity. They are also neglected to the detriment of conceptualising adequate responses to the situations of people who are victims of different kinds of discrimination.

This is one side of the coin. The other is, however, that the intersectional approach should not keep us from analysing the specific workings of singular power vectors. Sex discrimination is "special" as discrimination on any ground is "special" in its particularities. Certainly these singular power vectors like sex, race, class or sexual orientation cannot be completely isolated from each other. But they do have different foundations, expressions and effects and demand different remedies. Intersectionality, in other words, should not keep us from focusing, although the framework of our focusing has changed considerably. It has changed in that we should be cautious concerning the norms and universals we implicitly create (the usual unstated norm of sex discrimination discourse is the white heterosexual middle class female with career aspirations).

[1] *For an overview see Bell 2002, 32-53.*
[2] *Sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*
[3] *Sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.*
[4] *See on the issue Bell 2002 with special focus on the discrimination grounds of racism and sexual orientation.*
[5] *Raised in diverse anti-essentialist approaches to the human condition, to be found in compilations such as Dowd/Jacobs 2003.*

1. EQUALITY

To pin down different forms of discrimination against different categories of persons (or "groups"[6]), we have first to explore the concept of equality and second complicate it by differentiating several spheres in which goods are distributed and in which discrimination can occur.

So first, let me sketch a theory of equality. My starting point is the ordinary formula that is usually quoted when equality is the issue: that equal things be treated equally and unequal things unequally. Of course, this definition of equality only shifts the question. We have then to ask what it means that certain things and situations are equal and in which respects, that is, which differences "count".[7]

In this context I want to introduce another, more substantial notion of equality, following political philosopher Ronald Dworkin. He introduces the fundamental principle of being treated as an equal (Dworkin 1978, 272-273). Being treated as an equal means to be treated with equal respect (as to one's autonomous decisions) and concern (as to one's needs). Let me focus very briefly on both dimensions.

Autonomy means the ability to live an autonomous life, that is, a life, which is constituted by what Joseph Raz calls the "conditions of autonomy". Those conditions of autonomy "consist of three distinct components: appropriate mental abilities, an adequate range of options, and independence" (Raz 1986, 372). Appropriate mental abilities are the precondition for (rationally) deciding which options to choose during the course of one's life (Raz 1994, 119). The "adequate range of options" is what distinguishes this concept of autonomy from a crude "individualism" that has so often been criticised by feminist theorists, since options are socially made available. Such options must be worth the effort of pursuing them. "Independence" is opposed to manipulation and coercion. All those conditions "admit of degree" (Raz 1986, 373). I will return to this concept later.

As to the needs that demand equal concern, certainly different abilities and life circumstances demand different responses in different spheres. Several philosophers have attempted theories of the human need concerning physical and emotional well-being. Martha Nussbaum (1990), for example, has developed a thick vague theory of the good in which she aims to pin down the basics of what it means to live a human life to the fullest. We can roughly say that the needs of individuals and groups of people will depend on the given circumstances of their present situation (constituted by law and "real life" circumstances) as well as an ideal situation or the prevailing ideal of a successful life as seems legitimate and possible. (Of course, autonomy and needs are intertwined. I do not intend to reinstate a traditional mind/body or nature/culture divide).

One aspect of this principle of treatment as an equal is the underlying "genuine principle" that "no one should suffer from the prejudice or contempt of others" (Dworkin 1977, 108). But discrimination does not only result from prejudice and contempt, but also from *rational* decisions that are framed by the principles, norms and values in the respective *spheres* that are separated as well as interconnected. Michael Walzer (1983) has conceptualised the spheres in which autonomous choices are to be made and needs are to be met. The spheres he differentiates are the following: "membership"; "security and welfare"; "money and commodities", that is, the market; "office", that is, politics; "hard work"; "free time"; "education"; "kinship and love", that is, among others, the domestic sphere; and "divine grace".

[6] *For an elaboration of the concept see Young 1990.*
[7] *Alexander Somek (2003, 11) drastically calls this formula "metaphysical nonsense" since cases or groups of cases appear as equal or unequal barely in the light of a political purpose.*

In all of these spheres goods are distributed. In the distribution of the goods, the values of the respective spheres are invoked as they have developed over time (that makes Michael Walzer a thinker who is associated with communitarianism). That is, the value of the goods and the rules of their distribution are "traditional"; they are based on "shared understandings". While this may be a precise observation, one certainly cannot simply stop at this point, since many of the traditional values are problematically gendered or falsely gender-blind.[8]

As to the interconnection of the spheres, Walzer primarily focuses on the problematic side of transgression: the spheres have to remain autonomous. That is why Walzer introduces an "open-ended distributive principle: *No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x.*" (1983, 20)

To put the abstract in a more concrete way, the status of a person in one sphere should not influence his or her status in another sphere. Privilege in one sphere should not be followed by privilege in another; a certain positioning in one sphere should not result in a certain positioning in another. We will see how this rule can be invoked when it comes to explaining sex discrimination, since the (actual or alleged) positioning of women in the "private" sphere has severe effects on women's positioning in all "public" spheres.

Quite obviously, treatment *as an equal* as sketched here will sometimes lead to being treated *equally* (i.e. identically). But this is not always the case. Sometimes equal treatment might itself amount to *discrimination* because the norms invoked are discriminating in themselves. A legal system that does not provide rules concerning maternity as a physical process – norms that can only apply to women – will be discriminating in that a fundamental female experience is not being provided for.[9]

2. DISCRIMINATION

Let us begin our exploration into the complexities of discrimination and start with a working definition: the individual right to be free from discrimination can be defined as the right to be free from *illegitimate adverse treatment* in social cooperation and concerning the distribution of important goods like jobs, housing or physical and psychical integrity. Illegitimate adverse treatment is treatment that disadvantages without reasonable and objective justification. (What can be seen here is that the concept of discrimination is rather limited.) What exactly constitutes discrimination in an actual case in a specific sphere is often a highly charged and contested question and depends on the underlying theory as well as the norms and values that are embodied in the concept of equality.

At this point, in order to clarify what I am thinking of, an explanation of different strains of feminist legal theory and how these strains have perceived discrimination seems to be apt. Let me sketch two of them briefly.[10] The first strain, "equality doctrine" (Frug 1992, 4-6), questioned the legitimacy of categorising along the lines of gender as such. Any such differentiation was suspected to amount to discrimination.[11] Any such differentiation was presumed to be too broad and insensitive a categorisation. The law, according to the equality doctrine, should abolish all references to gender differences except where they concerned "unique physical characteristics".[12]

[8] For a discussion of this problematic aspect of Walzer's theory see Okin 1989, 62-68.

[9] Dworkin's famous example is instructive: of two children who need a certain medication, and there is only one dose, one would die whereas the other would only feel sick but would survive. Treating the children "equally" in the sense of "identically" would lead to the death of one child. Treating them with equal concern and respect amounts to putting up with the one child's sickness in order to save the other. Giving the child who is only going to feel sick no medication does not mean that the child is not respected or treated with concern, given the limitation of resources. (And these are the circumstances of justice: Rawls 1999, 110, shortly lists, among the objective circumstances, moderate scarcity and, among the subjective circumstances, the conflict of interests.)

[10] A longer version in German can be found in Holzleithner 2002, 22-42.

[11] The first move of typically made by feminist legal theorists: "when you see a gender classification, ask whether the classification is valid." (Cain 1997, 16)

[12] Brown et al. 1971, 893- 896. However, "[t]he radical notion that the law should ignore or undo distinctions made on the basis of sex quickly became the doctrine that women who were similarly situated to men should be treated the same as men, and nothing more." (Cain 1997, 17)

The second strain, "equality theory" (Frug 1992, 6-7), questioned this approach as too stern, as amounting to blindly accepting the "male norm" by claiming that women could be "the same".[13] The "Equality Doctrine", the critique went, made sense for the exceptional woman who wanted to make a career along the male model, but not for the "ordinary woman" in her real life context. The law should take into account the "real differences" between the sexes that are not only biological, but also cultural. Women had different needs[14] and those needs should be treated with equal concern to male needs. Discrimination was constituted by "wrong" classifications. [15]

But also the idea of "special needs" does not dismiss the prevailing male norm that remains "general" while women remain "special". The idea can be transferred to other classifications that are the basis of discrimination. It is one feature of general norms that they constitute insiders and outsiders, those who "function" without any problems and those who have to be provided for. "Special needs" are such that they are ignored at worst and provided for at best, but those who provide for them believe that they do those who are deviants from the norm a *favour*. Men, who usually have better, more important things to do, "helping" women in the household, which is "really" a woman's duty, is the paradigmatic case.[16] This is (still) "normal".

Consequently, working against discrimination, open or hidden,[17] always also implies "working the norm(s)" of equality in different spheres. What is regarded as "treatment as an equal",[18] according to the prevailing norms, may be revealed as rationalisation of discrimination. At this point, I want to stress two important aspects of the phenomenon of discrimination.

First, discrimination is often "rational" (Somek 2002). Reasons can be detected for treating people in certain ways that (might) amount to discrimination. It can be *rational* to invoke discriminating stereotypes because they respond to the realities of a real or imagined majority of group members. Thereby stereotypes can become self-fulfilling in that the members of the group adapt to them. This, however, is not to say that all kinds of discrimination are rational. Especially group-based harassment and violence, which is simply the expression of hatred or fear, I would call fundamentally irrational.

A second point: discrimination is not necessarily about mean intent. People are not only discriminated against if they are pursued by an actor who means badly. Discrimination can lie in the *effects* of treating some people in certain ways. That is also to claim that certain ways of acting convey messages irrespective of the actual intent of the actor.

The next question is what does discrimination do? In other words, and returning to Ronald Dworkin's definition of being treated as an equal, combined with the Razian notion of autonomy, what are the effects of being discriminated against?

As to autonomy: one effect is that the range of options is diminished compared to that of members of relatively privileged groups. First, one is not respected fully in one's autonomous choices because one is reduced to a stereotype. Such a stereotype sets the standard of how somebody in a certain position has to or is typically going to behave. This means that one cannot realise a choice one would have liked to have made due to discrimination, even though one has lived up to the prevailing norms and values (the issue of feminist equality doctrine). Discrimination occurs because one is suspected to *not really* live up to those norms and values.

Another effect concerns independence: victims of discrimination are being forced into choices that are not

[13] "Male norms" have men in their grip as well, but they are more empowering for men than for women – according to certain (most?) strains of feminist jurisprudence, a man who is discriminated against for racist reasons would still participate in male supremacy because he heads the private sphere. And this is certainly not the only case where that can be described as the simultaneous exercise of privilege along with victimisation.

[14] Those different needs and also women's different features are developed in "gynocentric" feminism with its gender pride and resistance to male concepts of living. One starting point of gynocentrism was Carol Gilligan's "In a different voice" (1982) that provoked a broad debate about the differences between the sexes and what that means in scientific fields as well as in different settings and contexts. See Young 1985.

[15] Both strains, doctrine and theory, were basically liberal in their framework.

[16] As much as men (or a privileged male groups) setting themselves as normative is problematic, the same strategy is problematic when it comes to feminism as well. The overall argument that can be extracted from this observation is the following thesis: "the lives of women of color cannot be seen as a variation on a more general model of white American womanhood." (Zinn/Dill in Dowd/Jacobs, 24)

[17] If there is no gender classification one is well prepared to "look for the hidden gender bias" (Cain 1997, 17).

[18] And be it that "treatment as an equal" means that "special needs" are met.

necessarily their own. The choices of discriminated people are affected by "more" constraints than a relatively privileged group. Such forces are constraints out of one's reach that taint the choices.

The other side of discrimination is the way people are not treated with equal concern in that their needs are not adequately met. This is one point where what Martha Minow (1990, 20) calls the "dilemma of difference" arises: "when does treating people differently emphasize their differences and stigmatise or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatise or hinder them on that basis?".

So what about the needs resulting from *stereotypical* ways of living? That is, what about the needs that result from ways of living that for example feminists have trouble understanding because they believe that these are not autonomous but result from diverse constraints (that may nevertheless be legitimised by reference to private preferences)? Examples would be decisions of women to sacrifice their careers for the benefit of their family, or, according to some feminist theorising, choosing the profession of a sex worker. If these decisions are respected fully and the resulting needs are met "adequately", a side effect is the strengthening of norms of stereotypical living.

Since this is a dilemma, it need not be resolved but we can simply watch the way it works and identify the issues. The task of feminists and critical scholars is to analyse the context of women's choices and explore in how far they are constrained and why this might be so.[19] The quest for remedies is the next step.[20]

3. FACES OF OPPRESSION

The discrimination of people by virtue of their being a member of a certain group leads to their oppression. In what follows, I want to elaborate on what that means and give several examples that refer to the particularities of sex discrimination.

Discrimination constitutes "groups" of people that are inter alia united in (or unified by) their oppression. They may share an identity (or, to put it in less static terms, a process of identification), a history, perhaps a legal history, and they may feel solidarity on that basis (or another). The notion of the group is tricky, and there is good reason not to state that women are a group, but that depends on how the notion is used. "Women" are a group insofar as "men" are a group, insofar as "the group of women" has historically been and currently is treated differently from that of men. Oppression is, and here I follow the exposition by Iris Marion Young, constituted through the following processes:

The first process is exploitation. Exploitation can be defined as "the systematic transfer of power of some persons to others, thereby augmenting the power of the latter, without compensating adequately for the services of the former" (Young 1990, 49). Women's work in the domestic sphere is one classic example that, I believe, is especially perfidious since its unpaid character is in part legitimised with reference to love.

Marginalisation, the second face of oppression, is a state of dependency in which people are expelled from meaningful participation in social life and thus potentially subjected to severe material deprivation; "single mothers" are an especially vulnerable group.

[19] For an excellent elaboration on the issue of the "free choice" of "working mothers" by showing the interconnection of the corset of public expectations and the alleged individuality of private preferences see Williams 1991.

[20] Those remedies should enable one to live alternative ways of living without the fear of being punished legally and socially.

Oppression's third face, powerlessness, is a condition of being the object of power without exercising it oneself; "the powerless are situated so that they must take orders and rarely have the right to give them" (Young 1990, 56). These three faces of oppression refer "to relations of power and oppression that occur by virtue of the social division of labour" (58).

The fourth face of oppression, cultural imperialism, refers to the experience of how the dominant groups in society universalise their experience and culture and establish them as the norm. In doing that, groups that do not conform are stereotyped and marked as a deviant "other". By virtue of this process, difference becomes marked predominantly as "deviance and inferiority" (59).

The fifth face of oppression is violence: "to be oppressed means to live in the fear of random, unprovoked attacks which have no motive but to damage, humiliate or destroy.[21]" Such violence is directed at people simply by virtue of their being members of a group. The violent acts are highly "irrational", cruel acts motivated by fear or hatred. They are demonstrations of power, sometimes combined with sexual components as in sexual harassment. Infamously, oppressed groups may have the additional experience of not having their experience counted. "Gay bashing" is an obvious example in that many legislatives do not include this form of violence in hate crime laws.

Young stresses that facing any of these five conditions allows for calling a group oppressed. But the particularities of oppression show themselves differently, and "different group oppressions exhibit different combinations of these forms, as do different individuals in the groups.[22]" Besides, discriminated groups are not "naturally" benign to their own "outsiders" nor to certain "insiders". Women in different cultural surroundings are an obvious example. Their bodies are often the playing field of religious and/or cultural traditions that narrow the room for manoeuvres across gender lines.

Sex is certainly only one ground of discrimination and of oppression, but it is especially pervasive: the bodies of those who are discriminated against on *other* grounds are always also *gendered* and the "group" that is the focus of sex discrimination on this ground "naturally" makes up (more than) half of the population.[23]

Iris Young pinpoints the interplay of various forms of oppression concerning gender: women's oppression consists partly of a systematic and unreciprocated transfer of powers from women to men. Women's oppression consists not merely of an inequality of status, power, and wealth resulting from men excluding them from privileged activities. The freedom, power, status, and self-realisation of men is possible precisely because women work for them. Gender exploitation has two aspects, transfer of the fruits of material labour to men and transfer of nurturing and sexual energies to men.[24]"

4. WOMEN IN DIFFERENT SPHERES: THE LABOUR MARKET AND THE DOMESTIC

We can now bring together the different threads of the theoretical framework I have tried to sketch. I think that a combination of the different theoretical threads helps identify the special status of sex discrimination. Walzer's theory of the spheres of justice and their interconnection is especially instructive. The discrimination and oppression of women is a function of their (alleged) status and duties in the domestic sphere.

[21] Amazingly, the theories of justice are often silent about violence as much as they are silent about cruelty. See Shklar 1984, 7-44 ("Putting Cruelty First").
[22] Young 1990, 64.
[23] Moreover, the "other" ground may have to do with the transgression of an established gender role. The transgression may be a result of "nature" (the birth of an intersexed child), "psychology" (the transsexual phenomenon), or love, affection and the sexual impulses (sexual orientation).
[24] Young 1990, 50.

I choose to focus on the interconnection of the domestic sphere and that of the job market for obvious reasons. One of them has to do with the framework of EC anti-discrimination law. The equal treatment directive 76/207/EC outlaws discrimination against women, now as ever, in the job market.

To function properly in the job market, certain requirements must be met. It is very difficult to function properly if one is the primary carer in the domestic sphere. For to function as a worker, one must have enough time to work and have free time. Double and triple burdens render this close to impossible. People, usually women, who are doubly burdened are disadvantaged not only in the job market but also in the other spheres: they have less free time, they do more hard work (and hard work it is to take care of a home), and their work is intimately connected not with the idea of pay but with that of love duty.

The prevailing option of today's "working mother" (who has ever heard the notion of the "working father"?) is to hand over "her" responsibility for a child or another dependent person to usually another woman who is even more disadvantaged (such as migrant women who clean and care); their disadvantaged position makes them available to others financially (Williams 1991).

The interconnection of the labour market and the domestic sphere has infamously been cut short by the European Court of Justice in the case of *Hofmann* v. *Barmer Ersatzkasse*. Mr. Hofmann claimed the German law granting paid leave after the birth of a child and after the end of expiry of the protective period (in the case of Germany 8 weeks) only to mothers but not to fathers discriminated against him on the basis of sex and that this discrimination was outlawed by directive 207/76/EC. He was joined by the Commission which called for a restrictive interpretation of Art. 2(3) of the directive, the maternity exemption.

The Court, however, chose to argue that this was not a question of discrimination in the context of the labour market but one of family arrangements alone. It came to the conclusion that "[d]irective 76/207 is not designed to settle questions concerning the organisation of the family, or to alter the division of responsibility between parents." The Court could easily have construed the question of shared parental responsibility as one that is so strongly interconnected with women's participation in the labour market that there can be no question as to the responsibility of the EU Member States to provide for parental leave, and not only maternity leave. But instead, the court chose to construe the rationale of the directive narrowly, insisting on the special situation of women.

The rationale of the "maternity" exception was construed broadly: "maternity leave granted to a woman on expiry of the statutory protective period falls within the scope of article 2(3) of directive 76/207, in as much as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely." The invocation of the term "motherhood", which is broader than "maternity", conveys the message.[25] The Court's reasoning was highly charged with gender stereotypes and also blind to the immense pressure on *fathers* not to take paternity leave. The message was and is: it is women's wish and duty to take care of the children. Fathers may "help".

In constructing men and women's societal roles and self concepts, a fundamental question is at stake, namely that of the concept and organisation of society's reproduction. If that sounds too harsh and detached: at stake are the highly charged relations of the genders, the presence and the future of life and love, of heterosexual love

[25] *Ellis 1998, 241-243.*

as well as the love and care of mothers for their children and, as anxious rhetoric as to the unwillingness of people to have children shows, the future of the nation.

5. CONCLUSION

The intersection of race and gender and other vectors of power such as age, sexual orientation and ability is complex and interactive and I do not mean to say that race and sex and other vectors of power are separable and additive forms of discrimination that can easily be analytically separated. However, I mean to say that we should not get lost in dispersion. In law, we have to operate on the basis of certain claims, and this operating is often simplifying. It is one of the features of law to reduce complexity, and necessarily so. There is no way out of that.

The situation of a white able-bodied heterosexual middle class male should not be taken as the universal norm from which deviations can be observed. This group of people has a wide range of special needs that have been accommodated best since they were able to render them universal and make other people who are less privileged work for their benefit.

Likewise, the situation of a white able-bodied heterosexual middle class woman should not be taken as the universal norm from which deviations can be observed. That woman is no more universal than her coloured working class lesbian sister. The kinds of discrimination both will face may be very different. But since they are "women" and "womanhood" is still an existential marker in our societies, I doubt that the discrimination of a woman of any situation will not have a gender component. Indeed, their situation as non-white or disabled or a member of a religious group may aggravate one feature that always occurs in discrimination: the reduction to being the discriminated feature, in this case, a woman. The meaning of this reduction is at least twofold: one is that being a woman means being for the service of men and the other is that being a woman amounts to an alleged malfunctioning due to the alleged traits of the female sex.

This is how my conclusion comes to be that sex discrimination, often aggravated by other forms of discrimination and sometimes in conflict with them, should and can (still) be dealt with separately from other grounds of discrimination.

To conclude, sex discrimination is special in that it is based on stereotypes and realities connected with the dominant concept and organisation of reproduction.[26] Every woman in her reproductive age is confronted with these realities; they are the background sound to her aspirations. Reproduction is used in the broadest possible sense of the term, containing services for children and husbands that are ideally provided for with love. So the question cannot be separated from the underlying and further issue of loving relationships between the "sexes" and their "outcome". This, I believe, is what renders the issue so highly charged.

Having stated that, let me finish by asking one final question, and this question has to do with the thesis, implicit in my remarks, that anti-discrimination is not enough, because anti-discrimination is an individualistic concept.[27] The question is, should positive action be taken for the improvement of "other" underprivileged and discriminated groups, should their equality be promoted? The answer is a firm yes that is combined with one condition:

[26] This is not to say that anxieties as to the whiteness of the nation can be overlooked. The dominant concept of reproduction is also a racist and racialising project, though certainly less explicitly so than it is gendered.

[27] See Ellis 1998, 312-336 on the limits of the concept of discrimination and the necessity of broadening the approach to sex equality, an aim that "will need the backing of a Court of Justice which demonstrates rather more enthusiasm for the principle of sex equality than the court currently shows" (336).

I believe that positive action should be taken only if it is gender sensitive. This amounts to my embracing the concept of gender mainstreaming. Fighting discrimination on other grounds should not result in gender blindness, as much as fighting sex discrimination should not lead to being blind to the other grounds. That is what intersectionality is all about.

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HOW TO USE THE EXPERIENCE WITH SEX DISCRIMINATION FOR THE OTHER GROUNDS

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WRITTEN TEXT OF THE ORAL PRESENTATION

1. INTRODUCTION

EC legislation on discrimination on grounds of race, religion, disability, age and sexual orientation is quite recent. Art. 13 EC, the provision which gives the EC the explicit competence to legislate in these areas, was only introduced into the Treaty in the framework of the Amsterdam Treaty, and as such has been in force since 1 May 1999. Meanwhile, two Directives have been adopted on the basis of this provision in what has been called "record speed for social Europe", namely the Race Directive and the so-called General Framework Directive. There is no case law on these Directives yet. By contrast, there has been EC sex equality law from the very beginning of the Community. The Treaty provision on equal pay for men and women (then Art. 119 of the EEC Treaty, now Art. 141(1) and (2) EC) has been in force since 1 January 1958. With time, a substantial number of Directives on sex equality issues developed,[29] together with a large body of case law on the meaning and effect of EC sex equality legislation. This difference in time and development begs the question what lessons could be learnt from EC sex equality law for the still young areas of discrimination covered by the two more recent Directives mentioned.[30]

Perhaps the most obvious lesson concerns the *importance of the Court of Justice's case law*.[31] Why is it so important? First, EC law takes precedence over national law. More precisely, all kinds of EC law take precedence over all kinds of national law. This means that the provisions of an EC Directive may take precedence over a national Constitution, as is exemplified in the Kreil case where the Court's interpretation of Art. 2(2) of the Second Equal Treatment Directive (in its original version) led to a change of Art. 12a of the German Constitution. The case was brought by a woman who complained about the fact that she was refused employment in the German army simply because of her sex. In the light of such examples, it is extremely important to understand the reach and the meaning of EC law. EC law is interpreted and applied on many levels but it is the Court of Justice in Luxembourg that enjoys the monopoly regarding its authoritative interpretation, in particular through the preliminary ruling procedure. Experience in the area of sex equality shows that the Court's case law, and thereby also the precise meaning of EC non-discrimination law, is *not easily predictable*. When the UK House of Commons[32] discussed the consequences of the then proposals for two new EC Directives to be adopted based on Art. 13 EC, it observed: "It is clear from the experience with the Equal Treatment Directive that the ECJ can interpret legislation of this type with unexpected results […]. The consequences of adopting this proposal, and its eventual impact on existing UK legislation [….] is not readily predictable." The reason for this situation lies mainly in the Court's interpretation technique which is rarely historical but rather purposive and dynamic (or teleological).

The importance of the Court's case law is confirmed on various levels of the law, concerning in particular the legislation's scope, the precise nature and reach of the rights granted by the law, the possibilities of derogations and the protection of the rights granted. Surprises and problems can be found on each of those levels. In the following, I will give examples from the Court's case law and I will ask in how far they might be relevant for discrimination grounds other than sex. Thereafter, I will also touch upon some more fundamental aspects of sex discrimination law that raise questions.

[29] A useful overview on the sex equality law in force can be found on the internet, at http://europa.eu.int/comm/employment_social/equ_opp/rights_en.html.

[30] For a somewhat more extensive but still general overview on EC sex equality law, see TOBLER Christa, 'Sex Equality Law in the EU Context', in MARTINHO TOLDY Teresa/CASQUEIRA CARDOSO João (eds.), A Igualdade entre mulheres e homens na europa. As portas do século XXI/Equality Between Women and Men in Europe: At the Gateway of the 21st Century, Oporto: Edições Universidade Fernando Pessoa 2000, 21-52. An updated version can be obtained from the author.

[31] A list of the Court of Justice's decisions and the secondary law quoted in this contribution can be found at the end of the text.

[32] UK HOUSE OF COMMONS, EUROPEAN SCRUTINY COMMITTEE, Commission Proposals to Combat Discrimination, Session 1999-2000, Nineteenth Report, xiv-xxiii, London: The Stationary Office 2000, n. 27.

2. LESSONS FROM THE COURT'S CASE LAW

2.1. The scope of non-discrimination law

Obviously, non-discrimination law can be relevant within its field of application only. RUST[33] in that context aptly speaks about *the ear of the needle* through which a case must pass before the question of discrimination can even be posed. If a case does not pass this hurdle, it cannot involve legally prohibited discrimination but at the most factual discrimination, that is discrimination which is unacceptable according to standards other than law (morals, sense of justice and the like).

a) Limited scope of the existing legislation

As far as EC non-discrimination law is concerned, there may be important *limitations of scope* indicated in the law itself. The widest possible scope is that of Art. 12 EC, which prohibits discrimination on grounds of nationality (EU Member State nationality only) in all areas of the Treaty. By contrast, EC sex equality law so far has been limited to work-related issues, including social security. Even more limited is the scope of the General Framework Directive which concerns employment only. By comparison, much wider is the reach of the Race Directive which covers essentially employment, social protection, education, social advantages as well as access to, and supply of, goods and services that are available to the public. Obviously, these differences are very important when it comes to cases of multiple or intertwined discrimination.

b) Wide interpretation of scope in principle

As a general principle, *basic notions defining Community rights* are interpreted widely by the Court (e.g. "pay", "working population"). This is a general rule of EC law and not specific to EC sex equality law. Therefore, the same will apply in the case of the new Art. 13 Directives, for instance regarding the notion of services (which in the context of EC free movement law, where it is also relevant, requires an element of pay – will the same be true in the context of social law?) and regarding the notion of social advantages (very widely interpreted by the Court in EC free movement law). In spite of the principle of wide interpretation, there may be cases that are not covered, even though they certainly seem to involve sex discrimination from a factual point of view (e.g. the Court's judgment in the cases Jackson and Cresswell; note the different opinion of the Advocate General).

Provisions limiting the scope of EC rights are interpreted narrowly. For instance, the Third and Fourth Equal Treatment Directives allow the Member States to exclude from their scope issues concerning the different pension age of men and women (Art. 7(1)(a) and Art. 9, respectively). An example in the context of the General Framework Directive is the exclusion of cases of discrimination on grounds of nationality and of rights of third country nationals (Art. 3), and further, the exclusion of regulations concerning a person's marital status (recital 22 of the preamble). The latter is particularly important in the context of discrimination on grounds of homosexuality. WAALDIJK[34] rightly criticises that such an approach maintains an indirect form of discrimination on grounds of homosexuality.

In the context of EC sex equality law the issue of scope is particularly important because we have a number of different Directives. *Which one applies?* A famous example is provided by the Court's case law on the meaning of the notion of "pay" which is at the centre of the principle of equal treatment of men and women under

[33] *RUST Ursula, 'Nadelöhr und Einschätzungsprärogative - die Rechtsprechung des Europäischen Gerichtshofes zur (un-)mittelbaren Geschlechterdiskriminierung im Sozialrecht', Streit 1997, 147-154, at 149.*

[34] *WAALDIJK Kees, 'Onderscheid wegens geschlachtsgelijkheid. Burgerlijke staat, sexuele gerichtheid of geslacht als grond?', Nemesis 1997, 117-120, at 118/119.*

Art. 141(1) and (2) EC and the First Equal Treatment Directive (or Equal Pay Directive). The most difficult issue in that regard has been the question whether pensions can constitute pay. Eventually, the Court ruled in the so-called Barber case law that this term also includes occupational pensions which, therefore, are not covered by the Fourth Equal Treatment Directive on social security. The difference is important because Mr Barber complained about the different pension age for men and women which resulted in different benefits: whilst such a differentiation is possible under the Directive, it is not possible under the equal pay principle.

c) Delicate issues of the division of competences

Difficulties of a special nature arise where the scope of a given Directive causes debates regarding the division of competences between the EC and its Member States. The EC can legislate only when it is given the competence to do so under the EC Treaty (principle of attribution of powers, Art. 5 EC). This happens through legal basis or enabling provisions, such as Art. 13 EC. Whatever is not covered by such provisions remains within the area of competence of the Member States. There are certain areas in which Member State competences traditionally have been particularly important, such as taxation and the armed forces. The Court's case law in the area of sex discrimination shows that here, again, there may be surprises. In Sirdar and Kreil the Court ruled that the Second Equal Treatment Directive also covers employment in the armed forces – even though this had clearly not been the Member States' intention when adopting the Directive (but they did not think of putting an explicit exclusion of this matter from the Directive's scope in the text). In Kreil, where the Court in terms of substance found sex discrimination, this caused an uproar in certain circles in Germany. However, the limit of this case law is indicated in the recent judgment in the case Dory which also came from Germany and where the Court emphasised that the organisation of the armed forces is a matter of national competence. Therefore, Mr Dory's complaint that only men have to do military service under the German Constitution was not examined in terms of substance. Obviously, in this type of case there is much more at issue than simply technical questions of scope.

2.2. The precise nature and reach of the rights granted by the law

Once a case has passed the hurdle of scope (that is, has been found to fall within the field of application of existing EC non-discrimination legislation), the next question is whether it involves an infringement of Community rights.

a) Non-discrimination versus specific rights

The EC non-discrimination Directives grant rights of a certain type only. Essentially, a distinction should be made between non-discrimination and specific rights. The latter are characterised by the fact that the law itself *defines a certain level of treatment* (e.g. at least 14 weeks of maternity leave under the Maternity Directive, at least three months of parental leave under the Parental Leave Directive).

By contrast, non-discrimination law is only about *comparatively equal treatment*, independent of the level of that treatment. Equally bad treatment is also equal. Thus, if Member State legislation provides for the same permissive rules on night work for both men and women, regardless of the health hazards of such work and its social consequences, this is accepted under EC law. EC law requires equal treatment of men and women in that regard, except in the context of biological maternity (Stoeckel; meanwhile also the Maternity Directive). Similarly, if a Member State decides to close down public toilets rather than equipping them for people with handicaps, this is – unfortunately - acceptable under EC law.

As for the new Art. 13 Directives, they are essentially about discrimination, though Art. 5 on reasonable accommodation in the General Framework Directive would seem to be an example of a specific right (though one that is vaguely formulated).

b) "Discrimination"

In the framework of non-discrimination, the meaning of the term "discrimination" is particularly difficult. Originally, it was not defined in the written law (EC Treaty or Directives) but only in case law. In EC law, discrimination is understood as related to equality and as such has traditionally meant a right to *equal treatment of comparable situations*.

The Court held in Ruckdeschel that the general 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 Schumacker (a tax law case) and Hill (a sex equality law case), the Court explained that "discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations". However, whilst in EC law this is the general starting point on equality and discrimination, in practice there is a strong *focus on equal treatment* of comparable situations. In some cases, this is evident even from the legislation's title (e.g. the titles of the Equal Treatment Directives); sometimes it appears from case law (e.g. Abdoulaye where the Court dismissed the argument of discrimination in relation to a benefit paid only to women upon a child's birth because it found women and men to be in different situations).

Within such a framework, *comparability* is a central issue (e.g. Lawrence where the Court dismissed the argument of pay discrimination because the women complaining tried to rely on the wrong comparator men) and there are only few exceptions in that regard. One example is the decision in the case Dekker where the Court stated that there can be a finding of discrimination on grounds of sex if an employer bases adverse treatment on pregnancy even though there are no men that could serve as comparators. Another example is the new provision that sexual harassment is a form of discrimination (Art. 2(3) of the Revised Second Equal Treatment Directive; compare also Art. 2(3) of the Race Directive and of the General Framework Directive). In such cases, there is no requirement of comparability as a prerequisite for a finding of discrimination.

In theory, there are *three legal forms of discrimination*: direct, indirect and structural discrimination. The latter, which connotes disadvantages flowing from a given society's organisation, deeply held views, (sometimes even unconscious) prejudices and the like, is not as such expressly addressed by EC law. In particular, there is no provision like Art. 5a CEDAW which obliges the signatory states to engage in "social engineering", that is in working towards changes in society. EC law knows the legal terms of *direct and indirect discrimination*. Originally, the distinction was developed by the Court of Justice through its case law, first in free movement law, and later also in sex equality law where there is now a large body of case law on the meaning of the concept of indirect discrimination. Later, Art. 2(2) of the Burden of Proof Directive provided the first legal definition in that regard. Both direct and indirect discrimination are now defined in Art. 2(2) of the Revised Second Equal Treatment Directive, though only for its specific field of application. It should be noted that the definition of indirect discrimination in that latter piece of legislation is slightly different from that in the Burden of Proof Directive and in the Court's case law (both of which continue to be valid within their field of application). It will have to be seen whether the Court's interpretation of the new definition will be significantly different from the old one. Thus, it is possible that the old case law cannot or only to a certain extent be relied on in the context of the new definitions.

By analogy, this would also apply to the new definitions of direct and indirect discrimination in Art. 2(2) of the Race Directive and of the General Framework Directive, which correspond to those in the Revised Second Equal Treatment Directive. Finally, it should be noted that the *dividing line* between direct and indirect discrimination is not always clear (compare the problematic and rather unclear ruling in the case Schnorbus and in particular the Advocate General's opinion on this case).

c) Discrimination "on grounds of sex"

In EC discrimination law, the prohibition of discrimination relates to certain *discrimination grounds* only. So far, there is a closed list of prohibited grounds.[35] In the area of social law, the grounds include sex, race, religion, disability, age and sexual orientation. New grounds may follow in time (e.g. genetic discrimination as mentioned in the Charter on Fundamental Rights). In the framework of a closed system, it is very important to know what is meant by the existing notions, for instance "discrimination *on grounds of sex*". In particular, if a specific ground that forms the basis for a concrete case of alleged discrimination is not explicitly prohibited under EC law, it may be possible to "include" it into an existing notion by interpreting that notion widely. Case law from the area of sex equality shows that the Court's approach to such cases may be difficult to understand. The best known example concerns discrimination on grounds of gender reassignment (transsexuality, case P. v S.) and discrimination on grounds of sexual orientation (homosexuality, in particular the case Grant), both presented to the Court at a time when the Art. 13 Directives did not yet exist. The Court found that discrimination on grounds of gender reassignment was, in fact, sex discrimination (the transsexual person who complained about a discriminatory dismissal would not have been dismissed if she had remained the biological man that he formerly used to be). The Court emphasised the importance of human dignity in that context, a remark which gave hope to another group suffering from discrimination, namely homosexuals. However, the Court – unlike its Advocate General - refused to find that discrimination on grounds of sexual orientation is sex discrimination. It essentially said that in such a case it is not a person's own sex that is at issue but the sex of his or her partner. Detailed analysis of these cases shows that it is not easy to understand, or to make sense of, the Court's reasoning. One reason for the outcome of the second case may have been an issue of competences: Art. 13 EC already existed at the time of the judgment, and the Court may have found that this indicated that only now was the Community competent to act in this field (though similar reservations were never made in the context of sex equality law where the Community legislated early on even in the absence of specific legal basis provisions for this area; instead, it relied on general provisions allowing it to legislate in the interests of the Common Market).

2.3.The possibilities of derogation

If a case has passed the ear of the needle, and if there seems to be an instance of either direct or indirect discrimination, this is not yet the end of the matter. In many cases, the law provides for the possibility of derogations.

a) Derogations or objective differences?

A first issue that raises questions in this context is whether all "derogations" indicated by the law are indeed *derogations in terms of their substance*. Some of them rather seem to take into account existing differences between men and women and in that sense simply reflect the "other side of equality", that is, equality that is based on different treatment rather than on equal treatment. Examples from sex equality law are different treatment in the context of biological motherhood (biological differences) and in the context of positive action (social and economic differences) under Art. 2 of the Second Equal Treatment Directive. However, the Court has only very rarely recognised the special nature of such "derogations" by acknowledging that EC law aims at substantive

[35] *The provisions of the Charter on Fundamental Rights are worded in an open way but this is not binding upon the Member States; Charter of Fundamental Rights of the European Union, OJ 2000 C 364/1. The Charter currently does not have the standing of legislation; see Commission Communication on the legal nature of the Charter of Fundamental Rights of the EU, COM(2000) 644 fin., point 4 subs.*

rather than only at formal equality (e.g. Thibault, Abrahamsson). On the other hand, the Court in decisions on individual cases often does not clearly distinguish between issues of comparability (objective differences) and issues of justification. Schnorbus provides an example.

b) Strict interpretation in principle

It is a general principle of EC law that derogation provisions are *interpreted strictly*. In practice, this is not always the case and then sometimes with regrettable results (e.g. Hofmann where a progressive father tried to obtain paid parental leave; the Parental Leave Directive has since been adopted which, however, does not provide for the right to payment). As far as the *specific case of positive action* under Art. 2(4) of the Second Equal Treatment Directive in its original version is concerned, the Court in Kalanke emphasised both that it is a derogation and that, consequently, the term "promotion of equal opportunities" has to be interpreted narrowly. That was the reason for the strict approach taken by the Court in that case (the Court's remark on equality of starting points and equality of results was only a side remark which, moreover, does not return in later case law). Meanwhile, things have changed. In Lommers, the Court still said that the positive action provision is an exception but this time it did not mention the principle of narrow interpretation. Instead, it emphasised the importance of the principle of proportionality. Since then, the wording of the provision has been changed in order to bring it in line with Art. 141(4) EC which was introduced through the Amsterdam revision. Art. 2(8) of the Revised Equal Treatment Directive no longer mentions equal opportunities but refers instead to "ensuring full equality in practice between men and women". Academic writers have argued that this should influence the Court's approach to positive action to make it more open. Recently, the EFTA Court took the same view (though it could not apply this approach in the context of the law of the European Economic Area because the Amsterdam Treaty revision is not part of that law; EFTA Surveillance Authority v Norway). It remains to be seen whether this will convince the Court of Justice. Given that the Art. 13 Directives use the same wording regarding positive action as the Revised Equal Treatment Directive, it might be wise to caution from simply transposing the Court's old case law from the area of sex equality law to these new legal instruments.

c) Closed system – open system

A further difficult point arises in the context of the distinction between direct and indirect discrimination. We used to think that there is a closed system of justification in the case of *direct* discrimination in that only a limited list of justification grounds specifically mentioned in the law can be relied on. For instance, since neither the Treaty nor the Equal Pay Directive indicate any justification grounds for sex discrimination relating to pay, the Court has consistently refused to accept justification (e.g. Dekker, Tele Danmark). In such a context, the only way of avoiding a finding of sex discrimination in the case of unequal treatment is to show that the situations at issue are not comparable (e.g. Abdoulaye). By contrast, justification in the case of *indirect* discrimination is of an open nature since, according to the definition of the concept of indirect discrimination, it is simply about "objective justification". However, more recently the distinction has become less clear. For example, the Part-Time Work Directive, which prohibits discrimination against part-time workers, provides for the open category of objective justification, just as in the case of indirect sex discrimination which forms its historical background (Bilka). Similarly, Art. 6 of the General Framework Directive provides for open justification possibilities in the case of discrimination on grounds of age ("objectively and reasonably justified by a legitimate aim").

d) Reasonable accommodation

A final remark regarding justification deals with Art. 2(2)(b)(ii) of the General Framework Directive. This is simply to say that it is particularly unclear what this reference to reasonable accommodation in the framework of justification for indirect discrimination on grounds of disability means. The UK Government argues that it gives the employer a choice between objective justification and reasonable accommodation but this is not the most favourable interpretation for the victims of discrimination. It is therefore to be hoped that the Court will interpret it differently.

2.4. The protection of the rights granted

Once a case has gone through the issues of scope, infringement of rights and justification, and has indeed led to a finding of (legally prohibited) discrimination, there remains the issue of the protection of the rights in terms of procedures and sanctions or, more generally, of the enforcement of equality law.

a) General features of EC law

There are some general principles concerning the effect of EC law in the national legal orders that are of vital importance in that context, all of them developed by the Court of Justice through its case law. First, Community law provisions may have *direct effect*, that is, it may be possible for an individual, when faced with a conflict between EC law and national law where EC law is more favourable to him or her, to rely directly on the relevant EC law provision before a national court. This court then has to give precedence to Community law. As far as the right to equal pay for men and women is concerned, the Court held in Defrenne II that Art. 119 of the EC Treaty (now Art. 141(1) and (2) EC) can be relied on both in vertical (individual against the State) and horizontal (individual against another individual) situations. By contrast, it is clear from the Court's case law that Directives can never have horizontal direct effect (Marshall I, Faccini Dori). As a result, Directives can be fully effective only in vertical situations. In cases where there is no direct effect (either as a matter of principle or because the conditions are not fulfilled), an individual may still point to the national courts' duty to interpret national law in the light of Community law, as far as that is possible in view of the Directive's wording (so-called *interprétation conforme*; von Colson and Kamann, Marleasing). The third general feature of EC law is the duty of the Member States to *make good financial damage* which they have caused to individuals through infringements of EC law (Member State liability). Again, this is tied to certain conditions (see notably Francovich, Dillenkofer).

b) Remedies and sanctions: specific secondary law provisions

Sometimes there are *specific EC law provisions* concerning the remedies and sanctions that are available in the context of the protection of Community rights. An important example from EC sex equality law is Art. 6 of the Second Equal Treatment Directive (original version) which simply provided for the right to judicial access in the case of complaints of discrimination. Again, the Court's case law on this provision has been most creative, in the interest of the individuals concerned. The Court not only confirmed that under Art. 6 an aggrieved individual must in fact have the right to address a court and to have the case examined (Johnston), it also stated that the provision includes a right to effective and adequate sanctions. The Court held that EC law does not prescribe a specific sanction, in particular, it does not prescribe that the complainant is reinstated in his or her rights. Instead, the law leaves the choice of sanctions to the Member States – on the condition, however, that the sanction is effective, proportionate (adequate) and dissuasive (von Colson and Kamann, Draehmpaehl). This shows that the Court read a lot more into Art. 6 than the mere wording of this provision would seem to indicate. In the

revised version of the Directive the provisions on enforcement are much more extensive; they reflect the Court's case law. The provisions in the Race Directive and the General Framework Directive are somewhat less explicit (Arts. 7 subs. and 9 subs., respectively), but there the same case law should apply. Finally, there is also ECJ case law regarding the *burden of proof*. Again, this case law has been partially codified, first in the *Burden of Proof* Directive (which applies to certain areas of sex equality only) and now also in the new non-discrimination legislation (regarding sex discrimination, see Art. 8d of the Revised Equal Treatment Directive and the Burden of Proof Directive; regarding the other types of discrimination Art. 8 of the Race Directive and Art. 10 of the General Framework Directive).

c) National procedural law

In spite of the existence of such provisions, procedural law – particularly important for the protection of Community rights - remains in principle *an area of Member State competence*. As such and as long as there is no relevant Community law, it is a matter for Member State regulation. The Court through its case law has nevertheless imposed a limit in the form of the *principles of equivalence and efficiency* (van Schijndel). The former means that national rules on procedures (and sanctions) relating to Community rights may not be less favourable than those for comparable national rights. The latter means that national rules must not make the exercise of Community rights virtually impossible. An example from sex equality law where these principles apply is the issue of *time bars* imposed on actions by national law. The Court found that this issue is not covered by Art. 6 of the Second Equal Treatment Directive. Applying the principles just mentioned, the Court held that reasonable time bars are acceptable (Emmott, Fantask).

d) Community law procedures

Finally, a brief word on some Community procedures that may be important in the context of EC non-discrimination law. First, it may be possible to ask the Court for the annulment of a Community law Directive (*annulment procedure*, Art. 230 EC). However, the conditions for the access to this procedure for individuals are very strict. Moreover, there is only a very short period for bringing such an action (two months). An example from EC sex equality law where this was attempted is the case UEAPME where a European union tried to get the Parental Leave Directive annulled. It did not, however, succeed due to lack of procedural standing (the case is quite important in that context because the Parental Leave Directive was adopted in a complicated procedure involving implementation through an EC Directive of a framework agreement concluded by the European social partners).

It may also be possible for a national court to ask the Court of Justice questions on the validity of EC law through the *preliminary ruling procedure* (Art. 234 EC), though the judgment will have a limited effect only. The preliminary ruling procedure is of central importance in the context of the second type of question which can be put to the Court through this avenue, namely questions of interpretation of EC law. Most of the Court's creative case law has been handed down in that framework. The procedure can be used by national courts and tribunals of every level once they are faced with insecurities regarding the meaning of EC law that seems relevant in a case before them; last instance courts are obliged to ask questions. Unfortunately, specialised bodies within the meaning of the Race Directive (Art. 13) and the Revised Equal Treatment Directive (Art. 8a) are not courts or tribunals in that sense under the Court's case law (Österreichischer Gewerkschaftsbund); neither have they been given this possibility through the new legislation itself.

Further, if a Member State does not fulfil its duties under EC law, for instance by not implementing a non-discrimination Directive on time or by implementing it in a deficient manner, it is possible to alert the Commission to this situation. The Commission may (but is not obliged to) commence *enforcement proceedings* (Art. 226 subs. EC) which may lead to an action against the Member State before the Court of Justice.

3. IN CONCLUSION: SOME FUNDAMENTAL ISSUES

Finally, a few issues of a fundamental nature shall be mentioned. These do not result merely from the structure of the relevant law but have been found to underlie the problem of sex discrimination. *Mutatis mutandis*, similar issues will arise in the context of other types of discrimination.

- The formal starting point:
  EC sex equality law aims in the first place at equal treatment. It is based on a vision that *the law should be neutral* in terms of gender ("gender blind"). This raises the question what is or should be the place in the law of existing differences between people, for instance the biological differences between men and women regarding pregnancy, but also societal and economic differences such as women's under-representation in well-paid and influential positions. Earlier, it was seen that different treatment in such contexts is normally seen as an exception or derogation. How could the law's approach in that regard be improved?

- The problem of structural discrimination:
  The Court's case law shows that the role of the existing EC sex equality law in *tackling structural discrimination* is quite limited. There are two main legal instruments in this context, namely the prohibition of indirect discrimination and positive action measures. Both of them are limited in their effect, though for different reasons. There is no equivalent in EC law to Art. 5 CEDAW. How could the law change this situation? In particular, what role should CEDAW play in preparing the text for a new Art. 13 Directive on sex? And what does this mean in the context of other types of discrimination?

- The problematic category of sex:
  To some extent, the discrimination categories used by the law are *in themselves problematic*. Sex should be perceived as a continuum rather than simply as relating to a clearly determined number of groups (e.g. inter-sexuality, transsexuality).[36] This is even more evidently true for categories such as race and age. What should that mean for the law?

- The relationship between the various grounds mentioned in Art. 13 EC:
  In the social reality, these grounds may be *linked to each other* (intertwined and multiple discrimination). On the legal level, there is now a number of parallel and similarly structured Directives of equal value. Sex equality stands out only through the Treaty's provision on mainstreaming, Art. 3(2) EC. Should differences be made between them in terms of their importance and in terms of the legal approach used in their context?

[36] *See AG TESAURO in his opinion on the case P. v S..*

As a final remark, a suggestion made by some academic writers shall be mentioned. HOLTMAAT[37] and ALKEMA/ROP[38] have argued that *not every form of unequal treatment that conflicts with the law should be understood as discrimination*. Rather, this latter term should be reserved to certain severe types of unequal treatment which, therefore, should be examined in a strict legal framework. The authors therefore suggest that a distinction be made between discrimination in the strict sense on the one hand and unlawful unequal treatment on the other. The former concerns instances of systematic subordination of groups of persons because of important characteristics that determine their identity. More specifically, it is characterised by three factors, namely 1) one group in society has the power of excluding or stigmatising another group; 2) the exclusion of the powerless group is (all) pervasive, that is, it is not limited to one given sphere; and 3) the characteristic by which the classification or exclusion takes place is fundamental to a person or group's understanding of themselves (identity) and cannot be discarded based on one's own free will (immutability). According to HOLTMAAT, discrimination on grounds of sex and race are examples for discrimination in this strict sense. By contrast, the less strict category of unequal treatment concerns other cases where the law prescribes equal treatment, such as disadvantageous treatment on grounds of the type of employment contract (part-time work, fixed-term work, and the like) and on grounds of characteristics that are not absolute but only temporary, such as age and nationality. This distinction is particularly important in the context of justification. HOLTMAAT suggests that in the case of discrimination in the strict sense, the justification system must be a closed one, certainly in the context of direct discrimination. In that context, grounds that can serve as justification must by definition weigh very heavily. Objective justification for indirect discrimination is acceptable if interpreted as strictly as possible. By contrast, in the case of mere unequal treatment, a more open weighing of interests is acceptable, even in the case of direct discrimination.

LIST OF DIRECTIVES

First Equal Treatment Directive: Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975 L 45/19 (First Equal Treatment Directive or Equal Pay Directive).

Second Equal Treatment Directive: 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, OJ 1976 L 39/40 (Second Equal Treatment Directive, original version).

Third Equal Treatment Directive: Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

Fourth Equal Treatment Directive: Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security, OJ 1986 L 225/40 (Fourth Equal Treatment Directive).

Maternity Directive: Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348/1.

[37] *HOLTMAAT Rikki, 'Het gelijkheidsbeginsel: van een vat vol dilemma's naar drie typen van gelijkerechtenwetgeving', in KROES M./LOOF J.P./TEN NAPEL H.-M.Th.D. (ed.), Gelijkheid en rechtvaardigheid. Staatsrechtelijke vraagstukken rondom ‚minderheden', Deventer: Kluwer 2002, 161-175, in particular 170 subs.; also HOLTMAAT Rikki,'Stop de uitholling van het discriminatiebegrip! Een herbezinning op het onderscheid tussen discriminatie en ongelijke behandeling', Nederlands Juristenblad 2003, 1266-1276.*

[38] *ALKEMA E.A./ROP A.C., 'Gelijk zijn en gelijk krijgen – aspecten van gelijkheid in de rechtspraktijk', in KROES M./LOOF J.P./TEN NAPEL H.-M.Th.D. (ed.), Gelijkheid en rechtvaardigheid. Staatsrechtelijke vraagstukken rondom ‚minderheden', Deventer: Kluwer 2002, 31-77, at 37 subs.*

Parental leave Directive: Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/4.

Burden of Proof Directive: Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6.

Race Directive: Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

General Framework Directive: Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

Revised Second Equal Treatment Directive: Directive 2002/73/EC amending Council Directive 76/297/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, OJ 2002 L 269/15 (Revised Second Equal Treatment Directive).

LIST OF CASE LAW

Abdoulaye: Case C-218/98 Omar Abdoulaye and others v Régie Nationale des Usines Renault SA [1999] ECR I-5723.

Abrahamsson: Case C-407/98 Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist [2000] ECR I-5539.

Barber case law: Line of case law starting with Case C-262/88 Douglas Harvey Barber v Guardian Royal Exchange [1990] ECR I-1889.

Bilka: Bilka-Kaufhaus GmbH v Karin Weber von Hartz [1986] ECR 1607.

Defrenne II: Case 43/75 Defrenne v SABENA [1976] ECR 455.

Dekker: Case C-177/88 Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus [1990] I-3941.

Dillenkofer: Joined Cases T-178, 179 & 188-190/94 Dillenkofer v Germany [1996] ECR I-4845.

Dory: Case C-186/01 Alexander Dory v Germany, judgment of 11 March 2003, n.y.r.

Draehmpaehl: Case C-180/95 Draehmpaehl v Urania Immobilienservice OHG [1997] ECR I-2195.

Emmott: Case C-208/90 Emmott v Minister of Social Welfare and Attorney General [1991] ECR I-4269.

Faccini Dori: Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325.

Fantask: Case C-188/95 Fantask A/S v Industriministeriet [1997] I-6783.

Francovich: Case C-6 & 9/90 Francovich and Bonifaci v Italy [1991] ECR I-5357.

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

Jackson and Cresswell: Joined Cases C-63/91 and C-64/91 Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer [1992] ECR I-4774.

Hill and Stapleton: Case C-243/95 Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance [1998] ECR I-3739.

Hofmann: Case 184/83 Ulrich Hofmann v Barmer Ersatzkasse [1984] ECR 3047.

Johnston: Case 222/84 Johnston v Chief Constable of the RUC [1986] ECR 1651.

Kalanke: Case C-450/93 Eckhard Kalanke v Freie und Hansestadt Bremen [1995] ECR I-3051.

Kreil: Case C-285/98 Kreil v Germany [2000] ECR I-69.

Lawrence: Case C-320/00 A. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd [2002] ECR I-7325.

Lommers: Case C-476/99 H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR I-2891.

Marleasing: Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

Marshall I: Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723.

Österr. Gewerkschaftsbund: Case C-195/98 Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich [2000] ECR I-10497.

P. v S.: Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143.

Ruckdeschel: Joined Cases 117/76 and 16/77 Albert Ruckdeschel & Co. a.o. v Hauptzollamt Hamburg-St. Annen a.o. [1977] ECR 1753.

Schnorbus: Case C-79/99 Julia Schnorbus v Land Hessen [2000] ECR I-10997.

Schumacker: Case C-279/93 Finanzamt Köln-Altstadt v Schumacker [1995] ECR I-225.

Sirdar: Case C-273/97 Sirdar v The Army Board, Secretary of State for Defence [1999] ECR I-7403.

Stoeckel: Case C-345/89 Criminal Proceedings against Stoeckel [1991) ECR I-4047.

Tele Danmark: Case C-109/00 Tele Danmark A/S v Handels- og Kontorfunktionµrernes Forbund i Danmark (HK), acting for Marianne Brandt-Nielsen [2001] ECR I-6993.

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

UEAPME: Case T-135/96 Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v Council [1998] ECR II-2335.

Van Schijndel: Joined Cases C-430&93 and C/431&93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioensfonds voor Fysiotherapeuten [1995] ECR I-4705.

Von Colson and Kamann: Case 14/83 von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891.

EFTA Surveillance Authority v Norway: Case E-1/02 EFTA Surveillance Authority v Norway, judgement of 24 January 2003.

HOW TO IMPLEMENT EU LAW ON PROTECTION AGAINST DISCRIMINATION AND GENDER EQUALITY IN NATIONAL LAW

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* *This contribution reflects the author's personal legal opinion, which does not necessarily represent the opinion of the institutions (the Austrian Federal Chancellery) she works for.*

1. LEGAL BASIS

As Prof. Tobler has very clearly outlined, the legal basis for combating discrimination differs according to the grounds of discrimination: equality between women and men has been covered by primary EC law since 1957 whereas the other grounds are covered by the Treaty of Amsterdam, which entered into force in 1999. Thus equality between the sexes is an old, well-established principle of EC law and - by contrast - anti-discrimination provisions addressing the other grounds are rather new. The implementation of these new provisions is only just starting and practical experience is therefore yet to be gained in the Member States of the European Union. Some possibilities of applying experience gained in connection with gender equality to other grounds of discrimination were discussed by Prof. Tobler in the previous presentation.

In sum, it can be said that the lack of coherence between the different grounds of discrimination is also affirmed by EU legislation, and that the most important differences between the various legal provisions are those in substance.

First example:
Art. 13 of the Treaty is aimed at *combating discrimination* whereas Art. 3(2) and Art. 141 of the Treaty are explicitly aimed at *promoting equality* and at *ensuring full equality in practice* between women and men, and thus – in my opinion - impose a *positive obligation to actively promote equality.*

Second example:
Secondary EC law establishes this twofold approach as well: Article 1 of Directives 2000/43 and 2000/78 focuses (only) on combating discrimination, whereas Article 1a of Directive 2002/73 goes beyond that aim by explicitly obliging Member States to actively take into account the objective of equality between women and men when formulating and implementing laws, policies and other activities with regard to employment.

Third example:
Another difference in substance derives from Directive 2000/43. This directive contains provisions which go *beyond access to employment* and additionally cover areas such as education, social protection (including social security and health care), social advantages, and access to, as well as the supply of goods and services. As I pointed out yesterday, there is hardly any specific rationale behind this; it was simply a political decision of the negotiating parties within the working group to extend the scope of application of non-discrimination clauses to cover members of racial and ethnic minorities but not people who feel discriminated against on grounds such as gender, age, disability and other grounds in areas outside employment.

Fourth example:
Equality between women and men has been a very important issue in the case law of the European Court of Justice - as Prof. Tobler has explained in detail – whereas there is almost no jurisprudence on the other grounds (except the cases “P” and Grant), and there is obviously no jurisprudence on the new directives.

Looking at all these differences which are laid down by EU legislation, I do not hesitate to say that the EU legislator has failed to provide for a coherent concept of combating discrimination in all the above-mentioned fields.

Nevertheless, the EU legislator has provided for some improvements: there are a lot of important provisions and interesting challenges, and if the Member States properly comply with all these requirements, good progress can be made. However, what EU legislation has provided us with is still far from perfect and now it is up to the Member States to make the best of it.

2. HOW TO IMPLEMENT THE NEW DIRECTIVES

Before I go into detail, let me just mention three basic principles which have to be taken into account by the Member States when implementing the new directives:

- -Firstly, Member States must take into account the prohibition of reducing the level of protection against discrimination already granted, which is contained in all three directives.
- -Secondly, Member States must comply with the principles of effectiveness and equivalence of EC law imposed by the European Court of Justice.
- -Thirdly, Member States may also have to meet constitutional requirements such as the principle of equality – as is the case in Austria.

With regard to the above-mentioned obligations deriving from the directives – namely ensuring full equality in practice (gender) versus (just) combating discrimination (on other grounds) – there is one important option for the implementation of the directives in national law: according to all three directives, Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the directives themselves. Thus Member States may *extend the scope of protection to cover all discriminated persons*, thus moving from the (limited) aim of (just) combating discrimination to a strategy of promoting full equality in practice. This would require a progressive policy by which all individuals and organisations (employers, unions, NGOs, etc.) involved in and responsible for equal treatment in the above- mentioned fields would have to be actively encouraged - or obliged – not only to take measures to combat discrimination, but also to take preventive measures, as well as to promote equal treatment in a deliberate and systematic way. However, for political reasons, this most coherent possible approach may not be feasible in all Member States. Thus differences within the scope of protection granted to the various discriminated groups might be the consequence. In any case, Member States – and all other organisations and people involved should carefully monitor the introduction of these provisions in national law and practice in order to avoid creating a hierarchy between the different grounds of discrimination and to minimise the risk of one ground of discrimination taking precedence over the others.

3. "TECHNICAL" QUESTIONS

In the following I would like to focus on several questions of a more technical nature and on certain questions of enforcing anti-discrimination law. In doing so I will also try to show how this relates to specialised bodies and what their role can be within these areas.

The questions I would like to discuss are:
3.1. One single act versus several pieces of legislation
3.2. One single, "independent" body or separate bodies for the different grounds of discrimination
3.3. Criteria for the right of organisations to support victims of discrimination
3.4. How to "encourage" social partners to conclude agreements - by optional or legally binding provisions
3.5. Promoting social dialogue and dialogue with NGOs - by legislation or through practice

3.1. One single act versus several pieces of legislation

In fact, the question whether there should be one single act or several pieces of legislation, each covering different grounds of discrimination, is more than just a technical question. While systematically considering this question, I could identify more advantages than disadvantages of a single act for all grounds of discrimination, and have thus changed my mind on this question.

The advantages I could identify are:

- -One ground can strengthen and reinforce the others.
- -Together they will be more than the sum of all individual grounds, in particular in public opinion.
- -Anti-discrimination law as such is more visible in public.
- -Accessing information about equality law and enforcement of rights is easier for victims of discrimination.
- -It is much easier for the legislator to deal with the different grounds with regard to coherence between them, to the level of protection against discrimination on any particular ground in comparison to the others, or to the question of multiple discrimination.
- -It leads to a higher degree of legal clarity.

Creating one single act does not, however, necessarily mean that all grounds have to be treated in the same way with regard to each and every individual provision or to the respective enforcement structures. In my view, one single piece of legislation would still allow national governments and parliaments to take into account the special aspects of each ground in designing specific measures or establishing the respective equality body or bodies.

On the other hand, if it is done well, I have no objection to passing separate pieces of legislation. In this case, legislation should be carefully designed so as not to create a hierarchy of grounds, i.e. the different grounds should not compete with each other, the standards of rights should be equivalent, coherent and appropriate to the specific requirements of each ground of discrimination, and there should be clauses regulating cases of multiple discrimination. But having spent a couple of years within public administration and gained some practical experience, in particular in the field of drafting legislation, I tend to doubt whether the outcome would be of the same quality as it would be in the case of one single legislative act.
Austria is going to take a more homogeneous, egalitarian approach which – in principle - tries to treat all grounds of discrimination in the same manner. A draft proposal extends the scope of the existing Equal Treatment Act from gender equality to all other grounds (except disability), and, additionally, includes the self-employed, as well as the non-employment aspects of the "Race Directive". Disabled people will be covered by a separate act but – as this has been a specific wish of organisations and interest groups representing people with disabilities – this does not constitute a major problem in my opinion. The special needs of people with disabilities will now – hopefully - be addressed more appropriately, and obviously none of the other grounds will suffer

from this separation. But the legislator should pay careful attention to the question of coherence of grounds and should certainly provide for a clear regime for handling multiple discrimination.

3.2. One single, "independent" body or separate bodies for the different grounds of discrimination

When preparing my ideas on this question, I came across a very useful tool, namely the Study on the "Role, structure and functioning of specialised bodies to promote equality and/or combat discrimination",[39] which was commissioned by the European Commission. As a point of departure for the question of how independent equality bodies could or should be designed, the study refers to the Council of Europe's Commission against Racism and Intolerance (ECRI), which recommends the following standards for the establishment of equality bodies:

a) Independence guaranteed by a constitutional or legislative framework
b) Autonomy from government
c) Pluralism, including pluralism of composition
d) A broad mandate
e) Adequate powers of investigation
f) Sufficient resources

a) Independence guaranteed by a constitutional or legislative framework

There can be no doubt that the independence of specialised bodies must be guaranteed by a constitutional or legislative framework in order to make it more difficult for governments to change the role and to influence the activities of such bodies.

b) Autonomy from government

Autonomy from government would be ideal; the question to what extent this aim can be realised while all financial and other resources come from the state remains open.

c) Pluralism, including pluralism of composition

This was a very important issue during yesterday's workshop on the questions of coherence and multiple discrimination. For the time being I would say that no question of discrimination should be dealt with without including representatives of the relevant group or groups in decision-making, or without, at least, consulting external experts on the respective questions. No discriminated person should again feel discriminated against in the course of their anti-discrimination proceedings because they cannot make themselves understood, or because decisions are taken without consulting them. This standard would also require a gender-balanced composition of that body; better still, the requirement should not just be that there must be women on that body (as being female alone is not a convincing concept to me), but that female experts on gender equality should be involved in the equality law enforcement process.

d) A broad mandate

The directives impose the requirement of a broad mandate by obliging Member States to ensure that the competences of these bodies include:

- providing independent assistance to victims of discrimination,
- conducting independent surveys, and
- publishing independent reports and making recommendations on any issue relating to discrimination.

[39] *See http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/mslegln/equalitybodies_final_en.pdf*

But whether one body will be able to fulfil all of these duties will be a question of financial and personnel resources, which are provided by government.

e) Adequate powers of investigation

This requirement is not, in fact, imposed by the directives but, as always, Member States are free to maintain or establish more favourable provisions and to provide for a mandate to conduct investigations, as is the case, for instance, with the existing Ombudswomen for Equality Affairs in Austria. Furthermore, the Member States are free to create not only independent bodies which support victims, but also quasi-judiciary bodies which have the power not only to investigate the facts but also to deliver opinions on certain questions of discrimination as is, for instance, the case with the existing Equal Treatment Commissions in Austria.

f) Sufficient resources

The question of sufficient resources seems to be the most crucial one. Adequate financial and personnel resources are most important for the questions of:

- whether the cases to be dealt with will be handled properly and in a satisfactory manner - for the victims of discrimination as well as for the public;
- whether the body in question will be able to meet all the requirements we have already identified as regards coherence of grounds and multiple discrimination;
- whether all victims of discrimination will have equal access to legal advice and support by the body or bodies in question.

Now I would like to come back from these basic principles to my previous question whether there should be one single, "independent" body or separate bodies for the different grounds of discrimination. While preparing my thoughts on these issues, I felt that I should not reinvent the wheel, and I would therefore like to refer to the outcome of a workshop dedicated to this question, held at a conference on "Europe against discrimination" in Brussels in October 2001; as far as I know, at least one participant in that event is here with us today, namely Ms Eilis Barry from the Equality Authority in Ireland.

The summary of that workshop, which was published in the documentation of the Brussels conference, begins by referring to Bob Niven from the Disability Rights Commission in the UK, who stressed that there was no universal answer to the question of whether the requirements set by the new directives should be met by means of a single equality body or several separate ones. The choice, according to Mr Niven, will depend on the national context – for instance, whether it is a country's priority to eliminate certain specific types of discrimination which appear in that state - and also on the prior existence or non-existence of such bodies in a given Member State.

As I have pointed out, I think that, if a separate body approach is adopted, it should be ensured that these specialised bodies are also aware of the other grounds of discrimination and take into account the provisions which apply in the other fields. This could best be done by means of legally binding rules of application and by rules of procedure, as well as by additional measures, such as providing information and training for the enforcement officers involved; needless to say, this will be most important with regard to the question of coherence of grounds and to cases of multiple discrimination.

Coming back to the outcome of the Brussels workshop, Eilis Barry identified the following advantages of a *single body:*

-It avoids creating a hierarchy between the different grounds of discrimination.
-It reflects the reality of life, namely that people have multiple identities which can change over time.
-It makes it easier to deal with cases of multiple discrimination.
-The different grounds can reinforce and "learn" from each other.
-It promotes administrative simplicity and cost-effectiveness.

The major problem identified with regard to a single body was the risk that one ground of discrimination could dominate the others. Therefore it will be crucial to ensure that no ground loses visibility. In my eyes this could be guaranteed, for instance, by staff training, research, and exchange of information and know-how with experts and interest groups like NGOs, trade unions, etc.

On the other hand, the advantages of *separate bodies* have been identified as follows:

-They can better take into account the specific characteristics and problems of each ground of discrimination.
-They add clarity to the goals and purposes
-The resources are better focussed.

The workshop report concludes by stating that the two models could also be combined in an intermediate model, and at this stage I would like to present the Austrian approach to this.

In Austria the Equal Treatment Commission was established as early as 1979 and the first Ombudswoman for Equality Affairs was installed in 1990. The plan now is to extend the Commission's mandate from gender-based discrimination to the other forms of discrimination (except disability), and to have one single body which will be divided into several sections as this new Commission will consist of three panels: Panel I for gender–based discrimination, Panel II for all other grounds except disability in employment and occupation, and Panel III for discrimination on grounds of racial or ethnic origin in areas other than employment and occupation. Thus the 3 different specialised bodies will be under one common umbrella and it is likely that the three Panels will have a common administrative structure, which will make it easier to handle the different cases, to exchange information and views, and so on. With regard to the function of the Ombudspersons, the same division of competence will be established as in the case of the Commission and the two new ombudspersons will be modelled on the existing one, who will also be integrated into the common administrative structure.

3.3. Criteria for the right of organisations to support victims of discrimination

Concerning the right of organisations to support victims in judicial or administrative proceedings, it has to be mentioned that the European legislator has chosen only one out of at least three available options in this field.

The directive only obliges the Member States to ensure that organisations may support

-individual victims of discrimination, but not to entitle them to
-watch over "objective" rights in the *public interest* (without having an individual case to deal with), or
-bring up a problem or phenomenon which affects many people or a group of people (without having an individual case to deal with).

Nevertheless, all of these aim to compensate for deficits in protecting the rights of the weaker party which might arise when an individual brings a claim before a court without any support from a stronger partner. For instance, an employee who has to face the economic power of her/his employer will need some support when asserting her or his rights before the courts. With regard to court proceedings, it seems most important that the cost risks for the claimant are minimised by adequate legal advice and legal aid.

It has already been said that the EU legislator decided to go only for the single-case-support approach but, as always, the national legislator can go beyond that and may thus introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the new directives. I would strongly recommend developing a broader approach towards concepts of "group justice", as neither the independent bodies nor the NGOs that will be entitled to represent victims of discrimination before the courts will be able to deal with all the individual cases which may be brought following implementation of the directives in national law.

In Austria we find some examples of existing provisions, for instance:

- -The Act on the Organisation of Labour Courts (ASGG), in its section 54, entitles trade unions to ask the Supreme Court for a ruling to clarify the question whether a right of representation exists in labour law questions affecting more than three employees. This possibility has been used, for instance, in relation to the question of indirect discrimination within collective agreements and led to a most important Supreme Court decision in 1994.
- -The Act on the Organisation of Labour Courts (ASGG), in its section 40, provides for the right of officials of one organisation - the so-called Chamber of Labour (Arbeiterkammer) - or of voluntary professional associations, which are entitled to conduct collective bargaining (i.e. the trade unions), to represent a claimant before the courts; the only requirement for the official is a mandate from her or his organisation.
- -The Equal Treatment Act (on gender equality): the Social Partners represented on the Equal Treatment Commission may bring a claim against the employer in court if the employer does not comply with the Commission's recommendations; this possibility has not been used since 1979.
- -The Equal Treatment Act (on gender equality): the Ombudsperson for Equal Treatment Affairs may challenge the Commission's opinion in court if she does not agree with it; this has never been the case since 1990 and therefore this possibility has never been used.

As mentioned above, according to all three directives, new measures will have to be introduced into national legislation in order to entitle organisations to act *on behalf* or *in support of* the complainant in any judicial or administrative proceedings for the enforcement of obligations under these directives. The expression "on behalf of" refers to the organisation's right to represent discriminated persons before courts and authorities. As mentioned above, in Austria these rights are already granted, for example, to existing employees' organisations. The expression "in support of" can also be implemented, for instance, by giving organisations the right to act in their own name as party to the proceedings (in German this would be called "*Prozesstandschaft*"). If I have understood correctly, this legal institution can be found, for instance, in Sweden, where the Ombudsperson may file a claim to the Labour Court as a party to the proceedings. Regardless of what kind of organisational support in legal proceedings is chosen, Member States may formulate further criteria for these organisations, as the directives refer to "criteria laid down by their national law". However, taking into account the above-mentioned principle of equivalence deriving, in particular, from the jurisprudence of the European Court of Justice, Member States do not have

much flexibility in this respect: they have to limit any requirements imposed to criteria which are not less favourable than the criteria applying to existing organisations, and which are justified in substance. Belgian law, for instance, only requires that the organisation has existed for five years, and that it names combating discrimination or the protection of human rights as an aim in its statutes.

With regard to the relationship between the specialised bodies which must now be established and the NGOs which must be entitled to support or represent victims of discrimination before the courts, great care should be taken in order to avoid competition among them. This issue is also addressed by the directives, which state that the right of independent bodies to support victims shall be without prejudice to the right of NGOs to do so.

3.4. How to "encourage" social partners to conclude agreements (by optional or legally binding provisions)

All three directives contain provisions by which the two sides of industry are to be "encouraged" to conclude collective agreements laying down anti-discrimination rules. The first question which may arise here is whether this provision requires action by the legislator. I would say it does, as it is not likely that legal instruments such as the directives are just aimed at public announcements or similar forms of "encouragement". If legal provisions are adopted, the next question is whether these provisions are to be legally binding on the social partners. The directive leaves this question open by referring, on the one hand, to the autonomy of the social partners to conclude such agreements and, on the other hand, to the "relevant national implementing measures" to be respected.

In Austria there are general collective agreements, as well as collective agreements at plant level. For collective agreements at plant level there is a provision in section 97 sub-section 1-25 of the Labour Constitution Act, which provides that such agreements may be concluded on affirmative action plans and on measures aimed at reconciling work and family life. Thus we do have a legal provision, but unfortunately these kinds of agreements are not binding and they cannot be enforced, whereas similar agreements on other questions, e.g. working hours, can be brought before a board of arbitration ("*Schlichtungsstelle*") if no agreement between the works council and the employer can be reached.

In this field the specialised bodies could also play an important role, for instance by counselling the two sides of industry, by designing models for affirmative action plans, or by recommending other kinds of measures in this field.

3.5. Promoting social dialogue and dialogue with NGOs - by legislation or through practice

Here the question again arises as to whether the directive requires action of the legislator: as the directive obliges the Member States to "take adequate measures", I am of the opinion that the mere continuation of existing practices will not be sufficient.

Thus I would recommend institutionalising the social dialogue (and a dialogue with NGOs as well, despite the fact that the obligations imposed by the directives are a little weaker in this respect) in order to give social partners and NGOs a more formal role in the political process, for instance in the form of

- -active participation in planning, drafting or commenting on legislation, and/or
- -monitoring practice once legislation has been implemented, e.g. by integrating them as members of the independent bodies or of external monitoring committees.

Based on practical experience, the institutionalised dialogue with social partners and NGOs should be based on formal rules, either on administrative orders and/or – where more appropriate - on legislation.

Austrian examples:

- -The Federal Equal Treatment Commission, for instance, is involved in the drafting of relevant legislation under a provision of the Federal Equal Treatment Act.
- -The Equal Treatment Commission for the private sector includes representatives of both sides of industry.
- -The Human Rights Advisory Committee ("*Menschenrechtsbeirat*"), which has been set up at the Ministry of the Interior in order to monitor the police with regard to human rights, includes representatives of both ministries and NGOs dedicated to human rights.

I hope I have shown that specialised bodies can play an important role, let's say as a mediator between government on the one hand, and social partners or NGOs on the other.

COMMENTS AND DISCUSSION

Participants addressed the question of whether there really are philosophical differences between the grounds of discrimination, and if so, whether such differences justify different approaches to combating discrimination on the distinct grounds. One viewpoint is that it is exactly these particularities – such as the traditional linking of women with the domestic sphere or the fact everyone is gendered in the case of sex discrimination - that discrimination is based on and thus to which the law should respond in a pragmatic way. It would constitute unequal treatment to treat grounds that are different in the same way.

The approach of European Community law and national law in many countries may be considered a pragmatic approach to the differences between the grounds.

Whereas Article 13 of the EC Treaty provides a legal basis for taking 'appropriate action to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', in relation to sex discrimination the Treaty goes further: Article 141(3) EC provides a legal basis for adopting 'measures to ensure the application of the principle of equal opportunities and equal treatment of men and women…', Article 141(4) allows for positive action, and Article 3(2) EC places an obligation on the Community to mainstream into all Community policies measures to eliminate inequalities and promote equality between men and women. These distinctions are reflected in the secondary legislation. In contrast to the non-discrimination approach of the Racial Equality Directive and the Framework Directive, the 2002 amending Sex Equality Directive provides that EU Member States shall 'actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities…' which can be interpreted as placing an active duty on Member States, going further even than mainstreaming.

Notwithstanding the differences in the wording of the Treaties and Directives however, the European Court of Justice may well interpret the term combating discrimination widely to cover promoting equality and even mainstreaming. It was recalled that the ECJ could sometimes be very unpredictable in its decisions. It was felt that mainstreaming should be extended to all grounds of discrimination, although it was warned that it would be difficult for policy makers, particularly in smaller countries, to effectively mainstream measures to promote equality in relation to so many grounds.

Equally, the differences in discrimination grounds in EC legislation can be attributed entirely to politics. The wide scope of the Racial Equality Directive (covering employment and occupation, social protection, social advantages, education and access to and supply of goods and services which are available to the public including housing) compared to that of the Framework Directive (covering discrimination only in relation to employment and occupation) is attributable at least partly to the political climate at the time the Council unanimously adopted the Racial Equality Directive.

There were strong views that while particularities of each ground can be identified, this does not give rise to convincing reasons for dealing with discrimination on each ground separately. On a practical level, it is often difficult to differentiate the grounds of discrimination or single out one ground as the basis for the discrimination, because often the victim has suffered multiple discrimination. Everyone who is discriminated against is gendered, and this dimension must be taken into consideration when dealing with discrimination of all kinds. It was pointed out that this is not a characteristic that is unique to sex discrimination.

Moreover, opinion was divided as to whether, even if discrimination on the various recognised grounds is treated differently by the law, they should be dealt with by separately institutionally, in other words by separate specialised bodies. While some of the arguments for and against handling gender discrimination differently from other grounds

of discrimination may be valid among academics and policy makers, they are not so clear to the public, for whom it is perhaps more logical to have one equality body. Specialised bodies must be transparent, simple and open to victims. It is becoming increasingly difficult for victims to identify the grounds of discrimination, and it is easier for a victim to approach one single body dealing with all grounds, which can then provide assistance in preparing his/her case on one or more grounds. On the other hand, close cooperation among separate single ground bodies can function well, as is the case for example among the Swedish Ombudsmen.[40] Either way, formal rules or even law on multiple discrimination would be useful, rather than leaving it to victims to decide how and where to proceed with their complaint. On a practical level, tasks such as monitoring, for example in workplaces or schools, would be more readily acceptable to the party being monitored if it were undertaken by just one body rather than several different bodies.

The structure of the anti-discrimination legislation is significant for the choice between establishing a single or multiple specialised bodies. If one piece of legislation is applicable to all grounds of discrimination, it can be logical that there is one body and vice versa. If the content of the legislation differs for each ground, each body dealing with one single ground learns to work specifically with that law. By the same token, if a multi-ground specialised body is faced with different laws for the various grounds of discrimination, it will not find itself dealing with all grounds in a uniform way. That body should, however, think about the implications their interpretation of law on one ground will have for other grounds of discrimination.

There are sometimes fears among those working on sex discrimination that they will suffer setbacks if resources are devoted instead to other grounds of discrimination. This may happen if an unfavourable political situation determines that insufficient resources will be provided to adequately deal with a series of grounds effectively and equally. However, these fears may be unfounded. In Ireland, for example, the Equality Authority with a mandate for nine grounds of discrimination replaced the Employment Equality Agency, which dealt only with sex discrimination, and there is no evidence to suggest that the gains made in equality between the sexes have been lost in any way. However, while the experience of Ireland and the Netherlands in transferring from a single ground body to a multi-ground body was positive, the transfer in Northern Ireland from single ground bodies to the Equality Commission for Northern Ireland, which deals with six grounds, has not been entirely successful: in terms of public awareness, it was believed that the previous sex equality body had been disbanded but not replaced. Furthermore, there is a feeling among some ethnic groups that they have lost out to other grounds, and that their communities are not as well represented as they previously were under the Commission for Racial Equality for Northern Ireland. No research has been done on how effective the Equality Commission for Northern Ireland is considered to be, and it was suggested that it would be very useful to ask victims for their views.

International treaties guaranteeing non-discrimination and equal treatment should be invoked more frequently before national courts and the European Court of Justice. These serve to complement the Directives, which provide only minimum standards. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is viewed to be underestimated in EC law and national law and should be taken into account by courts more often. CEDAW places an obligation on member States to promote equality and even to take positive action.

Specialised bodies may be in a position to influence both national and ECJ judges, acting as *amicus curae* in giving their informed opinion of a case. This is the approach the Dutch Equal Treatment Commission took in participating in the organisation of an expert seminar held in the presence of the Dutch judge of the ECJ on the consequences of the case *Kalanke*. Creative decision-making by the ECJ usually occurs in preliminary reference cases (although there have also been dissatisfactory preliminary reference decisions such as those in the cases *Seymour*

[40] *Ombudsman against Ethnic Discrimination, Equal Opportunities Ombudsman, Ombudsman against Discrimination on grounds of Sexual Orientation and Disability Ombudsman.*

Smith and *Van Colsen*). This tool should be used to the maximum by national courts. In writing opinions to submit to a court, specialised bodies can suggest questions to be put to the ECJ. The drawback of the preliminary reference procedure is its duration, which is on average two years. The direct effect of the Directives' provisions, as well as the duty of national courts to interpret national law in conformance with Community law, should also be called upon.

It was commented that the proposed Austrian model of specialised body, that is, one body for all grounds but with three separate sections - one for sex discrimination, one for all other grounds (except disability) in the field of employment and occupation, and one for the non-employment aspects of the Racial Equality Directive in relation to racial or ethnic discrimination - would restrict the development of the grounds other than race in fields beyond employment, which although not required at this stage by EC law, should not in principle be ruled out.

There was agreement that further experience is needed to decide which system can work best. The level of protection reached for gender discrimination constitutes a goal for other discrimination grounds. At the same time, there are lessons to be learned from negative experience in dealing with gender discrimination. Complete gender equality has still not been achieved and the reasons for this must be analysed. Ultimately, the objective must be inclusion, as opposed to exclusion, regardless of the ground.

WORKSHOP CONCLUSIONS

The following provides a summary of the conclusions reached by the Workshops on 'Positive Action / Promotion', 'Integration', 'Protection against multiple discrimination / convergence of grounds' and 'Gender mainstreaming / proactive legislation'.

1. Positive action / promotion

There seems to be little consensus as to the exact definition of positive action, with countries tending to fall into one of four definition categories:
a. aspirational targets
b. aspirational targets with time limited training / encouragement
c. aspirational targets and preferential appointment of equal candidates
d. aspirational targets and mandatory quotas in non-employment areas, e.g. training, committees/councils

Positive discrimination is illegal in some countries but allowed under certain circumstances in others. Most countries have a legal basis for positive action measures for women and ethnic minorities, and ways to apply positive action to other grounds should be considered. In some countries quotas are used to compel employers to employ disabled persons, though usually employers can avoid this duty by choosing to pay a lump sum to the State instead.

Promoting equality is a wider concept than positive action, encompassing also awareness-raising, changing attitudes, offering incentives for promoting equality, making the business case for equality, and establishing a legally enforceable duty to promote equality.

Conveying the business case to employers as a reason for adopting positive action measures is not always found to be simple, but there are strong arguments in support of the view that promoting equality encourages long-term

investment, gives companies a competitive edge, is part of risk management and inherent in corporate social responsibility. It is, in other words, more dangerous for employers to ignore equality issues than confront them.

Implementing positive action measures requires a quantative approach (targets, quotas), but this relies on there being available information and statistics on the make-up of society (ethnic, gender or other), which is in some countries controversial or even illegal.

The relevance of positive action for some discriminated groups is debatable, for example those suffering from discrimination on the ground of sexual orientation.

The role of the social partners in promoting equality was discussed. Whilst they are thought to be relevant actors in eradicating discrimination, their core role is to represent their members, not promote equality, and thus there is often reluctance to take on these issues, especially since they may represent both parties in a dispute. A considerable problem is that there is often discrimination at shop stewards level, thus in Denmark attempts are being made to increase the number of ethnic minority shop stewards in the hope that this will have a trickle down effect on members.

2. Integration

Integration can be individual or systemic. Again, the understanding of the term is subjective. It was said that in some countries the term has become very politically correct, which has diluted its meaning, and is sometimes even equated with assimilation. Integration implies that an individual remains as s/he is and joins society as that person, as opposed to assimilation. Integration is the inclusion of alienated groups and the acceptance of diversity, and it is a two way process between minority and majority groups.

The concept of integration must be combined with conditions to be relevant. It is the government who sets these terms and conditions. Integration can be promoted through positive action measures that seek to establish cooperation with the targeted group. An individual has the right not only to live free from discrimination, but also to be a full member of society. Equal opportunities, anti-discrimination and integration are all inter-dependent concepts.

Pluralistic integration is achieved when communities can make their own choices with regard to cultural affiliation whilst at the same time taking on some parts of the society they live in (e.g. language). Voluntary segregation occurs when communities that have had difficulties integrating opt-out as a reaction to that.

3. Protection against multiple discrimination / convergence of grounds

Multiple discrimination is very complex, with gender a part of every ground of discrimination. In Ireland and the Netherlands the single gender equality bodies developed into bodies dealing with discrimination on multiple grounds. Non-governmental actors had expressed concern before the grounds were increased but these fears proved unfounded. Having knowledge of multiple grounds of discrimination improves practitioners' understanding of the concept and definition of discrimination. By focusing on gender discrimination alone, bodies tended to only reach white middle class women.

Talking about hierarchies among the grounds of discrimination is almost taboo, but in reality it exists. For example, women earn less than men but migrant women earn less than the majority community and migrant men. Initial experience in relation to compensation shows that the level of awards differs among the discrimination grounds. The experience in relation to more developed grounds can be applied to the less developed grounds. In Ireland

for example, the concepts used in case law relating to the Traveller community was of assistance in identifying and defining discrimination on the ground of disability, which was less developed. There are many similarities in the defences provided by respondents on different grounds.

There is a real fear that the specialised bodies will not be adequately resourced. It is important but difficult to set criteria for selecting cases which will advance all grounds. This can be done by bringing cases which involve multiple grounds and cases which relate to issues that affect several areas such as health, education and welfare.

A weakness of the Directive is that the remedies it envisages are based on the individual having enough information and the capacity to bring a case which at best would only affect the individual. It is important that specialised bodies are empowered to combat institutional discrimination. Given the weaknesses of individual-based remedies, it was thought important that there are clearly legislated positive action measures.

NGOs and trade unions can assist claimants in bringing cases. Trade union and community advocacy is required to help ensure that rights are enforced. The resources and powers allocated to specialised bodies will be critical, as will assistance from other specialised bodies with expertise.

4. Gender mainstreaming / proactive legislation

(Gender) mainstreaming is an approach or strategy, and should not be regarded as a goal in itself. Mainstreaming has added value, and does not and should not replace existing equality instruments such as equal treatment legislation or positive action policies. There are no clear European directions on how to undertake mainstreaming. Specialised bodies have the task of persuading government departments to mainstream equality into their policy-making, and also to integrate the concept into their own work. Both tasks, however, are far from easy.

Persuading government officials to mainstream may be a very hard task, particularly when sufficient gender expertise is lacking, as is the case in most if not all countries. The availability of sufficient expertise is therefore imperative. Also, commitment and mainstreaming incentives are indispensable. Another difficulty is how to make sure that once government has started to mainstream, it will continue to mainstream. However, mainstreaming the work of the specialised bodies themselves may prove equally difficult, as it involves complicated analyses of intersectional discrimination, i.e. not 'just' multiple discrimination, but discrimination occurring only to persons who are e.g. female and black.

The concept of proactive legislation was also discussed. Opinions on its precise meaning differed. In the end, however, it was agreed that the concept refers to policy measures that range from positive action (in a broad sense) to policies that do not have a direct link with equal treatment legislation, but are somehow supportive of the goal of increased equality (for instance, more equality in family law may enhance equality in other fields such as labour market participation.)

Although, according to some participants, an obligation to promote proactive legislation may be inferred from the general (EU) equality goals, there is no legal obligation to be found in EC law, as even positive action programmes, and preferential treatment in particular, have been formulated as an exception to the rule of equal treatment.(*) On the other hand, within the limits of the law, positive action programmes, including targets and quotas, are allowed. This space could and should be used to effectively promote measures related to equality policies and legislation in order to enhance implementation of equal treatment law.

** For a comprehensive overview of European case law on positive action and preferential treatment see: Case E-1/02 EFTA Surveillance Authority v. Norway, 24 January 2003 (see also Christa Tobler's paper, in particular pg. 20 of this report).*

PROGRAMME

TUESDAY 20 MAY 03, WEDNESDAY 21 MAY 03

TUESDAY 20 MAY 03

9.00 Registration

9.30 Welcoming speech
Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities, Austria

9.40 Information about the project "Strengthening the Co-operation between Specialised Bodies for the implementation of equal treatment legislation"
Jenny Goldschmidt, Chair, Equal Treatment Commission, Netherlands

10.00 "How discrimination based on sex differs from the other grounds" Elisabeth Holzleithner, Vienna

Elisabeth Holzleithner is assistant professor at the institute of legal philosophy and legal theory at the University of Vienna, former head of the equal treatment commission of the University of Vienna and author of 'Law, power and gender. An introduction to legal gender studies'.

Plenary discussion
Chair: Erna Appelt, Professor for political science at the Leopold Franzens University Innsbruck, Austria

11.45-14.00 Lunch

14.00 Workshops
Special needs of / concepts for different groups:
Concepts: 1. Positive action / promotion
Eva Fehringer, Federal Ministery for Economic Affairs and Labour, Austria
David Zilkha, Commission for Racial Equality, Great Britain

2. Integration
René Schindler, Austrian metal and textile workers union, legal advisor
Margareta Wadstein, Ombudsman against Ethnic Discrimination, Sweden

3. Protection against multiple discrimination/ convergence of grounds
Anna Sporrer, Equality Law Expert, Austria
Eilis Barry, Equality Authority, Ireland

4. Gender mainstreaming / proactive legislation
Elke Lujansky-Lammer, Regional Ombud for Equal Employment Opportunities, Austria
Marjolein van den Brink, Equal Treatment Commission, Netherlands

Workshops will be focussed on the following three questions:
- Definition of particular concept
- Useful for whom / to promote which goal
- Ways of legal / institutional / practical implementation

Facilitators for the workshops: Ingrid Nikolay-Leitner and Christine Baur, Ombud for Equal Employment Opportunities, Austria

16.00 Coffee break

16.30 Presentation of the results of the workshops
Chair: Sabine Strasser, Institute for Social and Cultural Anthropology, University of Vienna

18.00 End of day one

WEDNESDAY 21 MAY 03

10.00 Welcome speech
Federal Minister for Health and Women's Issues, Maria Rauch-Kallat
The minister is sending her gender-expert, Elisabeth Publig, as her representative

10.15 "How to use experience with sex discrimination for the other grounds" Christa Tobler, Basel and Leiden

Christa Tobler is assistant professor at the University of Basel and lecturer at Leiden University (the Netherlands), and the author of articles on issues such as "EC Sex Equality Law", "Same sex couples under the law of the EU" and "Reconciliation of domestic and care work with paid work"

Plenary discussion
Chair: Christine Baur, Regional Ombud for Equal Employment Opportunities, Austria

12.00–14.15 Lunch

14.15 "How to implement EU Law on protection against discrimination and gender equality in National Law"
Anna Sporrer, Vienna

Anna Sporrer is member of the European Commission's Network of Legal Experts on the application of Community law on equal treatment between women and men and former head of the Austrian Equal Treatment Commission. She has published several articles in particular on the constitutional and Community Law foundation of equality between women and men, on international aspects of equality law as well as on questions of equality law enforcement.

Plenary discussion
Chair: Marcel Zwamborn, Equal Treatment Commission, Netherlands

16.00 End of the meeting

PARTICIPANTS:

Austria:
Erna Appelt, Innsbruck University, Institute for Political Science
Christine Baur, Regional Ombud for Equal Employment Opportunities
Neda Bei, Chamber for Workers and Employees Vienna
Sylvia Bierbaumer, Federal Ministry for Social Security, Generations and Consumer Protection
Karina Brugger-Kometer, Federal Ministry for Health and Women
Eva Fehringer, Ministry of Economic Affairs and Labour
Susanne Feigl, Journalist
Elisabeth Holzleithner, Faculty of Law, University of Vienna
Alice Karrer-Brunner, Equal Treatment Commission, Federal Ministry for Health and Women
Carmen Langer, Austrian Federal Economic Chamber
Elke Lujansky-Lammer, Regional Ombud for Equal Employment Opportunities
Judith Marte, Caritas Austria
Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities
Elisabeth Publig, Federal Ministry for Health and Women
Rene Schindler, Metal and Textile Trade Union
Anna Sporrer, Equality Law Expert
Sabine Strasser, Department of Social and Cultural Anthropology, University of Vienna
Hilde Strobl, Office of the Ombud for Equal Employment Opportunities
Katrin Wladasch, Association for Civil Courage and Anti-racism Work
(ZARA Counselling for Victims and Witnesses of Racism)

Belgium:
Bruno Blanpain, DLA Caestecker
Dirk De Meirleir, Centre for Equal Opportunities and Opposition to Racism

Denmark:
Mandana Zarrehparvar, Danish Institute for Human Rights

France:
Sarah Pellet, National Consultative Commission on Human Rights

Germany:
Anne Jenter, Section for Policies on Equality and Women, DGB - Deutscher Gewerkschaftsbund
(German Trade Union Federation)

Greece:
Angeliki Salamaliki
Greek Ombudsman's Office

Hungary:
Èva Heizerné Hegedűs, Office of Parliamentary Commissioner for the Rights of National and Ethnic Minorities

Ireland:
Eilís Barry, Equality Authority

Latvia
Liga Biksiniece, Latvian National Human Rights Office

The Netherlands:
Marjolein van den Brink, Equal Treatment Commission
Jenny Goldschmidt, Equal Treatment Commission
Brigitte Werker, Equal Treatment Commission
Marcel Zwamborn, Equal Treatment Commission

Poland:
Maria Anna Knothe, Secretariat of the Government Plenipotentiary for Equal Status for Women and Men

Slovak Republic
Jarmila Lajčáková, Human Rights Consultant, Office of the Slovak Government

Spain
Luisa Cava de Llano, First Deputy Ombudsman
Carmen Comas-Mata Mira, Chief Cabinet of the First Deputy Ombudsman

Sweden:
Margareta Wadstein, Ombudsman against Ethnic Discrimination
Hans Ytterberg, Ombudsman against Discrimination on grounds of Sexual Orientation

Switzerland:
Christa Tobler, Universities of Basel (CH) and Leiden (NL)

United Kingdom:
Geraldine Scullion, Equality Commission for Northern Ireland (Northern Ireland)
David Zilkha, Commission for Racial Equality (Great Britain)

Migration Policy Group:
Isabelle Chopin
Janet Cormack

TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (Framework Directive) enhance the potential to combat discrimination in the European Union. These compliment the existing legislative programme on gender discrimination, which was most recently added to by *Directive 2002/73/EC 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.* All EU Member States require legislative change to ensure compliance with these Directives.

Under Article 13 of the Racial Equality Directive, a specialised body (or bodies) must be designated for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies that have a wider brief than racial and ethnic discrimination. Article 8a of Directive 76/207/EEC as amended by Directive 2002/73/EC requires the same in relation to discrimination on the grounds of sex. The bodies' tasks are to provide independent assistance to victims of discrimination, conduct independent surveys on discrimination, and publish independent reports and make recommendations on any issue relating to such discrimination. Many States are thus faced with the challenge either of establishing a completely new body for this purpose, or revising the mandate of an existing specialised body.

The project ***Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies*** is funded by the European Community Action Programme to Combat Discrimination (2001-2006). It creates a network of specialised bodies with the objective of promoting the uniform interpretation and application of the EC anti-discrimination directives, and of stimulating the dynamic development of equal treatment in EU Member States. It promotes the introduction or maintenance of provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives, as allowed under Article 6(1) of the Racial Equality Directive and Article 8(1) of the Framework Directive. The partners of the project are the Ombud for Equal Employment Opportunities (Austria), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Equality Authority (Ireland), the Equal Treatment Commission (Netherlands, leading the project), the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Racial Equality (Great Britain), the Equality Commission for Northern Ireland, and the Migration Policy Group (Brussels).

The project provides a platform for promoting the exchange of information, experience and best practice. Specialised bodies from other existing and acceding EU Member States are also participating in the activities of the project.

This is the report of the second in a series of 7 experts' meetings conducted under the project, which was hosted by the Austrian Ombud for Equal Employment Opportunities on 20-21 May 2003 in Vienna. The theme of the meeting was 'Protection against Discrimination and Gender Equality - How to meet both requirements'. The meeting considered ways in which the experience built up at EU level in relation to discrimination based on sex can be used to implement the newer laws on discrimination on other grounds.

CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISME BESTRIJDING
CENTRE POUR L'ÉGALITÉ DES CHANCES ET LA LUTTE CONTRE LE RACISME
MPG
OMBUDSMANNEN MOT ETNISK DISKRIMINERING
DO
CGB
Commissie Gelijke Behandeling
Equality Commission
FOR NORTHERN IRELAND
THE EQUALITY AUTHORITY
AN EQUALITY IN A DIVERSE IRELAND
COMMISSION FOR RACIAL EQUALITY
BUNDESMINISTERIUM
FÜR SOZIALE SICHERHEIT UND GENERATIONEN
Anwältin für Gleichbehandlungsfragen