

Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive

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1. Introduction

The European Union (EU) reached a turning point with its anti-discrimination legislation in 2000. Initially, its legislation had predominantly focused on discrimination against EU migrant workers, as well as gender discrimination connected to participation in the labour market. Using new competences introduced by the 1999 Treaty of Amsterdam, the Union adopted two Directives which altered the character of EU anti-discrimination law. The Racial Equality Directive² prohibited discrimination on grounds of racial or ethnic origin in a wide range of areas including employment, vocational training, education, social protection, housing and the provision of goods and services. The Employment Equality Directive³ prohibited discrimination on a longer list of grounds (religion or belief, disability, age and sexual orientation), but across a more limited material scope (employment and vocational training).

The 2000 Directives have always carried an aura of unfinished business. No coherent argument of principle was advanced as to why the prohibition of racial discrimination was much more extensive in its application than that which applies to the other grounds. At the time of making the proposal for the Directives, the Commission frankly acknowledged that there was much stronger political will amongst the Member States to take an initiative against racism than other forms of

discrimination and the Commission wanted to capitalise upon that in order to produce as far-reaching a Directive as possible.⁴ Unsurprisingly, it was not long before civil society organisations began campaigning for further legislation to remove the gap in protection between the two Directives.⁵

The political case for additional legislation appeared to have been conceded in 2004 by the incoming Commission President, José Manuel Barroso. Before the European Parliament, he stated: "I also intend to initiate work with a view to a framework directive on the basis of Article 13 of the European Community Treaty, which will replace the directives adopted in 2000 and extend them to all forms of discrimination."⁶ Nevertheless, there followed a lengthy period of studies and consultations, which seemed to risk losing the momentum for a new Directive. Under pressure from the Parliament and civil society to follow through on the commitment given in 2004, the Commission finally published its proposal for an additional Directive in July 2008.⁷ In brief, this seeks to prohibit discrimination on grounds of religion or belief, disability, age and sexual orientation in the fields of social protection, social advantages, education and goods and services, including housing. The main political hurdle to the adoption of the Directive lies in the need for unanimous agreement within the Council

of Ministers from all 27 EU Member States. Negotiations actively commenced in autumn 2008 and are ongoing at the time of writing. This article will provide an overview of the contents of the proposed Directive and an initial evaluation of its potential strengths and weaknesses. It will begin by considering the grounds of discrimination, before progressing to examine: the definition of discrimination; the Directive's material scope; the exceptions to the prohibition of discrimination; and the enforcement mechanisms.

2. The Grounds of Discrimination

As mentioned above, the proposed Directive covers the grounds of religion or belief, disability, age and sexual orientation. Accordingly, the mission of the Directive is confined to addressing some of the perceived shortcomings of the Employment Equality Directive and it does not attempt to make a wider reform of EU anti-discrimination legislation. It also follows the pattern of the existing Directives in not providing any definition of the discrimination grounds.

This choice was particularly contested in relation to disability. The first decision of the European Court of Justice on disability adopted a relatively rigid approach:

“The concept of “disability” must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”⁸

The focus here on the individual's impairment seemed to adopt a medicalised model of disability, whereas the general trajectory of disability law reform has been to reduce the emphasis on the individual's impairment and instead to concentrate on the disabling

effects of the surrounding environment, such as building design or social prejudices. The proposed Directive could be regarded as a missed opportunity to give the Court a clearer steer on how it should interpret the concept of disability. This critique has filtered through; the European Parliament⁹ has proposed inserting a definition of disability drawn from the UN Convention on the Rights of Persons with Disabilities¹⁰ and the Council working papers show that such an amendment has also been adopted there.¹¹

In a similar fashion, the proposed Directive does not expressly address the issues of discrimination based on an assumption (e.g. that someone is a Muslim, even if he is actually Hindu), or discrimination based on association (e.g. a non-Romani woman denied entry to a bar because she is accompanied by a Romani man). Shortly after the proposed Directive was published, the Court of Justice decided that the existing Employment Equality Directive should be interpreted in a way which addressed associative discrimination. In *Coleman*,¹² the Court held that the Directive prohibits discrimination on particular *grounds* rather than protecting a particular class of persons. Therefore, discrimination against the primary carer of a disabled child could be discrimination on grounds of disability; it did not matter that the person encountering the discrimination was not personally disabled. The broad language used within the decision suggests that its reasoning will be applied to other discrimination grounds, so it could be argued that the Court has resolved this issue without the need for legislative intervention. Yet the Court's judgment is carefully worded to respond to the facts of the case before it, and in the operative part of the judgment it does not explicitly refer to discrimination by association.¹³ On balance, reasons of transparency and legal certainty suggest that it would be preferable

for the Directive to include an express prohibition of discrimination based on association or assumption.¹⁴

The final issue to be considered in this section is multiple discrimination. One of the oft-cited reasons for adopting additional EU anti-discrimination legislation was multiple discrimination. The lacunae in the existing legal framework frustrated the ability of the law to respond effectively to situations where individuals face discrimination on more than one ground. For example, a gay Asian tenant facing harassment on grounds of ethnic origin and sexual orientation is currently protected under EU law from the harassment he experiences on grounds of his ethnic origin, but not from that based on his sexual orientation. By seeking to 'level up' the legal protection on grounds of religion, disability, age and sexual orientation to that already existing for racial or ethnic origin, the Directive would contribute to combating multiple discrimination insofar as it plugs some of the gaps in the present law. There are, though, notable shortcomings in the way the Directive engages with multiple discrimination. First, intersections between gender and other discrimination grounds are typically the best recognised instances of multiple discrimination.¹⁵ Nonetheless, a side-effect of the current proposal, if adopted, is that gender discrimination would become the least protected of the grounds covered by EU anti-discrimination legislation. Presently, discrimination on grounds of sex is forbidden in employment, vocational training, aspects of social security law and in the provision of goods and services. There is no protection against discrimination in education.¹⁶

The second weakness in the Directive's approach to multiple discrimination is its failure to tackle some of the difficulty in using the legal framework. Even if there were com-

prehensive legislation prohibiting discrimination across all the grounds mentioned, problems can still arise in practice. These issues range from locating an appropriate comparator for a complainant alleging discrimination on multiple grounds, to determining whether the remedy awarded should be adjusted if the discrimination has been on more than one ground.¹⁷ The Commission's explanatory memorandum, which accompanied the proposal for the Directive, rather dismissively states that 'these issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas.'¹⁸ The legal foundations for this assertion seem tenuous. A Directive dealing simultaneously with four grounds of discrimination seems entirely apt for addressing the question of multiple discrimination and there is no apparent question of legal competence which would restrain the EU from legislating in this direction. In the European Parliament's first reading of the proposal, it endorsed a more penetrating response, notably by the addition of provisions expressly prohibiting multiple discrimination.¹⁹

3. The Definition of Discrimination

In the period between 2000 and 2006, various EU Directives have converged towards a settled definition of discrimination.²⁰ This has four limbs: direct discrimination, indirect discrimination, harassment and instruction to discriminate. Article 2(2) of the proposed Directive largely replicates this structure by adopting equivalent definitions of these four concepts to those already found in the other Directives. Aside from the discussion on how these definitions operate in relation to multiple and associative forms of discrimination, this aspect of the Directive has generated relatively little controversy. A specific issue for the UK arises in relation to the prohibition on harassment. British legis-

lation has chosen not to prohibit harassment on grounds of religion or sexual orientation in relation to the provision of services based on concerns about the impact that this could have on freedom of speech.²¹ Without delving into this complex debate, it is worth noting that few other Member States have felt the need to introduce such a restriction into their domestic legislation. Consequently, it may be difficult for the UK to persuade the rest of the EU to disrupt a settled and largely consistent approach to the definition of discrimination in order to accommodate its domestic agenda.

The genuine novelty in the definition of discrimination is the proposal to create a fifth limb to the concept of discrimination which would be “denial of reasonable accommodation” (Article 2(2)(5)). The Employment Equality Directive already includes a duty on employers to provide reasonable accommodation for disabled persons (Article 5). This is prefaced by the statement “in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities”. Logically, this can be interpreted as meaning that a failure to provide reasonable accommodation is a breach of the principle of equal treatment, but the Directive does not include such a failure within its actual definition of “discrimination” (Article 2). This has resulted in inconsistency within national legislation over whether failure to provide reasonable accommodation amounts to direct or indirect discrimination; whether it is a *sui generis* wrong; or whether it is treated as an aspirational duty with no specific sanction in the event of a breach.²² The proposed Directive clarifies this conundrum by ensuring that denial of reasonable accommodation is a specific form of unlawful discrimination, thereby drawing inspiration from the approach in the UN Convention on the Rights of Persons with Disabilities.²³

Given that denial of reasonable accommodation is to become a form of unlawful discrimination, it is surprising that the proposed Directive remains somewhat elusive on what constitutes reasonable accommodation.²⁴ Article 4(1)(a) would establish an anticipatory duty to provide “effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport”. The Directive does not spell out on whom this duty falls, but it implies that Member States and service-providers have a positive obligation to take measures to ensure equal access for disabled persons; it is not enough to respond on a case-by-case basis to the needs of individual disabled people as they seek to access the service. Article 4(1)(b) states that “notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.” On the one hand, this makes it clear that where, for example, a wheelchair user wishes to enter a large, modern supermarket and it has failed to provide a wheelchair accessible entrance, then the individual could bring a complaint of discrimination due to denial of reasonable accommodation. On the other hand, the Directive remains ambiguous as to whether there should be any other means of enforcing the anticipatory duty save than where an individual complainant is denied access to the service. For example, there is no provision for legal standing for a national equality body to bring proceedings where it finds evidence of service-providers failing to take anticipatory steps to ensure non-discriminatory access. If the anticipatory duty only bites in reaction to an individual complaint, then it adds little to a duty to provide reasonable accommodation.

4. The Material Scope of the Prohibition of Discrimination

The proposed Directive replicates those parts of the material scope of the Racial Equality Directive which were not included in the Employment Equality Directive: social protection, including social security and healthcare; social advantages; education; access to and supply of goods and other services which are available to the public, including housing.²⁵ Given that these are drawn from the Racial Equality Directive, it might be assumed that there should be little controversy over whether, in principle, the EU enjoys the necessary legal competence to legislate in these fields. In retrospect, the limits to the EU's competence were rather glossed over in the rush to adopt the Racial Equality Directive (which became a short-term political response to the entry into the Austrian government of a party from the far-right). When the Commission subsequently sought to legislate on gender equality in areas outside the labour market, much more resistance was encountered and the final Directive was limited to goods and services, with an express exclusion of media, advertising and education.²⁶ Similarly, the documentation from the Council of Ministers' negotiations reveals that many Member States are querying the scope of the Union's powers to legislate on topics such as education, health and social protection.²⁷

The ambiguity surrounding the legal competence of the EU can be traced to two factors. First, the EC Treaty heavily circumscribes the capacity of the EU to legislate on education and health. In education, for example, Article 149(4) EC only provides a power to "adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States". So the Union can create educational programmes, such as the

Erasmus student exchange programme, but it cannot harmonise the organisation of the school system. Against this restrictive view of the Union's role, it must be acknowledged that EU law relating to the free movement rights of EU citizens penetrates deeply into national social policy, including health and education. For instance, the Court of Justice has upheld the right of citizens, in certain situations, to seek healthcare in another Member State and to receive a reimbursement for the costs of this treatment, even within publicly-funded healthcare systems such as the British NHS.²⁸ In practice, such decisions are likely to have some implications for the organisation of the healthcare system, even if the EC Treaty elsewhere deems this to be a responsibility of the Member States.²⁹

The Racial Equality Directive squared this circle by listing the areas to which it applies (including health and education), but prefacing this with the statement: "within the limits of the powers conferred upon the Community, this Directive shall apply ... in relation to ..." On the surface, the Racial Equality Directive appears to apply unreservedly to all aspects of education, but it would be possible in a given case to dispute whether or not that aspect of education is one which actually fell within the limits of the Community's powers. Ultimately, this is a pragmatic response to the reality of fuzzy boundaries between what is a matter of exclusively national competence and what may be a matter of shared competence with the EU. Any attempt to delineate EU legal competence more closely is likely to produce an undesirable difference in the material scope of the Racial Equality Directive and the 2008 proposal. Indeed, this would undermine one of the core benefits of the 2008 proposal, which is to render consistent the prohibition of discrimination across a range of grounds.

In one respect, the Commission has already qualified the material scope of the 2008 proposal in comparison to the Racial Equality Directive. In relation to goods, services and housing, the proposal states that this “shall apply to individuals only insofar as they are performing a professional or commercial activity”.³⁰ The antecedents of this clause can be traced back to the polemics provoked in Germany during the transposition of the Racial Equality Directive. There was a fiery debate over whether or not the Directive violated the freedom of contract and privacy rights. The German federal anti-discrimination law takes a generous view of the private sphere; in principle, if a landlord does not rent out more than 50 flats, then she is not subject to the legislation.³¹ The Commission’s text evidently anticipates a similar debate, but the approach taken threatens to open a loophole.

The European Court of Justice has already recognised, in the context of gender equality legislation, that the principle of equal treatment has to be interpreted in the light of the right to private life.³² Consequently, the Court was willing to accept that there could be *some* forms of employment within the private household where restrictions on the principle of equal treatment could be applied.³³ This should be a sufficient safeguard to ensure that if there is a clash between non-discrimination and private life, then the Court will strike an appropriate balance. In its explanatory memorandum, the Commission suggests the following example: “letting a room in a private house does not need to be treated in the same way as letting rooms in a hotel”.³⁴ Nevertheless, the wording of the proposed Directive goes beyond that found in either the Racial Equality Directive or Directive 2004/113 on gender equality in goods and services. This creates the risk that Mem-

ber States (and the courts) will interpret this as favouring a more extensive concept of private transactions. Indeed, Germany is advocating for the Directive to be limited to transactions which are conducted impersonally and in a standardised fashion (as in its domestic legislation).³⁵

5. The Exceptions to the Prohibition of Discrimination

Some of the most controversial elements of the proposed Directive relate to the exceptions foreseen within the text. Some of these are general in nature, whilst there are others which specifically relate to disability and age. Beginning with the general exceptions, Article 2(8) permits “general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.” The difficulty with this provision is determining what sorts of measures would be regarded as justified. To date, the equivalent exception in the Employment Equality Directive³⁶ does not appear to have provoked significant judicial scrutiny in domestic legal systems and it has not been considered by the Court of Justice. The wording resembles similar provisions within the European Convention on Human Rights, so it seems likely that the proportionality test used by the European Court of Human Rights would also be imported in the interpretation of this provision. Nevertheless, it would be preferable if this was explicitly mentioned within the text.

More detailed exceptions are found in Article 3. This article concerns the material scope of the Directive, so, strictly speaking, these provisions are not exceptions to the prohibition

of discrimination, but simply limitations on the scope of application of the Directive. In summary, paragraphs 2, 3 and 4 state that the Directive is “without prejudice to”:

- national laws on marital or family status and reproductive rights;
- the content of teaching, organisation of the educational system, including special needs education;
- differences in treatment in access to educational institutions based on religion or belief;
- national legislation on the secular nature of the State;
- national legislation on churches and other organisations based on religion or belief;
- national legislation promoting equality between men and women.³⁷

Given the confines of this article, it is not possible to explore the meaning of each of these restrictions in depth. It is obvious, though, that they seek to shelter matters of particular sensitivity for certain Member States. For example, the latent rationale for the reference to the secular State is laid bare in recital 18 in the preamble to the proposal, which states that “Member States may also allow or prohibit the wearing or display of religious symbols at schools”. Unsurprisingly, the French Presidency proposed that this reference to religious symbols should be moved into the main text of the Directive.³⁸ Elsewhere, controversies surrounding same-sex marriage and adoption by lesbian and gay persons seem to underpin the sweeping exclusion of national laws on marital or family status and reproductive rights. The inherent problem in this part of the Directive is that the blanket language used extinguishes any meaningful attempt to balance equality claims with these competing interests. For example, a thorny issue is admission policies for schools with

a religious ethos. Where a religious minority, such as Judaism, wishes to establish schools reflecting a particular religious ethos, it may be necessary for there to be some preference in the admissions process in order to ensure that sufficient places are available for Jewish children wishing to attend that school. In contrast, if most national schools reflect the majority religious community, such as Catholicism, then giving a free reign to preferential treatment based on religion could leave children from minority religions with a very limited choice of schools. It is, therefore, necessary to strike a careful balance between permitting limited and proportionate instances of preferential treatment based on religion whilst not completely emasculating the principle of equal treatment. The proposed Directive, however, makes no attempt to engage with the nuances of this issue; the permission for “differences of treatment in access to educational institutions based on religion or belief” is unqualified.

Exceptions relating to age and disability

There are two further exceptions of relevance to the grounds of age and disability. Article 2(7) authorises “proportionate differences in treatment” in financial services, provided that “age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data”. In the explanatory memorandum, the Commission argues that “the use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product.”³⁹ This perspective can be challenged as not recognising the stereotyping which underpins the use of any discrimination ground as a basis for setting different premiums for financial products. A 72 year old man who is refused travel insurance is suffering from a

stereotype that older men are at greater risk of experiencing ill-health. Although this is factually true, it takes no account of the specific health record of the individual customer. As Baroness Hale observed in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport and another*:

“The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.”⁴⁰

On a more pragmatic level, this exception can also be criticised for not building in the same safeguards which are found in the equivalent exception in the Directive on gender equality in goods and services.⁴¹

The widest exception relates to age discrimination. Article 2(6) states:

“... Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.”

The first sentence of this paragraph echoes Article 6(1) of the Employment Equality Directive.⁴² This permits direct discrimination on grounds of age and opens the door for any form of age discrimination to be potentially capable of justification. The uncertainty generated by this wide scope for

justification is already reflected in the preponderance of preliminary references from national courts under the Employment Equality Directive, many of which have concerned the interpretation of Article 6(1).⁴³ There is relatively little controversy over the fact that there are a range of circumstances where direct age discrimination should be permitted. This ranges from minimum age requirements for access to alcohol, tobacco, pornography or firearms, through to qualification ages for state retirement pensions or other social benefits (such as free/discounted travel on public transport). The difficulty is how to protect and permit schemes which provide benefits for younger and older persons, whilst still ensuring judicial scrutiny of other, less warranted age-based differences in treatment. Both the European Parliament and the Council negotiations are favouring more detail in the legislation. The Parliament has advocated retaining the possibility to justify direct age discrimination, but complementing this with examples in the preamble of permitted differences in treatment, such as driving licences.⁴⁴ In contrast, the Council has discussed inserting a list of measures which are “deemed to be compatible with the principle of non-discrimination”, such as more favourable conditions for access to social protection.⁴⁵ The risk with the latter approach is that a broad swathe of age-based distinctions is placed outside the need for any objective justification.

The discussion above may also have implications for disability. This is another ground where there are numerous instances of preferential treatment which are conducive to the realisation of full equality in practice, even though they collide with formal equal treatment of disabled and non-disabled persons. Most, if not all, Member States will provide a range of social welfare benefits which are limited to disabled persons, such

as mobility and living allowances. It is presumably not the intention of the Commission that such programmes should be vulnerable to challenge as direct discrimination against non-disabled persons. Nevertheless, the proposed Directive does not expressly address the legal foundation for permitting such measures. The Council has debated adding disability into Article 2(6),⁴⁶ however, that would considerably weaken the protection against disability discrimination by allowing the justification of direct discrimination. A more suitable approach would be to recognise an asymmetrical objective for disability discrimination legislation; in other words, that it is concerned with protecting disabled persons against discrimination rather than conferring parallel protection for the non-disabled.⁴⁷

6. Remedies and Enforcement

For the most part, the Commission has eschewed any innovation in how the Directive approaches procedures for enforcement or remedies. Instead, it replicates standard provisions from existing EU anti-discrimination legislation; for example, there is protection from victimisation and provision for a shift in the burden of proof where the complainant establishes facts from which it may be presumed that discrimination has occurred. The principal novelty, compared to the Employment Equality Directive, is the obligation on Member States to designate a body or bodies for the promotion of equal treatment. This duty already exists in EU legislation in respect of discrimination on grounds of sex and racial or ethnic origin. Yet the Commission's proposal timidly refrains from addressing the loophole which is inherited from the Employment Equality Directive. If the text was adopted as it stands, states would be obliged to have a body which assists individuals facing discrimination on grounds

of religion, age, disability and sexual orientation in the relevant areas outside employment, but there would be no requirement for this body's mandate to cover discrimination in the labour market.

The overall direction of the remedies and enforcement chapter of the Directive is to continue the heavy focus in EU legislation on an anti-discrimination model reliant on complaint-based enforcement, primarily brought by individuals. This jars with the announced direction of EU policy. In 2005, the Commission published a "Framework Strategy" on non-discrimination and equal opportunities. This acknowledged the limitations in the complaint-based model:

"It is clear that implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups."⁴⁸

Instead, the "positive and active promotion of non-discrimination and equal opportunities for all" was identified as the core objective of the new strategy.⁴⁹ There is little evidence of this thinking in the 2008 proposal. There is the option for Member States to take positive action measures,⁵⁰ but there are no duties on Member States and/or public authorities to promote equality. Even the modest steps in the EU's gender equality legislation, such as a duty to "actively take into account the objective of equality" when formulating laws and policies,⁵¹ has not been transplanted into this proposal.

7. Conclusion

This Directive would, for the most part, bolster domestic anti-discrimination legislation. A mapping study for the Commission

published in 2006 found that although there was a wide range of legislation in the Member States on discrimination outside employment, this was often variable in its material scope and it was not always consistent in the range of discrimination grounds covered.⁵² In a similar fashion to other EU Directives, this proposal would stimulate a revision of national laws in a generally upward direction. Importantly, it would make a major contribution to diminishing the perceived “equality hierarchy” within EU legislation, levelling-up protection towards that found in the Racial Equality Directive.

The turbulent history of this initiative makes it understandable that the Commission has opted for a cautious proposal. It has focused its energies on ensuring common legislation for all four discrimination grounds, as

well as aiming for a wide-ranging material scope. The trade-off seems to lie in the underpinning model of the legislation. By replicating, as far as possible, provisions within the existing Directives, the Commission has shied away from innovation in areas such as multiple discrimination or the promotion of equality. This might be a strategically sensible choice with a view to limiting the range of contentious issues on the negotiating table. It is, though, a missed opportunity for modernisation. There is an increasing disjunction between, on the one hand, the array of EU policy initiatives seeking to advance equality via positive action, mainstreaming and data collection,⁵³ and, on the other hand, the actual content of EU legislation which remains wedded to a traditional complaints-based anti-discrimination model.

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² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

³ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁴ European Commission, “Communication on certain Community measures to combat discrimination”, COM (1999) 564, p. 8.

⁵ For example, the European Disability Forum collected over one million signatures in favour of a further Directive on disability discrimination.

⁶ European Parliament Debates, 26 October 2004.

⁷ European Commission, “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”, COM (2008) 426.

⁸ Case C-13/05 *Chacón Navas* [2006] ECR I-6467, para. 43.

⁹ Amendment 17, European Parliament legislative resolution of 2 April 2009 on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

¹⁰ See “Promoting a Paradigm Shift”, *Equal Rights Review*, Vol. 2, 2008, p. 87.

¹¹ Recital 19a, Council, Document 16594/08 ADD 1, 9 December 2008.

¹² Case C-303/06, *Coleman v Attridge Law and Steve Law*, 17 July 2008.

¹³ See Waddington, L., Case Note, *Common Market Law Review*, Vol. 46, 2009, p. 672.

¹⁴ See above, note 9. Amendment 41 adopted by the European Parliament would introduce such a clause.

¹⁵ European Commission, “Tackling multiple discrimination – practices, policies and laws”, Office for the Official Publications of the European Communities, Luxembourg, 2007, p. 47.

¹⁶ Article 3(3), Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

¹⁷ See Uccellari, P., “Multiple Discrimination: How Law Can Reflect Reality”, *Equal Rights Review*, Vol. 1, 2008, pp. 24-49.

¹⁸ See above, note 7, p. 4.

¹⁹ Amendment 37, EP (see above, note 9).

²⁰ In addition to the Racial Equality and Employment Directives, there have been three significant Directives relating to gender equality: 2002/73/EC [2002] OJ L 269/15; 2004/113/EC [2004] OJ L373/37; 2006/54 [2006] OJ L204/23.

²¹ See Uccellari, P., “Banning Religious Harassment: Promoting Mutual Tolerance or Encouraging Mutual Ignorance?” *Equal Rights Review*, Vol. 2, 2008, pp. 7-27.

²² Waddington, L., “Reasonable accommodation” in Schiek, D., Waddington, L., and Bell, M., (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Hart Publishing, Oxford, 2007, pp. 740-745.

²³ Article 5(3). The Convention entered into force on 3 May 2008.

²⁴ The European Parliament supported inserting a definition of reasonable accommodation (Amendment 57, see above, note 9) and this has also been proposed in the Council negotiations (Article 4(1)(a), see above, note 11).

²⁵ Article 3(1).

²⁶ Article 3(3), Council Directive 2004/113/EC.

²⁷ See above, note 11, Council, pp. 15-16.

²⁸ Case C-372/04, *R (on the application of Watts) v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-4325.

²⁹ Article 152 EC.

³⁰ Article 3(1).

³¹ Para 3.2.9, Mahlmann, M., “Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: Germany”, 2007. Available at: http://www.migpolgroup.org/public/docs/125.Germany_DiscriminationCountryReport_EN_01.07.pdf.

³² Case 165/82, *Commission v UK* [1983] ECR 3431.

³³ *Ibid*, para. 14.

³⁴ See above, note 7, European Commission, p. 8.

³⁵ See above, note 11, Council, p. 16.

³⁶ Article 2(5).

³⁷ Article 3(5) reproduces Article 3(2) from the Racial Equality Directive specifying that the Directive does not cover

differences of treatment based on nationality.

³⁸ See above, note 11, Council, Article 3(3).

³⁹ European Commission (see above, note 7) p. 5.

⁴⁰ [2005] 2 AC 1, para. 74.

⁴¹ Article 5(2) of Directive 2004/113 requires Member States to ensure that the data used in determining actuarial factors are published and regularly updated. In addition, Member States must review this exception after a period of 5 years.

⁴² In contrast to the Employment Equality Directive, the proposed text omits the words "objectively and reasonably" prior to "justified".

⁴³ For example, Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; Case C-388/07 R (*the Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009).

⁴⁴ See above, note 9, amendment 2.

⁴⁵ Article 2(6), (note 11 above). The Council is also discussing a list of detailed examples akin to that recommended by the Parliament (recital 14a).

⁴⁶ See above, note 11.

⁴⁷ This approach would, though, need specific provision to be made for discrimination due to association with a disabled person.

⁴⁸ European Commission, "Non-discrimination and equal opportunities for all – a framework strategy" COM (2005) 224, p. 2.

⁴⁹ *Ibid*, p. 12.

⁵⁰ Article 5.

⁵¹ Article 29, Council Directive 2006/54/EC.

⁵² McColgan, A., Niessen J., and Palmer, F., "Comparative analyses on national measures to combat discrimination outside employment and occupation", Migration Policy Group and Human European Consultancy, Brussels, 2006.

⁵³ For analysis, see Bell, M., *Racism and Equality in the European Union*, Oxford University Press, Oxford, 2008, pp. 82-85.