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PART I

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## 1

## Introduction

HELEN MEENAN\*

## Part I

This volume is compiled at a remarkable time in the history of equality and anti-discrimination law in the European Union (EU). The EU has already achieved the expansion of its anti-discrimination grounds from just two<sup>1</sup> under the E(E)C Treaty to seven following the Amsterdam Treaty,<sup>2</sup> which incorporated Article 13 into the EC Treaty (EC). Article 13.1 EC empowers the Council to ‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. The first two Article 13 Directives, the Race Directive and the Employment Equality Directive<sup>3</sup> are six years old at the time of writing and their implementation dates have all expired. The intriguing third such Directive, the Equal Treatment Directive between men and women in access to and supply of goods and services is already two years old.<sup>4</sup> The European Court of Justice (ECJ) has delivered some early judgments on this newly expanded body of equality and anti-discrimination law. But we do not yet have the full measure of the challenges presented by the new anti-discrimination grounds. Nor do we have the full measure of diversity arising from combinations of protected grounds, much less the ability of the Article 13 Directives to deal with them. There is also the increased diversity introduced to the EU by the accession of ten new Member States in 2004, two new Member States in 2007 and future enlargements of the Union to consider.

\* I am indebted to Dr Haris Kountouros, Frances Meenan, Barrister, Dublin and Nicola Aries, Kingston University, for their helpful comments on an earlier draft.

<sup>1</sup> Sex and nationality which will be discussed below. <sup>2</sup> 1957 and 1997, respectively.

<sup>3</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180, pp. 22–6 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303, p. 16.

<sup>4</sup> Council Directive 2004/113/EC [2004] OJ L373, p. 37.

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The prospect of the 2004 enlargement was a major impetus for the timing and the importance of the Article 13 package of measures.<sup>5</sup> Enlargement also reveals European equality law as a vehicle for new approaches working alongside the Article 13 Directives, which enable targeted responses to the needs of particular groups, as in the case of the Roma.<sup>6</sup> Crucially, this includes the recommendation that ‘any measure seeking to promote the integration of the Roma/Gypsy minority should be devised with the active participation of representatives of this group’.<sup>7</sup> However, at present it cannot be assumed that similar approaches will automatically spill over to other groups. At the moment the key question is where will EU equality and anti-discrimination law go from here?

*From a ‘hierarchy of equality’ to inter-sectionality*

A substantial body of literature developed rapidly on Article 13 EC. In the early stages there was much commentary and analysis on the so-called legislative hierarchy among the anti-discrimination grounds.<sup>8</sup> This volume acknowledges that the hierarchy argument *on its own* may not be the most effective platform on which to argue for a levelling up of protection or a dismantling of (negative) differences in treatment. There is also an inherent uncertainty in the idea that where one ground leads the way, others may yet follow. In any event, some commentators argue

<sup>5</sup> M. Bell, ‘Article 13 EC: The European Commission’s Anti-discrimination Proposals’, (2000) 29 *ILJ* pp. 79–84 at p. 84 and E. Ellis, *EU Anti-Discrimination Law* (Oxford University Press, 2005) at p. 29.

<sup>6</sup> In-depth study by the European Commission ‘The Situation of Roma in an Enlarged European Union’ (Brussels, 2004). The Inter-Service Group established by the European Commission co-ordinates the policies and programmes dealing with Roma issues, *European Commission, Equality and Non-discrimination Annual Report, 2005* at pp. 25–36. By mid-2006, the EU had already targeted € 100 million for Roma issues. Note the recommendation by the EU Network of Independent Experts in Fundamental Rights *Report on the Situation of Fundamental Rights in the European Union for 2003*, at p. 103, which recommended the adoption of a Directive to encourage the integration of Roma. This has been repeated by the EU Network of Independent Experts on Fundamental Rights *Thematic Comment No.3 The Protection of Minorities in the European Union*, 25 April 2005, at pp. 52 and 64. Note also the European Commission website on the Roma [http://ec.europa.eu/employment\\_social/fundamental\\_rights/roma/index\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/roma/index_en.htm).

<sup>7</sup> *Thematic Comment No. 3*, *ibid.*, at p. 64.

<sup>8</sup> For an overview see, Mark Bell for the European Commission, *Critical Review of academic literature relating to the EU directives to combat discrimination* (Brussels, 2004) at pp. 12–14. See also Lisa Waddington ‘Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive’, (2000) 29 *ILJ*, pp. 176–81 and Mark Bell, ‘Article 13 EC: the European Commission’s Anti-discrimination Proposals’, (2000) 29 *ILJ* pp. 79–84 at p. 80.

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that differences between the equality grounds may require and justify specific responses.<sup>9</sup> To date however, it can be said that a ground-specific approach has taken the individual grounds and the Article 13 family as a whole only so far. Indeed a sectoral approach goes against legislative and institutional developments in some EU Member States. In addition to a single piece of comprehensive equality legislation there now or shortly will exist a single body to be charged with the promotion of all protected grounds of equality (and even human rights) in some Member States.<sup>10</sup>

Multiple discrimination is slowly emerging as a key issue at EU level, which will also help to nudge stakeholders away from a purely single ground focus.<sup>11</sup> One theme to emerge from this book is that approaches based on inter-sectionality and human rights should now supplant the hierarchy argument as a means of moving towards a level playing field for all grounds, insofar as this is possible. An intersectional analysis approach to multiple discrimination also makes way for an understanding of a specific type of discrimination resulting from the interaction of anti-discrimination grounds.<sup>12</sup> In this volume the terms inter-sectional discrimination and multiple discrimination are used in the broadest possible senses. Case law long prior to the incorporation of Article 13 EC demonstrated that age limits could trigger sex discrimination.<sup>13</sup> So the idea of intersecting grounds of discrimination in the EU is far from new. Inter-sectionality and multiple discrimination perspectives would give us new ways of thinking about the anti-discrimination grounds and any subgroups they may contain and for devising strategies to tackle their anti-discrimination and equality needs. It may also be time to take a more expanded approach to anti-discrimination which arguably Article 21 European Charter of Fundamental Rights (EUCFR) might help to achieve with its non-exhaustive formulation.

<sup>9</sup> For example, M. Bell and L. Waddington, 'Reflecting on inequalities in European equality law', *European Law Review*, 28 (2003) pp. 349–69 and Barry Fitzpatrick in this volume.

<sup>10</sup> European Commission, *Equality and non-discrimination Annual Report, 2005* (European Communities, Luxembourg, 2005) at pp. 22–4.

<sup>11</sup> On 6 May 2006, the European Commission issued a call for tender (Invitation to tender VT/2006/01) for a study to promote understanding of the causes and effects of multiple discrimination in the EU. This study will include recommendations on how to tackle multiple discrimination.

<sup>12</sup> Timo Makkonen, Institute for Human Rights, Abo Akademi University, Research paper, *Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore*, April 2002, at pp. 10–11, [www.abo.fi/institut/imr/norfa/timo.pdf](http://www.abo.fi/institut/imr/norfa/timo.pdf). Note also Kimberle Crenshaw, 'Mapping the margins: Intersectionality, identity politics and violence against women of color', (1991) 43 *Stanford Labor Review*, Vol. 6, pp. 1241–99.

<sup>13</sup> For example, Case 152/84 *Marshall v. Southampton Area Health Authority* [1986] ECR 723.

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[More information](#)*The goals of this volume*

This volume adopts three considered approaches to European equality and anti-discrimination law. Firstly, and of paramount importance, it provides an expert essay on each ground contained in Article 13. Secondly, it adopts a contextual approach. In Part I it lays out a number of important contexts against which the grounds in Part II are examined. This will also act as a reminder that while much has been achieved, more work may be required in light of the various (changing) contexts within which equality and non-discrimination law is applied and must respond. Thirdly, to greater and lesser extents, the individual authors additionally aim to take the following broad issues into account in the assessment of their subject: to include the 2004 enlargement, human rights aspects (including the relevance of the EUCFR and the Constitutional Treaty now overtaken by the proposed Reform Treaty), inter-sectionality and multiple discrimination, gender and age dimensions, access to justice and particular strategies required to combat discrimination and promote equality. The overarching aim is simple: to see what insights can be drawn from a collective and contextual assessment of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation within this framework, at this important juncture following transposition.

*A time of change*

The time of writing is also remarkable, as many potentially significant projects are only just underway. The Gender Institute<sup>14</sup> and Fundamental Rights Agency<sup>15</sup> are in the early stages of development. We do not yet know how they will impact on and interact with older EU institutions, existing extra-institutional bodies such as the EU's various networks of independent experts, not to mention national bodies concerned with promoting equality and human rights and the world beyond EU borders.<sup>16</sup> These institutional developments are symptomatic of a major drive towards a stronger fundamental rights edifice for the EU but this was stalled by the

<sup>14</sup> European Commission Press Release 3 March 2006 'Commission to tackle gender inequality with new roadmap and €50 million gender institute.' Commission Proposal for a Regulation Establishing a European Institute for Gender Equality COM(2005) 81 final.

<sup>15</sup> Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights COM(2005) 280 final.

<sup>16</sup> However, the Proposal states 'The Network of independent experts could be one of the information networks animated by the Agency' and 'The Agency shall co-operate with other Community and Union bodies to ensure mutual support in the accomplishment of their respective tasks, and in particular to avoid duplication of work'.

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non-ratification of the Constitutional Treaty in at least five ways. (1) The EU Charter does not have binding legal force. Although it is also true that the underpinning provisions that had binding force before the Charter was adopted will continue to do so<sup>17</sup> and that the Charter remains a source of rights and interpretation. (2) The EU cannot accede to the ECHR or its protocols. (3) The potential of the Union's objective in Article I-3(3) ('[the Union] shall combat . . . discrimination') for anti-discrimination in general remains unexplored. (4) The loss of the general mainstreaming provision in Article III-3 for the Article 13 grounds is considerable.<sup>18</sup> (5) The Constitution would have also elevated equality to one of five values on which the Union is founded.<sup>19</sup> This is not to mention innovations such as, Article I-44 on observance of the principle of democratic equality of citizens by the EU institutions, bodies, offices and agencies. In chapter 3, McCrudden and Kountouros will consider the relevance of the proposed Reform Treaty, 2007 for equality and the EUCFR.

In the meantime, the European Commission has published its first report<sup>20</sup> (to be repeated every five years) to the European Parliament and Council on the Member States application of the Race Directive, with a report on the Employment Directive expected to follow. This report indicates that the three key characteristics of the Directive have proven effective: it applies to all persons, beyond the field of employment and requires the Member States to establish an equality body to promote equal treatment on grounds of racial or ethnic origin. This third feature has proven particularly successful, as victims are more likely to approach an NGO or equality body rather than the courts, for fear of victimisation and issues of cost.<sup>21</sup> At this stage the Roma are the group most represented in complaints.

These reports should include proposals to revise and update the Directives, if necessary.<sup>22</sup> However, there were mixed signals from the European Commission for some time. On his first day at work, Vladimir Spidla, European Commissioner for Employment, Social Affairs and Equal Opportunities, announced that a feasibility study on flanking measures to complement the legal framework would be produced on

<sup>17</sup> Personal communication with J.-P. Jacque, Director, Legal Service of the Council of the European Union.

<sup>18</sup> Despite existing mainstreaming provisions for isolated grounds. <sup>19</sup> Article 1–2.

<sup>20</sup> Commission Communication, 'The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin', COM(2006) 643 final.

<sup>21</sup> Ibid. at p. 4. <sup>22</sup> Article 19.1 EED and Article 17 RD.

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all grounds and that he would work on a new legal framework for equality.<sup>23</sup> The results of the feasibility study were due at the time of writing and a 'framework strategy for non-discrimination and equal opportunities for all' was adopted.<sup>24</sup> The Framework Strategy aimed to ensure full implementation of the Directives and to support back-up measures for their application and compliance. However, it may have contributed to opposing messages: 1) in light of the differences in level and scope of protection among the anti-discrimination grounds the Commission 'does not intend at this stage to present new legislative proposals'; and 2) the Commission's feasibility study 'will examine national provisions that go beyond Community requirements and will take stock of the advantages and disadvantages of such measures'. Thus the introduction of new grounds and the extension of goods and services legislation to additional grounds, appeared to be off the agenda. The Commission confirmed that it did not see a need to bring forward legislative proposals in respect of the Race Directive. There was no case law from the ECJ on race or ethnic origin and there was a lack of experience with implementation of the Directive at that time.<sup>25</sup>

Securing full implementation of the Article 13 Directives and the possible adoption of appropriate back-up measures focused on bedding down (and improving) what was already in place. Thus it appeared that we were without a second track: a new vision, a new phase or a new direction for the European fight against discrimination. However, *the European Year of Equal Opportunities for All 2007* provided a fresh impetus. In July 2007, the Commission announced that it would propose new initiatives to prevent and combat discrimination outside the labour market for gender, religion or belief, disability, age or sexual orientation<sup>26</sup> and it announced a public consultation on anti-discrimination measures. There is also considerable potential for the ECJ to highlight any limitations of the *acquis communautaire*.<sup>27</sup>

<sup>23</sup> Conference, *Equality in a future Europe 'A Social Europe It is time for action'*, 22/23 November 2004 at p. 3.

<sup>24</sup> Commission Communication, 'Non-discrimination and equal opportunities for all – A framework strategy', COM(2005) 224 final.

<sup>25</sup> Communication, *ibid.* at p. 8.

<sup>26</sup> Decision No 771/2006/EC of the European Parliament and of the Council establishing the European Year of Equal Opportunities for All (2007) – towards a just society [2006] OJ L146, pp. 1–7. Commission's Annual Policy Strategy 2008 COM(2007) 65 final.

<sup>27</sup> Case 249/96 *Grant v. Southwest Trains Ltd* [1998] ECR I-621, would be a past example.

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*Ongoing racial and religious tensions in the EU and beyond*

This volume also emerges following a period of worrying tensions, unrest and human rights concerns within the EU and among neighbouring countries in the period 2005–6. The race riots in France, Belgium and Berlin in late 2005 that were triggered by the deaths of two black teenagers, accidentally electrocuted while trying to hide from the police in Paris, are particularly worrying.<sup>28</sup> These riots were of a different order to the incidents of racist violence that were factors in the impetus and speed of the adoption of the Race Directive. Mark Bell in his contribution to this volume outlines those particular factors and discusses the EU's stalled attempts, following the Amsterdam Treaty, to make specific racist activities punishable by criminal law in all Member States.

The more recent race problems have their roots in a combination of poverty, discrimination and harassment experienced by France's North and black African communities extending well beyond the field of employment.<sup>29</sup> Early 2006 also saw demonstrations in the Middle East and European countries against caricatures of the prophet Muhammed printed in a Danish newspaper and reprinted in newspapers in a number of EU and non-EU countries.<sup>30</sup> The cartoons, which were regarded as blasphemous by Muslims, brought freedom of expression into direct conflict with religious beliefs.<sup>31</sup>

McCrudden and Kountouros, in this volume, ask whether the restrictions on freedom that anti-discrimination law represents are unjustified in human rights terms. They believe that 'We are increasingly likely to see, in both European theoretical literature and in litigation, challenges to anti-discrimination law from the perspective of freedom of association, privacy, freedom of speech, the right to property, and freedom of religion, as well as freedom of contract.' They suggest that complex

<sup>28</sup> J. Sturcke 'France braced for 12th night of riots', *The Guardian*, 7 November, 2005. G. Murray 'Understanding the riots in France', 18 January 2006, available at [www.irr.org.uk/2006/january/ha000016.html](http://www.irr.org.uk/2006/january/ha000016.html).

<sup>29</sup> Ibid.

<sup>30</sup> L. Harding and K. Wilsher 'Anger as papers reprint cartoons of Muhammed', *The Guardian*, 2 February 2006, available at [www.guardian.co.uk/print/0,,5389526-110633,00.html](http://www.guardian.co.uk/print/0,,5389526-110633,00.html). K. Wilsher, L. Harding and N. Watt, 'European elite scrambles to defuse furor over caricatures of Muhammad', *The Guardian*, 3 February 2006.

<sup>31</sup> Anti-semitic incidents also persist within in the EU see inter alia, EUMC Working Paper, 'Antisemitism Summary overview of the situation in the European Union 2001–2005', May 2006.



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legal questions will arise. Gwyneth Pitt discusses the collision between freedom of expression and freedom of religion and Mark Bell discusses the challenges of balancing freedom of expression with combating racism.<sup>32</sup> While these points are well made, it is also good to remember that the EC has developed a number of tools to promote human rights and equality, both internally and externally. These include the EC's unique human rights clause contained in its bilateral agreements with third countries<sup>33</sup> and the recent embedding of equality criteria in EC public procurement legislation.<sup>34</sup>

Close to EU borders, the rise of racial hate crimes and xenophobia together with an increasingly negative attitude to human rights NGOs in Russia, also help to characterise these times.<sup>35</sup> These selected issues confirm that this is no time for complacency in the fight against discrimination and the quest for human rights and equality in facing the challenges of simply living together in a modern, urban and globalised world. These issues have deep and complex roots and it is worth asking whether there is a role for EU anti-discrimination and equality law in tackling or preventing the underlying causes of such flash points when they occur within EU borders. To what extent are the Article 13 Directives equipped for such a role? Tailored research is required to find the answer. There are also more pervasive and overarching concerns. What are the implications of demographic ageing for working and living in the EU and for EU anti-discrimination and equality law? The EU has already started to prioritise the former<sup>36</sup> but arguably the latter lags behind notwithstanding the age strand of the Employment Directive and greater efforts in this direction could also help characterise a new era. This is all apart from discussions on the grounds of nationality and national minorities (often linked to race) both of which are absent from Article 13.1 EC and the Race Directive, moreover nationality is also absent from Article 21.1

<sup>32</sup> In this volume.

<sup>33</sup> Note the discussion of equality clauses by McCrudden and Kountouros in this volume.

<sup>34</sup> In, for example, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

<sup>35</sup> NCJS 'Number of ethnic and nationalistic crimes grows fast in Russia', *Pravda*, 19 January 2005; *Time Europe Magazine* 'From Russia with Hate', 11 April 2005; N. Paton-Walsh 'Moscow asks court to close civil rights group', *The Guardian*, 28 January 2006.

<sup>36</sup> Note Article 143 EC: 'The Commission shall draw up a report each year on progress in achieving the objectives of Article 136, including the demographic situation in the Community . . . The European Parliament may invite the Commission to draw up reports on particular problems concerning the social situation.'

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of the EUCFR. It will be shown below that nationality remains a complex issue within the EU.

This volume must start with some analysis of an important context within which the Article 13 Directives were adopted and continue to operate – the existing rich body of sex and nationality discrimination law. It is well known that these fields have contributed to the development of the Article 13 Directives.

## Part II – From simple beginnings

Equality and non-discrimination in all their embodiments stand out as areas of EU law that directly and unashamedly benefit the individual. Their development has been unpredictable, lacking in uniformity, sometimes timid and at other times daring. It pays tribute to the living qualities of EU law and the dynamic interplay between the Member States and the Community institutions, occasionally involving the individual as litigant. This interplay has evolved to provide a growing space for representative bodies concerned with diverse interests to be heard at a national level.<sup>37</sup> Today's rich landscape belies the now remarkable fact that only two grounds benefited from equality or non-discrimination in the E(E)C Treaty, 1957. Article 119 E(E)C Treaty (now Article 141 EC as amended) required Member States to ensure 'the application of the principle that men and women should receive equal pay for equal work'. The E(E)C Treaty contained no general principle of non-discrimination on grounds of sex,<sup>38</sup> contributing towards an initially lower status than nationality. Simply put, the principle of equal pay for men and women was included in the Treaty to deal with the competition concerns largely of one Member State.<sup>39</sup> While Article 7 E(E)C (now Article 12 EC) provided that 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' By contrast, nationality discrimination was prohibited throughout the entire scope of the Treaty<sup>40</sup>

<sup>37</sup> Note Articles 9.2 and Article 14 EED.

<sup>38</sup> S. Prechal and N. Burrows, *Gender Discrimination Law of the European Community* (Dartmouth, 1990) at p. 10.

<sup>39</sup> France.

<sup>40</sup> But this scope can also be viewed restrictively. See Sacha Prechal: 'Then there was the general prohibition of discrimination on grounds of nationality, but this applied only within the scope of application of the EEC Treaty' in 'Equality of treatment, Non-discrimination and social policy: achievements in three themes', (2004) 41 *Common Market Law Review*, p. 533.