

## **Discrimination and equality in public procurement**

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# Discrimination and equality in public procurement

## 1. Issues

This paper deals with the legal regulation of discrimination and equality in public procurement. It will discuss aspects of the procurement rules which may impact on - by improving or reducing - the level of equality in the procurement process and in society at large.

Equality problems in a procurement context may arise from equality failures in the procurement practice of the contracting authority, eg direct or indirect discrimination on grounds of nationality, sex, race, etc in the contracting authority's conduct of procurement processes. I use the expression 'protected criteria' as a general term covering all those criteria (nationality, sex, racial or ethnic origin, religion, age, etc) with regard to which there are legal protection against (some kinds of) discrimination. Statistics in the US show that:<sup>1</sup>

Women-owned businesses are dramatically underrepresented in federal procurement. Although women comprise almost 51 percent of the total U.S. population and own approximately 26 percent of the 20.8 million nonfarm businesses in the United States, surprisingly women-owned firms represent only 8.3 percent of all federal prime contractors and on average receive less than 2.5 percent of total federal prime contract dollars annually.

There is - as far as I know - no similar statistics in Europe but the problem may well be the same.

In respect of race discrimination the UK Commission for Racial Equality (CRE) has issued a number of publications on how to avoid direct and indirect race discrimination in public procurement and how to fulfil the obligation existing under the UK Race Relations Act to promote racial equality, see Commission for Racial Equality's home page on public procurement.<sup>2</sup>

Equality problems in a procurement context may also arise from lacks in the implementation of mainstreaming duties incumbent upon the contracting authority. Within the framework of the Council of Europe ECRI on 13

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<sup>1</sup> Sirmons, Denise Benjamin: Federal Contracting with Women-owned Businesses: an Analysis of Existing Challenges and Potential Opportunities, Public Contract Law Journal 2004 p725.

<sup>2</sup> <http://www.cre.gov.uk/duty/procurement.html>

December 2002 adopted a general policy recommendation No 7 on national legislation to combat racism and racial discrimination.<sup>3</sup> It provides in point 9:

9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits.

Equality problems may further arise from equality failures in society at large. Ayres' study<sup>4</sup> of retail car negotiations suggests that men and women do not obtain similar contracts when buying in the private sector in situations where the price is not definitively fixed. It seems doubtful whether the EU procurement regime makes the contracting process more gender neutral.

Even if there is no reason to suspect that a procurement process adds to equality problems in the society at large, public procurement may be used as a tool to overcome discrimination and facilitate equality. Government is often the largest purchaser of goods and services in European countries. Public procurement can be made an instrument to pursue the social goal of the socio-economic inclusion of immigrants, ethnic minorities<sup>5</sup> and women. This can be done by taking the protected criteria into account, ie mainstreaming the protected criteria into various stages of the procurement process, such as invitation to tender, contract documentation (contract notice, specifications, etc), conditions for performance of contracts, variants, subcontracting, exclusion, verification of the suitability of tenderers, choice of participants (in restricted and negotiated procedures and in competitive dialogue), award and performance of the contract.

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<sup>3</sup> See on the recommendation compared to Directive 2000/43/EC on the implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin Howard, Erica: Anti Race Discrimination Measures in Europe: An Attack on Two Fronts, *European Law Journal* 2005 p 468.

<sup>4</sup> Ayres, Ian: *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, *Harvard Law Review* 1991 p 817 and Ayres, Ian: *Pervasive prejudice? - unconventional evidence of race and gender discrimination*, Chicago 2001.

<sup>5</sup> See Cormack, Janet and Jan Niessen: *Public Procurement and Anti-discrimination Legislation*, part II in Chopin, Isabelle and Jan Niessen (eds): *Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further*, Commission for Racial Equality, London 2002

Discrimination/equality law and public procurement law represent two different approaches to European contract law. European equality law is in regard to public contracting a prime example of social contract law<sup>6</sup> while procurement law is of a more commercial nature. The two areas of law interact. They complement each-other but in some respects they may be seen as contradictory.

Problems related to discrimination/equality in public procurement are addressed both in discrimination/equality law on the one hand and in procurement law on the other. In the following I will analyse the intersection of procurement law and equality law in more detail at various stages of the procurement process.

Protection against discrimination on grounds of nationality is at the centre of procurement law whereas the other protected criteria are dealt with in more detail in discrimination/equality law. In the following I will look more into the different ways of handling discrimination and the principle of equality in procurement law and discrimination/equality law.

The first part of the paper compares procurement law and equality/discrimination law with regard to the ban on discrimination and mainstreaming. The second part of the paper discusses to what extent gender, race, etc can or must be taken into account at different stages of the procurement process. The third part of the paper deals with the different sets of remedies established in procurement law and equality/discrimination law and discusses how they fit together.

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<sup>6</sup> Wilhelmsson, Thomas: Social Contract Law and European Integration, Aldershot 1995.

Part I.  
Comparison of Procurement Law and Equality/discrimination Law with  
Regard to the Ban on Discrimination and Mainstreaming.

## **2. Overview of Procurement Law**

Since 1958 public procurement in the EC/EU has been governed by the general provisions of the EC Treaty on free movement of goods (Article 28 EC), persons (Article 39 EC on workers and Article 43 EC on freedom of establishment) and services (Article 49 EC). The procurement Directives are fragmentary and only aim at limited harmonization. The Treaty provisions and general principles of EU law which have to be complied with alongside the Directives are therefore of major importance.

### **2.1. Ban on discrimination and free movement of goods, persons and services**

There is a general requirement of non-discrimination directly or indirectly on grounds of nationality and a prohibition of restrictions on the free movement of goods, services, etc which must be complied with in all procurement policies including employment related ones. Direct or indirect promotion of local or national employment will be unlawful in public procurement.

In *Commission v Italy*<sup>7</sup> the ECJ held that the exception to freedom of establishment and freedom to provide services provided for by the first paragraph of Article 45 and by Article 56 EC must be restricted to activities which in themselves involve a direct and specific connection with the exercise of official authority. That is not the case in respect of activities concerning the design, programming and operation of data-processing systems for the public authorities, since they are of a technical nature and thus unrelated to the exercise of official authority.

### **2.2. General Principles of EU Law**

The procurement directive<sup>8</sup> builds on the ban on discrimination on grounds of nationality and develops it further into a principle of equal treatment of tenderers. Recital 2 to the 2004 Procurement Directive states:

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle

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<sup>7</sup> Case C-3/88 [1989] ECR 4035.

<sup>8</sup> 2004/18/EC.

of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

Under Article 2 of the Directive which lays down principles of awarding contracts contracting authorities shall treat economic operators equally and non discriminatorily and shall act in a transparent way.

Further there is a duty to respect the *principle of equal treatment* of all tenderers or potential tenderers. This principle is stated expressly in Article 2 of the 2004 procurement directive. As a consequence of this principle there is a prohibition of negotiation with the candidates or tenderers. Equality policies in procurement can therefore not result from negotiations during the tendering procedure, see further below in part II.

All bidders must be treated equally irrespective of whether they are of the same (as in *Beentjes*, where both the cheapest and second cheapest bid were from Dutch firms) or different nationality.

There is a requirement of *transparency*. For any criterion to be lawful it must be made known to all potential bidders from the beginning of the tendering procedure. Secret or disguised employment policies will always be unlawful in public procurement.

In *Beentjes* the ECJ ruled that an additional specific condition requiring employment of long-term unemployed must be mentioned in the contract notice. This is necessary in order to create transparency.

The requirement of transparency is probably one of the stronger arguments against allowing procurement to be used as a policy tool. Few and simple criteria promote transparency in the procurement process. Lowest price only as award criterion ensures a high degree of transparency. An indefinite number of criteria are, however, allowed under the heading “economically most advantageous offer”. Employment related criteria are not, necessarily complicated and difficult to see through.

In *Telaustria*<sup>9</sup> the ECJ dealt with a service concession contract, consisting of several, partly interlocking contracts, concerning the production of printed telephone directories and providing, in particular, for the provision of the following services: collecting, processing and arranging subscriber data, production of telephone directories and certain advertising services. The ECJ held that such a concession contract was outside the scope of the then Utilities

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<sup>9</sup> Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745.

Directive.<sup>10</sup> This view has been codified in the 2004 Procurement Directive.<sup>11</sup> The Court went on to remind the national court that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.<sup>12</sup> The ECJ stated in ground 62 (emphasis added):

That obligation of transparency which is imposed on the contracting authority consists in ensuring, *for the benefit of any potential tenderer*, a degree of *advertising* sufficient to enable the services market to be opened up to competition and the impartiality of *procurement procedures* to be reviewed.

As appears the Court talks about advertising duties and procurement procedures that must be open to review.

In *Coname*<sup>13</sup> the complainant claimed that the award of a service concession contract which falls outside the scope of the procurement directives should have been made following an invitation to tender. The ECJ held that Articles 43 EC and 49 EC preclude, in circumstances such as those at issue in the main proceedings, the direct award by a municipality of a concession for the management of the public gas -distribution service to a company in which there is a majority public holding and in which the municipality in question has a 0.97% holding, if that award does not comply with transparency requirements which, *without necessarily implying an obligation to hold an invitation to tender*, are, in particular, such as to enable an undertaking located in the territory of a Member State other than that of the municipality in question to have access to appropriate information regarding that concession, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession

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<sup>10</sup> 93/38/EEC.

<sup>11</sup> Article 17 of directive 2004/18/EC explicitly states that, without prejudice to the application of Article 3 (on general principles), the Directive shall not apply to service concessions as defined in Article 1(4).

<sup>12</sup> 61. The ECJ held in case C-275/98 *Unitron Scandinavia* and 3-S [1999] ECR I-8291, paragraph 31, that this principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

<sup>13</sup> Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*, nyr, judgement of 25 July 2005

In *Parking Brixen*,<sup>14</sup> the ECJ gave further clarification to the tendering obligation outside the scope of the procurement directives. The referring court asked whether the award of a public service concession without it being put out to tender is compatible with Community law, if the concessionaire is a company limited by shares resulting from the conversion of a special undertaking of a public authority, a company whose share capital is at the time of the award 100% owned by the concession-granting public authority, but whose administrative board enjoys all extensive powers of routine administration and can effect independently, without the agreement of the shareholders' meeting, certain transactions up to a value of EUR 5 million. The ECJ stated (emphasis added):

46 Notwithstanding the fact that public service concession contracts are, as Community law stands at present, excluded from the scope of Directive 92/50, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and Case C-231/03 *Coname* [2005] ECR I-0000, paragraph 16).

47 The prohibition on any discrimination on grounds of nationality is set out in Article 12 EC. The provisions of the Treaty which are more specifically applicable to public service concessions include, in particular, Article 43 EC, the first paragraph of which states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited, and Article 49 EC, the first paragraph of which provides that restrictions on freedom to provide services within the Community are to be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

48 According to the Court's case-law, Articles 43 EC and 49 EC are specific expressions of the principle of equal treatment (see Case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraph 8). The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment (see Case 810/79 *Überschäär* [1980] ECR 2747, paragraph 16). In its case-law relating to the Community directives on public procurement, the Court has stated that the principle of equal treatment of tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality (see, to that effect, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraphs 33 and 54). As a result, the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality.

49 The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the

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<sup>14</sup> Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG*, nyr, judgement of 13 October 2005.

benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, *Telaustria* and *Telefonadress*, cited above, paragraphs 61 and 62).

50 It is for the concession-granting public authority to evaluate, subject to review by the competent courts, the appropriateness of the detailed arrangements of the call for tenders to the particularities of the public service concession in question. However, *a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency.*

### **2.3. The 2004 Procurement Directive**

The substantive rules in the EC Treaty on free movement have, in matters of public procurement, been complemented with Directives coordinating tendering procedures in respect of supplies, works, services and utilities since the early 1970's. The procurement Directives contain procedural and remedial provisions aimed at ensuring transparency and equal treatment of different tenderers. There is free choice for the contracting authority or contracting entity between two different tender procedures: open procedures or restricted procedures. There are detailed provisions on selection of candidates to be invited to submit tenders in restricted procedures; on exclusion of potential contractors or service providers and on proof of professional and technical capability and of economic and financial standing. Award of contracts will usually have to be made on the basis of either the lowest price or the economically most advantageous tender. There is no definition in the Directives of the concept of 'economically most advantageous tender'.

In March 2004, the Community adopted two new directives on public procurement: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

The new directives came into force on 1 May 2004 and must be implemented by the Member States by 31 January 2006. In this paper the focus is on Directive 2004/18/EC - in the following called the Procurement Directive.

The main aims of the new procurement directive are to increase flexibility, to take account of new practices or market reality and to simplify the current rules.<sup>15</sup>

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<sup>15</sup> See for a general overview of the new directives Arrowsmith, Sue: An Assessment of the New legislative Package on Public Procurement, *Common Market Law Review* 2004 p 1277.

The directive contains new provisions on framework agreements, electronic procurement and competitive dialogue. Below in part II it is discussed further whether contracting authorities are allowed to conduct a dialogue with economic operators on equality issues.

Denmark<sup>16</sup> has already transposed the new directives into Danish law. By statutory instruments issued in September 2004 the directives were put into force in Denmark as at 1 January 2005.<sup>17</sup> In December 2004 the Competition Authority published Guidelines on their interpretation.<sup>18</sup>

### **3. Equality/discrimination Law**

Discrimination on grounds of Racial or Ethnic Origin in the provision of goods and services - including inter alia public procurement - is prohibited in the Directive on ethnic equality.<sup>19</sup> Discrimination on grounds of sex in the provision of goods and services is prohibited in the Directive on equal treatment between men and women in the provision of goods and services.<sup>20</sup>

Discrimination on grounds of other protected criteria, for example religion or age, is not prohibited at EU level in regard to the provision of goods and services, including public procurement, but only with respect to employment and occupation.

#### **3.1. Legal base - Article 13 EC**

As regards equality outside of employment and occupation the legal basis for binding Community legislation was weak before the coming into force of the

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<sup>16</sup> See further Nielsen, Ruth: Danish Procurement Legislation - after the implementation of Directive 2004/18/EC, *Tijdschrift Aanbestedingsrecht*, maastricht 2006 (forthcoming).

<sup>17</sup> See statutory instrument No 936 on procurement procedures of entities operating in the water, energy, transport and postal services sectors and statutory instrument No 937 of 16.9.2004 on the procedures for the award of public supplies contracts, public service contract and public works contracts.

<sup>18</sup> Konkurrencestyrelsens vejledning til udbudsdirektiverne, 20 December 2004.

<sup>19</sup> Directive 2000/43/EC Directive on the implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin.

<sup>20</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Amsterdam Treaty when that situation was changed. Article 13 EC<sup>21</sup> - which is the legal base of both the Race Directive and the Gender Equality (Goods and Services) Directive provides a clear legal basis for measures to combat discrimination on a number of grounds. The appropriate action that can be taken under Article 13 EC includes all kinds of binding secondary EU legislation such as regulations and directives.

### **3.2. Equality as a Fundamental Right and a General Principle of EU Law**

EU respects<sup>22</sup> fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Under the *acquis communautaire* Member States are bound by the fundamental rights including the fundamental right of equality when they act within the field of Community law as for example the freedom to provide services in Article 49 EC.<sup>23</sup>

In the proposal<sup>24</sup> for the Gender Equality (Goods and Services) Directive the Commission stresses that equal treatment between women and men and non-discrimination on grounds of sex are fundamental principles of Community law. The EU's approach to equality has developed considerably over time, so that the original emphasis on equal pay and on avoiding distortions of competition between Member States has been replaced by a concern for equality as a fundamental right. This is demonstrated by the attention given to equality in the EC Treaty, in the EU Charter of Fundamental Rights and in the draft Constitutional Treaty.

A similar development has taken place in case law. The ECJ has, since the ruling in *Defrenne (3)* in 1978, considered equality between men and women

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<sup>21</sup> Article 13 EC provides: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

<sup>22</sup> According to Article 6 EU.

<sup>23</sup> See case Case 5/88, *Wachauf* [1989] ECR 2609, C-260/89, *ERT* [1991] ECR I-2925 and case C-60/00, *Carpenter* [2002] ECR I-6279.

<sup>24</sup> COM(2003)657.

a fundamental right and a general principle of law.<sup>25</sup> In 1976, in *Defrenne (2)*,<sup>26</sup> the ECJ took the view, as regards Article 141 EC on equal pay, that it pursues a twofold purpose, both economic and social. In *Schröder*,<sup>27</sup> the ECJ went further and held that the economic goals of avoiding distortion of competition underlying Article 141 EC are secondary to the social aims of that provision, which constitutes the expression of a fundamental human right.

Article 2 EC enshrines the promotion of equality between men and women as one of the Community's essential tasks. Article 3(2) EC requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities. Article 13 EC confers on the Council the power to adopt appropriate action to combat discrimination on a number of grounds.

In the preamble to the EU Charter of Fundamental Rights,<sup>28</sup> which is incorporated in the draft Constitutional Treaty for the EU, it is stated that the Charter reaffirms the fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case law of the ECJ and of the EctHR.

The second and third recital in the Preamble to the Race Directive provides:

(2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.

(3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

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<sup>25</sup> Case 149/77, *Defrenne (No 3)* [1978] ECR 1365.

<sup>26</sup> Case 43/75, *Defrenne (No 2)* [1976] ECR 455 paragraph 8-11.

<sup>27</sup> Case C-50/96, *Schröder* [2000] ECR I-743 paragraph 57.

<sup>28</sup> See [europa.eu.int/comm/justice\\_home/unit/charte/en/rights.html](http://europa.eu.int/comm/justice_home/unit/charte/en/rights.html).

Similarly the first recital in the Preamble to the Directive on equal treatment in the provision of goods and services refers to Article 6(2) EU and the second recital states that the right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised in a number of international treaties to which all EU countries are signatories.<sup>29</sup>

### **3.3. The Directive on Ethnic Equality**

The Directive on equal treatment between persons irrespective of racial or ethnic origin is based on the view that discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice. To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as ... supply of goods and services.

To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation. In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty on gender mainstreaming, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

The purpose of the Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. The

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<sup>29</sup> The recital reads: (2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

definitions of the concept of discrimination, the scope of the Directive and positive action is discussed below.

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 Directive. The implementation of the Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

### **3.4. The Gender Equality (Goods and Services) Directive**

In its Social Policy Agenda from June 2000,<sup>30</sup> the Commission announced its intention to present a proposal for a directive to prohibit sex discrimination outside of the labour market to be based on Article 13 EC.

In November 2003, the Commission finally presented a proposal for a Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services.<sup>31</sup> Contracts for the access to and supply of (sale, etc) goods and services form a typical subject of contract law. The Directive was adopted unanimously in December 2004. It contains a horizontal prohibition of sex discrimination which will give legal form to the principle of gender equality in most areas of contract law, including tendering for public contracts.

The purpose of the Directive is to lay down a framework for combating sex discrimination in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women. The proposal for a Directive implements the principle of equal treatment in the field of the access to and supply of goods and services which are available to the public, including housing. In this respect, the Directive takes the same approach to the area as the Directive on Racial and Ethnic Discrimination.<sup>32</sup>

The Directive includes elaborate definitions of the concepts of direct and indirect discrimination, harassment and sexual harassment which are almost identical to the definitions adopted in 2002 in the amended Equal Treatment

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<sup>30</sup> COM(2000)379.

<sup>31</sup> COM(2003)657, Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services. SEC(2003)1213, Commission Staff Working Paper contains an Extended Impact Assessment of the proposal.

<sup>32</sup> 2000/43/EC.

Directive.<sup>33</sup> Positive action, ie the maintenance and adoption of specific measures by Member States in a specific area will be allowed to overcome the weight of accumulated disadvantages linked to sex suffered by women or men see further below.

Within the limits of the powers conferred upon the Community, the Directive shall apply to all persons in relation to the access to and the supply of goods and services which are available to the public, including housing, as regards both the public and private sectors, including public bodies, see further below in Chapter 4. The Directive does not preclude differences which are related to goods or services for which men and women are not in a comparable situation because the goods or services are intended exclusively or primarily for the members of one sex or to skills which are practised differently for each sex. The Directive shall not apply to education nor to the content of media and advertising.<sup>34</sup>

The Directive specifically targets insurance and financial services and prohibits different treatment of men and women by reference to actuarial factors.

Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

### **3.5. Scope**

The Racial Equality Directive applies to: employment, social protection, healthcare, education, goods and services and housing. The Gender Equality Directive in regard to goods and services applies to the access to and supply of goods and services.

Protocol 12 to the ECHR applies to ‘Any right set forth by law and any action or omission by a public authority.’

Both the Procurement Directive<sup>35</sup> and the Utilities Directive<sup>36</sup> apply to works, supply and services contracts. Both works and services contracts are

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<sup>33</sup> 2002/73/EC amending Directive 76/207/EEC.

<sup>34</sup> In particular advertising and television advertising as defined in Article 1(b) of Council Directive 89/552/EEC.

<sup>35</sup> 2004/18/EC.

<sup>36</sup> 2004/17/EC.

probably covered by the concept of services in the discrimination directives, so that public and utilities procurement under the EU directives fall within the material scope of the discrimination directives.

Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

## **4. Procurement Law and Equality Law Compared**

### **4.1. Fundamental principles**

In its Green Paper of 27.11.1996 on Public Procurement<sup>37</sup> the European Commission emphasized that the foundations of the Community's open procurement rules are to be found in the EC Treaty, particularly in those provisions which guarantee the free movement of goods, services and capital, ie Articles 28, 43, 49 and 56 EC, establish fundamental principles (in particular equality of treatment of different bidders, transparency and mutual recognition) and prohibit discrimination on grounds of nationality.

Equality of treatment, transparency, free movement and prohibition of discrimination on grounds of nationality are also leading principles underlying labour law. The social and economic aspects of public procurement thus share some fundamental principles. In addition prohibition of discrimination on other grounds than nationality such as gender and race are also recognized as fundamental principles in EU labour law.

### **4.2. Differing Concepts of Discrimination**

#### *4.2.1. European Convention on Human Right and Protocol 12*

The non-discrimination provision of the Convention (Article 14) is of a limited kind because it only prohibits discrimination in the enjoyment of one or the other rights guaranteed by the Convention.<sup>38</sup> Protocol 12 removes this limitation and guarantees that no-one shall be discriminated against on any

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<sup>37</sup> COM(96)583.

<sup>38</sup> Article 14 provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

ground by any public authority. Protocol 12 to the European Convention on Human Rights states:

Article 1 - General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

In contrast to the Racial Equality and Framework Directives, Protocol 12 does not contain any definition of discrimination. The best guidance for the future interpretation of the protocol is to be found in the case law of the Court of Human Rights on the meaning of discrimination in Article 14 ECHR. This was summarised by the court in its opinion on the proposal for Protocol 12:<sup>39</sup>

5. As regards the substantive content of the Protocol, it notes, in relation to Article 1, that the draft Explanatory Report (see paragraph 18) refers to the notion of discrimination as consistently interpreted in the case-law of the Court, namely that a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. As the Court put it in the Belgian Linguistic case, “the competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions” (judgment of 23.7.68, Series A no. 6, p. 34, §§ 10). This is further reflected, consistently with the subsidiary character of the Convention system, in the margin of appreciation accorded to the national authorities in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment in law (see, among other authorities, Rasmussen v. Denmark, judgment of 28.11.84, Series A no. 87, p. 15, §§ 40).

#### *4.2.2. EU-Directives on non-discrimination on grounds of racial or ethnic origin og on grounds of sex*

The Directives implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>40</sup> and on equal treatment between men

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<sup>39</sup> Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, Doc 8606, 5 January 2000, para 5, på [www.coe.int/T/E/Human\\_rights/cddh/3.\\_Committees/01.\\_Steering\\_Committee\\_%28CDDH%29/02.\\_CDDH\\_Texts/05.\\_Working\\_Documents/2000/CDDH%282000%29001%20E%20-%20Opinion%20of%20the%20ECHR%20on%20Protocol%2012.asp#TopOfPage](http://www.coe.int/T/E/Human_rights/cddh/3._Committees/01._Steering_Committee_%28CDDH%29/02._CDDH_Texts/05._Working_Documents/2000/CDDH%282000%29001%20E%20-%20Opinion%20of%20the%20ECHR%20on%20Protocol%2012.asp#TopOfPage).

<sup>40</sup> 2000/43/EC.

and women in the provision of goods and services<sup>41</sup> define discrimination. The latter defines sex discrimination as covering four types: direct discrimination, indirect discrimination, harassment and sexual harassment.<sup>42</sup> The Racial Equality Directive does not include a variant with sex but provides apart from that identical definitions of the concept of discrimination.

Article 2(a) of the Directive on equal treatment in the provision of goods and services provides:

For the purposes of this Directive, the following definitions shall apply:

- (a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;
- (b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
- (c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- (d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Three of those types of discrimination are also defined - and in the same way - in the Directive on ethnic quality.<sup>43</sup>

### **4.3. Direct Discrimination**

#### *4.3.1. Direct Discrimination on Grounds of Nationality*

The ECJ has addressed direct discrimination on grounds of nationality only in a few cases, probably because it is so obvious that it is unlawful. Even though the main rule is beyond doubt, there are a number of problems connected with the ban on discrimination in connection with public tender competitions.

Denmark committed a blatant breach of *Article 48 EC on free movement of workers* in the infringement case against Denmark concerning the Great Belt bridge. Denmark was found in violation of Articles 30, 48 and 59 EC by

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<sup>41</sup> 2004/113/EC.

<sup>42</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>43</sup> Directive 2000/43/EC Directive on the implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin.

putting out an invitation to tender for the building of a bridge over Storebælt on the basis of a condition requiring the use to the greatest possible extent of Danish materials, goods, labour and equipment.<sup>44</sup>

In *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli*<sup>45</sup> the ECJ held that Italian legislation which reserved dock work to Italian nationals was contrary to Article 39(2) EC and could not be justified on the basis of the public service exception in Article 39(4) EC. Similarly in *Commission v Belgium*<sup>46</sup> the ECJ held that Belgian legislation which imposed a Belgian nationality requirement for certain seamen's jobs on board sea vessels, other than those of master and second master, was contrary to Article 39(2) EC.

In *Rush Portuguesa*<sup>47</sup> the ECJ considered it a direct violation of Article 49 EC to require recruitment of third country nationals to take place through the local employment service when nationals from the (old) EU states could be recruited freely through any channel the employer preferred. The case concerned the transitional period after Portugal's accession to the EU when Article 59 EC on free movement of services was in force while Article 39 on free movement of workers had not yet come into force. In *van der Elst*<sup>48</sup> the ECJ ruled:

“Articles 59 and 60 of the EEC Treaty must be interpreted as precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.”

The ECJ held in *Climatec*<sup>49</sup> that Articles 59 and 60 EC preclude a Member State from requiring an undertaking in the construction industry established in another Member State and temporarily carrying out works in the first-mentioned Member State to pay employer's contributions in respect of loyalty stamps

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<sup>44</sup> C 243/89 [1993] ECR I-3353.

<sup>45</sup> Case C-179/90 *Merci Convenzionali Porto di Genova spa v Siderurgica Gabrielli spa* [1991] ECR I-5889.

<sup>46</sup> Case C-37/93 *Commission v Belgium* [1993] ECR I-6295.

<sup>47</sup> Case C-113/89 [1990] ECR I 1417. See also Joined Cases 62 and 63/81 *Seco SA v Etablissement d'Assurance contre la Vieillesse et l'Invalidite* [1982] ECR 223.

<sup>48</sup> Case C-43/93 ECR 1994-I-3803.

<sup>49</sup> Case C-272/94, Criminal proceedings against Michel Guiot and Climatec SA, [1996] ECR I-1905.

and bad-weather stamps with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable employer's contributions, with respect to the same workers and for the same period of work, in the State where it is established.

Such an obligation, even if it is applicable without distinction to undertakings established in the national territory and those established in another Member State which make use of the freedom to provide services, constitutes, in so far as the competitiveness of the latter is affected since it must pay contributions in two Member States, a restriction on the freedom to provide services. Such restriction could be justified by the public interest in the social protection of workers in the construction industry, although in that event the workers in question should not enjoy the same protection or essentially similar protection in the Member State where their employer is established.

It is for the national court to determine whether, apart from the technical differences between the schemes protecting employees in the two Member States in question, the workers concerned do not already benefit, in the Member State where the undertaking which employs them is established, from a mechanism, maintained by the contributions of their employer, which offers them protection essentially comparable to that financed by the contributions provided for in the State where the service is provided. If it is confirmed that such is indeed the case, the restriction on the freedom to provide services is not permissible.

In *Syndesmos*<sup>50</sup> the ECJ was faced with the question whether depriving tourist guides of the possibility of working as a self-employed person by mandatorily requiring the work to be performed in an employment relationship was a violation of Article 49 EC. That question was answered in the affirmative.

The contested Greek rules applied without distinction to all licensed tourist guides irrespective of nationality. However, Article 49 EC requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to nationals providing services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>51</sup>

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<sup>50</sup> Case C-398/95, [1997] ECRI-3091.

<sup>51</sup> Case C-76/90 *Säger* [1991] ECR I-4221 paragraph 12.

#### 4.3.2. Direct Discrimination on Grounds of Race or Sex

According to the equality directives direct discrimination occurs where one person is treated less favourably, on grounds of race or sex, than another is, has been or would be treated in a comparable situation and according to Article 3 the principle of equal treatment between men and women shall mean that there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity.

Direct race or sex discrimination is probably rare in public procurement but various apparently neutral criteria may affect minority-owned businesses or women-owned businesses more than male-owned businesses.

In matters of equal pay in employment, it is settled case law that different expectations on grounds of sex can be no ground for differences in pay to women and men for work still to be performed. In *Brunnhofers*,<sup>52</sup> the ECJ thus held that in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague.

The same principle must apply to other contracts. Differential treatment of men and women in early stages of a contractual process cannot be justified by reference to expected differences in the behaviour of men and women at later stages of the contractual process.

As set out above direct discrimination is defined as a situation where *one person* is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation (emphasis added).

Under the Equal Treatment Directive the ban on sex discrimination confers a right on each man and each woman to be treated on an individual basis irrespective of the general characteristics of the gender group they belong to, also in situations where an employer's assumptions about the different gender group's characteristics are empirically true. No individual man can, for example, be refused a job which requires dexterity just because women on average are better in that respect and no individual woman can be turned down for a job which requires physical strength just because men on average are stronger. A potential employer must assess job applicants on their individual merits.

Persons seeking to obtain other contracts than employment contracts, eg insurance contracts and pension contracts, are probably often subjected to

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<sup>52</sup> Case C-381/99, *Brunnhofers* [2001] ECR I-4961.

group assessments, ie a treatment which amounts to direct sex discrimination as defined in the Equal Treatment Directive.

One of the obvious group differences between men and women is that women in EU Member States on average live longer than men. In a number of EU countries occupational pension schemes must use unisex calculations.<sup>53</sup>

Many cases of discrimination consist in unfavourable treatment of subgroups of women or subgroups of men. The targeted persons are not selected exclusively on grounds of sex but on grounds of sex + something more.

Among women pregnant women, single mothers and mothers of small children are probably those who are most exposed to discrimination. In the Staff Working Paper<sup>54</sup> on the directive on equal treatment in the access to and supply of goods and services refusal to provide a mortgage to pregnant women is mentioned as an example of discrimination that has been reported to the Commission. One of the respondents in an analysis by the Danish Agency for Trade and Industry stated<sup>55</sup> that single mothers do not have much chance of obtaining a loan for their enterprises. The Gender Equality (Goods and Services) Directive explicitly classifies less favourable treatment of women for reasons of pregnancy and maternity as direct discrimination.

For men sex discrimination often occurs in combination with age, eg discrimination against young men in car insurance or - mainly in countries where state social security is based on different pension ages for men and women - discrimination against older men who have passed the pension age for women but not reached the pension age for their own sex, see further below in chapter 4 on sex-based price differences. In the UK - where the state pension age at the material time was 60 for women and 65 for men - the House of Lords has decided a case where a married man who was 61 wanted to visit a swimming pool together with his wife who was also 61. She was admitted free of charge because she had passed the pension age while he was required to pay an admission fee because he had not passed the pension age. This was held to

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<sup>53</sup> See for details Joint report by the Commission and the Council on adequate and sustainable pensions, March 2003, available at [http://europa.eu.int/comm/employment\\_social/soc-prot/pensions/2003jpr\\_en.pdf](http://europa.eu.int/comm/employment_social/soc-prot/pensions/2003jpr_en.pdf).

<sup>54</sup> SEC(2003)1213 p 7.

<sup>55</sup> The Relations of Banks to Women Entrepreneurs. The Analysis of the Danish Agency for Trade and Industry: Women Entrepreneurs Now and in the Future, Published by the Danish Agency for Trade and Industry, September 2000, available online at <http://www.efs.dk/publikationer/rapporter/bankers.uk/index-eng.html>. The quotation on single mothers is from part 2.2. The respondents in the analysis were staff in the banks and independant advisors to the banks, eg chartered accountants.

be unlawful under the UK Sex Discrimination Act 1975.<sup>56</sup> In *K B*<sup>57</sup>, the ECJ stated that the fact that certain benefits are restricted to married couples cannot be regarded *per se* as discrimination on grounds of sex.

Article 1(3) of the Gender Equality (Goods and Services) Directive provides that the Directive does not preclude differences which are related to goods or services for which men and women are not in a comparable situation because the goods or services are intended exclusively or primarily for the members of one sex or to skills which are practised differently for each sex. In the explanatory remarks<sup>58</sup> it is explained that certain goods and services are specifically designed for use by members of one sex (for example, single-sex sessions in a swimming pool). The provision is discussed further below in Chapter 4 under market segmentation by gender.

The Danish Complaints Board for Equality has held that it was not a violation of the ban on sex discrimination in the Danish Equal Status Act that an organisation (*Hitzb-ut-tahrir*) provided access to a public meeting through separate entrances of equal quality for men and women.<sup>59</sup>

The orthodox view in EU law is that (except for derogations from the ban on sex discrimination) there is<sup>60</sup> no defence that can justify direct discrimination. It can, for example, not be justified by reference to the fact that the discriminator will incur considerable costs if he does not discriminate.

In *Dekker*<sup>61</sup> the distinction between direct and indirect sex discrimination was at issue. In this case an employer refused to engage a woman because she was three months pregnant and the employer's insurer would not reimburse the maternity payments payable during the maternity leave. The Hoge Raad (the Dutch Supreme Court) referred questions to the ECJ as to whether an employer infringes, directly or indirectly, the principle of equal treatment if he refuses to enter into a contract of employment with a suitable applicant *on the ground that the applicant's pregnancy*, existent at the time of the application, *might have adverse financial effects* for the employer due to provisions in national

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<sup>56</sup> See further McCrudden, Christopher: Equality in Law between Men and Women in the European Community, United Kingdom, Luxembourg 1994 p 15.

<sup>57</sup> Case C-117/01, *K B* [2004] ECR I-0000 (nyr, judgment of 7 January 2004).

<sup>58</sup> COM(2003)756 p 13.

<sup>59</sup> The decision is available (in Danish) at [www.ligenaevn.dk](http://www.ligenaevn.dk).

<sup>60</sup> See for a fuller discussion on this point Lynn M. Roseberry: The Limits of Employment Discrimination Law in the United States and European Community, Copenhagen 1999 p 77 et seq.

<sup>61</sup> Case C-177/88, *Dekker* ECR [1990] I-3941.

law. The Hoge Raad also asked whether it makes any difference whether there were male applicants.

The ECJ observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

The question whether direct discrimination may sometimes be justified, for example on grounds of serious economic costs of gender equality, is, however, contested. In *Birds Eye Wall*<sup>62</sup> the Commission and Advocate General thus argued that economic justification should be possible, see also below in chapter 4 on the use of actuarial factors in pensions.

#### 4.4. Indirect Discrimination

##### 4.4.1. Indirect Discrimination on Grounds of Nationality

The ECJ has held that the ban on discrimination covers both overt and covert (indirect) discrimination.<sup>63</sup> As an example from among the procurement cases where the ECJ has taken this view an infringement action against Italy<sup>64</sup> may be mentioned. The ECJ held that the principle of equal treatment, of which Articles 43 and 49 EC embody specific instances, prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

Procurement policies in favour of groups who are typically nationals of, or resident in, the contracting state will be unlawful as a violation of the ban on indirect discrimination in Articles 39 and 49 EC.

The questions referred to the European Court of Justice in *Beentjes*<sup>65</sup> arose in proceedings in which Beentjes claimed damages from the Netherlands state in respect of the loss arising from the fact that although it had submitted the lowest tender under an invitation to tender for a public works contract issued by the water land local land consolidation committee it did not obtain the

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<sup>62</sup> Case C-132/91, *Birds Eye Walls* [1993] ECR I-5579.

<sup>63</sup> Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case 33/88 *Allué and Coonan v Università degli Studi di Venezia* [1989] ECR 1591.

<sup>64</sup> Case C-3/88 [1989] ECR 4035.

<sup>65</sup> Case 31/87, ECR [1988] 4635.

contract, which was awarded to the tenderer with the next lowest price. The local committee justified its rejection of Beentjes' tender on the ground that it was less well qualified than the selected tenderer to employ long term unemployed persons.

The requirement in the *Beentjes* case that the long term unemployed should be registered with the local employment service may be in contravention on the ban on indirect discrimination on grounds of nationality. The ECJ found that the condition relating to the employment of long-term unemployed persons was compatible with the Directive if it had no direct or indirect discriminatory effect on tenderers from other Member States of the Community. It was left to the national court to decide whether that was the case. As appears the Court only considered the possible discriminatory effect upon tenderers from other Member States, that is the possible indirect violation of Article 49 EC on free movement of services.

It could also be argued - and maybe more strongly - that the condition could be an indirect violation of Article 39 EC on free movement of workers since long term unemployed from other countries were not likely to be registered in Holland.

It is, however, not obvious that recruitment through a local employment service is indirectly discriminatory. The Regulation on migrant workers<sup>66</sup> enables the European Commission to develop European cooperation in this field and the Commission has made a decision<sup>67</sup> on the establishment of EURES (European Employment Service). The idea is to link the local employment services in the EU and EEA together in a computer network in order to facilitate the exchange of job offers. EURES is still in an early stage. When it is fully developed there will be no nationality discrimination in conditions requiring the use of the local employment service. The reason for such a requirement is not necessarily linked to nationality. It may be a way of securing that local employment law including collective agreements are observed. As the ECJ held in *Rush Portuguesa Limitada D'Immigration*<sup>68</sup> Member States are free to make national labour law provisions mandatory and require foreign service providers to comply with them on the condition that the same requirement is put on domestic employers.

Some minority groups are much more present in some EU states than others. Policies favouring them will likewise be unlawful as indirectly discriminatory on grounds of nationality.

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<sup>66</sup> 1612/68/EC.

<sup>67</sup> Commission Decision of 22.10.1993, OJ 1993 L 274.

<sup>68</sup> Case C-113/89 [1990] ECR I 1417. See also Joined Cases 62 and 63/81 *Seco SA v Etablissement d'Assurance contre la Vieillesse et l'Invalidite* [1982] ECR 223.

#### 4.4.2. *Non-discriminatory obstacles to free movement*

The question may be raised as to what extent the ban on discrimination prohibits not only discriminatory measures but all measures having an equivalent effect upon the free movement of goods, workers, self-employed persons and service providers.

In *Dassonville*<sup>69</sup> the ECJ ruled that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Up until the mid 1990's there was a difference between the rules on free movement of goods and services on the one hand and persons - free movement of workers and freedom of establishment - on the other hand. The ECJ has abandoned this distinction. In *Gebhard*<sup>70</sup> it stated in general terms, that national measures likely to obstruct or render less attractive the fundamental freedoms guaranteed by the Treaty must fulfil four conditions. They must:

1. apply in a non-discriminatory manner
2. be justified by compelling reasons of public interest
3. be an appropriate means of securing the intended objective
4. not be more restrictive than necessary.

In *Bosman*<sup>71</sup> the ECJ confirmed this interpretation which implies that there is no difference between the protection of the free movement of goods and persons.

In the field of procurement the ban on restrictions of free movement has been applied in the *UNIX*<sup>72</sup> case to a non-discriminatory measure, namely the requirement that an operating system should be UNIX. The ECJ held that a Member State (in casu Holland) fails to fulfil its obligations under the Supplies Directive where it fails in a tender notice to add the words "or equivalent" after a technical specification defined by reference to a particular trade mark (in casu UNIX which is a US trade mark, not a Dutch one), when the Directive requires them to be added and when failure to do so may impede the flow of imports in intra-community trade, contrary to Article 28 EC.

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<sup>69</sup> Case 8/74 [1974] ECR 837.

<sup>70</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

<sup>71</sup> Case C-415/93 *Union Royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

<sup>72</sup> Case C-359/93 *Commission v The Netherlands* [1995] ECR 157.

In the context of the problems discussed in this book, the main question is whether social labelling, for example trade marks indicating a certain social standard, can be used to describe the desired product, for example whether it is lawful to put out a tender for the purchase of rugs of the quality indicated by the trade mark “Rugmark” (which guarantees that the rugs have not been produced by means of child labour) or equivalent. As a starting point, a contracting authority is free to choose the quality of the desired product, including the social quality. But such quality requirements may operate as hindrances to the free movement of goods, etc.

The lawfulness of social labelling must therefore be tested against the criteria set out in *Gebhard*, ie the requirement must apply in a non-discriminatory manner, be justified by compelling reasons of public interest, be an appropriate means of securing the intended objective and not be more restrictive than necessary. Within the EU Rugmark is probably much more widespread in Germany than in other countries. It may therefore be argued that such a requirement is indirectly discriminatory.

There is no case law to clarify whether social objectives concerning working conditions in third countries would be accepted as compelling reasons of public interest. In *Climatec*<sup>73</sup> the ECJ held that a restriction of the freedom to provide services could be justified by the public interest in the social protection of workers in the construction industry, although in that event the workers in question should not enjoy the same protection or essentially similar protection in the Member State where their employer is established.

#### 4.4.3. Reverse discrimination

Reverse discrimination occurs when a Member State exercises discrimination *vis à vis* its own nationals by treating them less favourably than it treats nationals of other Member States. The ECJ has delivered a number of rulings on this issue where it has consistently held that purely internal matters fall outside the scope of Articles 39, 43 and 49 EC etc. The starting point is thus that a Member State is free under Community law to discriminate against its own nationals be they workers, self-employed or service providers.

It may be asked whether the procurement rules require equal competition conditions for all, ie prohibit reverse discrimination, or whether a contracting authority can impose stricter requirements, for example with a view to protecting the environment including the working environment or the workforce, on tenderers of its own nationality or on tenderers employing workers of the same nationality as the contracting authority than on other bidders. The traditional argument for allowing reverse discrimination is that it is a fully

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<sup>73</sup> Case C-272/94 *Criminal proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905.

internal matter and therefore not the concern of the Community. It may be argued that contracting in the framework of a European Union wide procurement procedure is never purely internal to a Member State and that workers, etc are therefore protected by Community law against their own nation-state when their employers take part in public procurement tendering. The law, as it stands at present, does not seem to be clear.

In matters such as working environment where penal sanctions are used there is some reverse discrimination. In *Hansen og Søn*<sup>74</sup> a Danish employer whose drivers infringed the Regulation on the harmonization of certain social legislation relating to road transport<sup>75</sup> was punished for an infringement occurring in Holland. Foreign employers could not be punished in such a situation but only if the infringement occurred in Denmark. Furthermore foreign employers were in practice never prosecuted.<sup>76</sup> The discrimination by the Danish prosecutors and courts against foreign drivers is a clear violation of Article 48 EC. It is more doubtful whether the reverse discrimination against the Danish employer is an infringement of EC law. Before the Danish courts it was argued by the employer in *Hansen og Søn* that the reverse discrimination he suffered was an infringement of Article 12 EC (then Article 7). This argument was dismissed.

*Hansen and Søn* was not a procurement case. It may, however, be asked if the case would have been solved differently if Hansen and Søn had been providing road transport as part of the performance of a public service contract.

#### 4.4.4. Indirect Discrimination on Grounds of Race or Sex

The current definition of indirect discrimination is inspired by the case law of the ECJ in cases involving the free movement of workers.<sup>77</sup>

According to this definition, an apparently neutral provision, criterion or practice will be regarded as indirectly discriminatory if it is intrinsically liable to adversely affect a person or persons on the grounds referred to in the Directive. This 'liability test' may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically

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<sup>74</sup> C-326/88 *Criminal Proceedings Against Hansen & Søn* [1990] ECR I-2911.

<sup>75</sup> 543/69/EEC.

<sup>76</sup> U 95, 9.

<sup>77</sup> See in particular Case C-237/ 94, *O'Flynn* [1996] ECR 2417.

disadvantageous for the person or persons concerned. This definition is modelled over the jurisprudence of the ECJ in the *O'Flynn*<sup>78</sup> case.

In the explanatory memorandum to the proposal for a Directive on equal treatment in the provision of goods and services the Commission states that the definitions are drawn from existing Community law and do not depart from previously agreed approaches in any way. The concepts of direct and indirect discrimination and sex-based and sexual harassment are, *mutatis mutandis*, identical to those contained in the already Article 13 Directives from 2000<sup>79</sup> and the amended Equal Treatment Directive from 2002<sup>80</sup>

#### 4.4.4.1. *Apparently neutral provision, criterion or practice. Suspect criteria*

A number of criteria are gender related depending on the social context. The part-time criterion has been widely used in national labour and social legislation and employment practice. In the Staff Working Paper<sup>81</sup> on the Gender Equality (Goods and Services) Directive refusal to offer loans to people working part-time is mentioned as an example of existing discriminatory practice.

On a number of occasions, the ECJ has held that differential treatment of full time and part time workers constitutes indirect discrimination on grounds of sex because a considerably larger proportion of women than men work part-time,<sup>82</sup> see for example *Rinner-Kühn*,<sup>83</sup> *Jenkins*<sup>84</sup> and *Bilka*.<sup>85</sup>

#### 4.4.4.2. *Would put members of one sex at a particular disadvantage*

The Proposal for a Directive on Equal Treatment in the Provision of Goods and Services from 2003 defines indirect discrimination in the same way as the

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<sup>78</sup> Case C-237/94, *O'Flynn* [1996] ECR I-2617.

<sup>79</sup> 2000/43/EC on race discrimination which in addition to employment applies *inter alia* to contracts for the provision of goods and services and the employment framework directive 2000/78/EC on discrimination on grounds of religion, age, handicap and sexual orientation.

<sup>80</sup> 2002/73/EC.

<sup>81</sup> SEC(2003)1213 p 7.

<sup>82</sup> See for more detail Nielsen, Ruth: European Labour Law, Copenhagen 2000 Chapter V.

<sup>83</sup> Case C-171/88, *Rinner-Kühn* [1989] ECR 2743.

<sup>84</sup> Case 96/80, *Jenkins* [1981] ECR 911.

<sup>85</sup> Case 170/84, *Bilka* [1986] ECR 1607.

amended Equal Treatment Directive from 2002. The English versions of the two provisions are identical, whereas there are minor differences in the wording in other language versions.

As the definition of indirect discrimination is worded<sup>86</sup> in the Gender Equality (Goods and Services) Directive and the Race Directive it is not necessary for there to be indirect discrimination that a formally neutral criterion actually operates to the disadvantage of one sex. It is sufficient that there is a possibility that the criterion would put one sex at a disadvantage.

Before 2000, the definition of indirect sex discrimination required disparate effect, ie that a considerably higher percentage of one sex than of the other should be affected by the apparently neutral measure. In the Race Discrimination Directive<sup>87</sup> the wording was changed so that what is decisive is that the contested criterion would put members of one sex at a particular disadvantage. This may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned. This definition is modelled over the jurisprudence of the ECJ in the *O'Flynn*<sup>88</sup> case.

#### 4.4.4.3. Objectively justified

Indirect discrimination may be justified by objective reasons. The starting point is that differential treatment is an expression of discrimination unless it can be shown that such treatment is justified in objective terms.

The leading case is still *Bilka*<sup>89</sup> where the ECJ ruled that Article 141 EC is infringed by an undertaking which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on *objectively justified factors unrelated to any discrimination* on grounds of sex. Such factors may lie in the fact that the undertaking seeks to employ as few part-time workers as possible, where it is shown that that objective corresponds to a *real need* on the part of the undertaking and the means chosen for achieving it are *appropriate* and *necessary*. The ECJ thus requires three conditions to be met:

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<sup>86</sup> The English version reads: 'would put at a disadvantage', the French version: 'est susceptible d'entraîner un désavantage' and the German version: 'können benachteiligen'.

<sup>87</sup> 2000/43/EC.

<sup>88</sup> Case C-237/94, *O'Flynn* [1996] ECR I-2617.

<sup>89</sup> Case 170/84, *Bilka* [1986] ECR 1607.

- 1) There must be a real need for the employer to apply the “suspect” criteria,
- 2) the means chosen by the employer must be necessary to achieve this goal, and
- 3) the means must be appropriate, ie there must be a reasonable proportion between end and means.

The *Bilka* test is based on application of the *principle of proportionality*.

#### 4.4.4.4. *Legitimate aim unrelated to any discrimination based on sex*

In *Enderby*,<sup>90</sup> the ECJ stated that it is for the national jurisdiction to decide, applying if necessary the principle of proportionality, if, and in what measure, the shortage of candidates for a particular post and the necessity of attracting them by a higher salary constitutes an objective economic reason justifying the difference in remuneration between the two tasks in issue.

In *Enderby* the ECJ used a wording which seems to accept economic grounds as legitimate aims which may be unrelated to any discrimination related to sex.. It stated:

25. The Court has consistently held that it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds (Case 170/84 *Bilka-Kaufhaus*, cited above, at paragraph 36 and Case C-184/89 *Nimz*, cited above, at paragraph 14). Those grounds may include, if they can be attributed to the needs and objectives of the undertaking, different criteria such as the worker's flexibility or adaptability to hours and places of work, his training or his length of service (Case 109/88 *Danfoss*, cited above, at paragraphs 22 to 24).

The ECJ also showed some acceptance of economic reasons as justification in *Jämställdhetsombudsmannen*.<sup>91</sup>

In *Schönheit*,<sup>92</sup> the ECJ confirmed its case law to the effect that restricting public expenditure is not an objective which may be relied on to justify different treatment on grounds of sex. It stated:

The Court has already held that budgetary considerations cannot justify discrimination against one of the sexes. To concede that such considerations may justify a difference in treatment between men and women which would otherwise constitute indirect

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<sup>90</sup> Case C-127/ 92, *Enderby* [1993] ECR I-5535.

<sup>91</sup> Case C-236/98 *Jämställdhetsombudsmannen* [2000] ECR I-2189.

<sup>92</sup> Joined Cases C-4/02 and C-5/02 *Schönheit* [2003] ECR 0000 (nyr).

discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States (Roks, paragraphs 35 and 36; Case C-226/98 Jørgensen [2000] ECR I-2447, paragraph 39; and Kutz-Bauer, paragraphs 59 and 60).

The different treatment of men and women may be justified, depending on the circumstances, by reasons other than those put forward at the time when the measure introducing the difference in treatment was introduced. In *Roks*,<sup>93</sup> the ECJ stated:

36. Moreover, to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, which is prohibited by Article 4(1) of Directive 79/7, would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.

In *Schönheit*,<sup>94</sup> the ECJ stated that different treatment of men and women, which in that case arose from legislation, may be justified, depending on the circumstances, by reasons other than those put forward at the time when the legislation introducing the difference in treatment was introduced. The means used to achieve the legitimate aim must be appropriate and necessary. If other means that are unrelated to sex could have been used, the justification test fails.

The means must not be excessive. The general principle they are to be measured by is, as mentioned, the principle of proportionality.

The lessons that can be learned from the practice on indirect sex discrimination in employment cases are unclear. The ECJ has often been criticised for inconsistencies in its case law on this issue.<sup>95</sup> It is, however, settled case law that general assertions are not enough to satisfy the requirements for justification. In *Seymour-Smith and Perez*,<sup>96</sup> the ECJ thus held that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.

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<sup>93</sup> Case C-343/92 *M A De Weerd, née Roks* [1994] ECR I-571.

<sup>94</sup> Joined Cases C-4/02 and C-5/02, *Schönheit* [2003] ECR 0000 (nyr).

<sup>95</sup> See further O'Leary, Siofra: Employment Law at the European Court of Justice. Judicial Structures, Policies and Processes, London 2002.

<sup>96</sup> Case C-167/97, *Seymour-Smith* [1999] ECR I-623.

In comparison it may be mentioned that in January 2004, the Commission presented a draft proposal for a Directive on Services which contains a ban on discrimination on grounds of nationality.<sup>97</sup> Article 21 of the Gender Equality (Goods and Services) Directive provides:

‘Non-discrimination. 1. Member States shall ensure that the recipient is not subjected to discriminatory requirements based on his nationality or place of residence.’

In the explanatory memorandum it is stated that the principle of non-discrimination in the Internal Market implies that access by recipients - particularly consumers - to services offered to the public should not be denied or rendered more difficult simply because of the formal criterion of the recipient's nationality or place of residence. Consequently, the Directive lays down obligations for Member States and service-providers. For service providers, the proposal in Article 21(2) prohibits them, in their general conditions relating to access to their services, from providing for refusal of access, or subjecting access to less favourable conditions, on grounds of the nationality or place of residence of the recipient.

This does not prevent service providers from refusing to provide services or applying different tariffs and conditions *if they can demonstrate that this is directly justified by objective reasons*, such as actual additional costs resulting from the distances involved or the technical aspects of the service.

The above proposal for a directive on services is mainly motivated by a desire to ensure the smooth functioning of the internal market. In matters of gender equality where there is a strong fundamental rights perspective the justification test of economic reasons will probably be stricter.

#### 4.4.5. *Link between gender mainstreaming and indirect sex discrimination*

The mainstreaming principle applies both at EU level and Member State level. If a Member State retains legislation with adverse gender impact it is violating the mainstreaming policy endorsed by Article 3(2) EC. It may also be violating the ban against indirect sex discrimination.

The conceptual links between ‘mainstreaming’ and ‘indirect discrimination’ are, however, only vaguely developed. The words ‘mainstreaming’ and “indirect discrimination” are seldomly used in the same documents.<sup>98</sup> In the

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<sup>97</sup> [europa.eu.int/comm/internal\\_market/en/services/services/docs/2004-proposal\\_en.pdf](http://europa.eu.int/comm/internal_market/en/services/services/docs/2004-proposal_en.pdf). It is provisional and subject to further linguistic revisions.

<sup>98</sup> See as examples Resolution on the Annual Report from the Commission: Equal opportunities for women and men in the European Union 1996 (COM(96)650 C4-0084/97), OJ C 304 p.45, Opinion of the Economic and Social Committee on 'Equal opportunities for women and men in the European Union - 1996' OJ C 296 p. 24, Resolution on implementation of equal opportunities for men and women in the

case law of the ECJ the word ‘mainstreaming’ is not used at all but the mainstreaming provision in Article 3(2) EC has been invoked. In *Dory*<sup>99</sup> AG Stix-Hackl thus argued that there is an obligation for the ECJ to interpret anti-discriminatory Community measures<sup>100</sup> in light of Article 3(2)EC.

Gender impact assessment would appear to be a common element of gendermainstreaming and indirect discrimination. In order to mainstream equality into all areas of society it is necessary to make gender impact assessments of legislation and policy measures.<sup>101</sup> If there is adverse gender impact there may well also be indirect sex discrimination, see above.

#### **4.5. Harassment**

The Gender Equality (Goods and Services) Directive prohibits both harassment and sexual harassment. The Race Directive prohibits only harassment. Harassment (as different from sexual harassment) occurs where unwanted conduct related to the sex of a person is exhibited with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The two concepts of harassment and sexual harassment are defined separately, because they are distinct phenomena. Harassment based on sex consists of unfavourable treatment of a person related to their sex, though it need not be of a sexual nature (an example might be male employee constantly making disparaging remarks about women customers).<sup>102</sup>

There are no rules on harassment in procurement law.

#### **4.6. Sexual Harassment**

Sexual harassment is unwelcome physical, verbal or non-verbal conduct of a sexual nature. Sexual harassment can include: comments about the way the person looks, indecent remarks, questions or comments about the person's sex life, requests for sexual favours, sexual demands and any conduct of a sexual nature which creates an intimidating, hostile or humiliating environment.

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civil service OJ C 362 p. 337.

<sup>99</sup> Case C-186/01, *Alexander Dory v Deutschland* [2003] ECR I-2479, point 102-3.

<sup>100</sup> In *Dory* the old Equal Treatment Directive 76/207/EEC.

<sup>101</sup> Compare the Commission's Guide on Impact Assessment, Brussels 1998.

<sup>102</sup> COM(2003)756 p 13.

It is most often women who are subjected to sexual harassment, but men too can be sexually harassed.

#### **4.7. Incitements to Discriminate**

According to the Race and Gender Equality directives incitement to direct or indirect discrimination shall be deemed to be discrimination within the meaning of the directives.

#### **4.8. Positive action**

Under the Race Directive the prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons. Article 5 of the Directive provides on positive action:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Similarly Article 6 of the Gender Equality (Goods and Services) Directive provides that with a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

##### *4.8.1. Division of power between the EU and the Member States*

Positive action is an option for the Member States. There is never a duty under EU law for the Member States to take positive action or to allow or impose a duty upon their businesses/citizens to take positive action.

To some extent EU law prohibits positive action, namely proclaimed positive action measures that do not pursue a genuine equality purpose or apply excessive means to achieve its (lawful) purpose. If measures are within the sphere of lawful positive action under EU law it is for the Member States, in accordance with their political choices, to decide whether or not to allow or prohibit positive action in the individual country.

##### *4.8.2. Statutory positive action provisions in EU law*

Article 141(4) EC which applies to working life provides:

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article II-23 of the draft Constitutional Treaty which applies in all areas of law, also outside of employment<sup>103</sup> provides:

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

#### 4.8.3. *The case law of the ECJ*

All ECJ case law on positive action is about gender equality. The Commission summarised that case law in the following way in the proposal for amendment of the Equal Treatment Directive:

- the possibility to adopt positive action measures is to be regarded as an exception to the principle of equal treatment;
- the exception is specifically and exclusively designed to allow for measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life;
- automatic priority to women, as regards access to employment or promotion, in sectors where they are under-represented cannot be justified;
- conversely, such a priority is justified, if it is not automatic and if the national measure in question guarantees equally qualified male candidates that their situation will be the subject of an objective assessment which takes into account all criteria specific to the candidates, whatever their gender.

The *Commission v France* case of 1986 is so far the only infringement procedure concerning positive action that has been brought before the ECJ. France had introduced a provision in the Code de Travail prescribing that any term reserving the benefit of any measure to one or more employees on grounds of sex included in any collective labour agreement or employment contract shall be void, except where such a clause was intended to implement provisions relating to pregnancy, nursing or pre-natal and post-natal rest. However, another provision prescribed that the above-mentioned provision of

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<sup>103</sup> Article 141(4) EC will, once the Constitutional Treaty has come into force, be replaced by Article III-108(4) of the Constitutional Treaty which is identical with Article 141(4) EC.

the Code de Travail did not prohibit the application of usages, terms of contracts of employment or collective agreements in force on the date on which the law was promulgated granting special rights to women. The Commission submitted – and was not contradicted by the French Government – that special rights for women included in collective agreements related in particular to: the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child was ill; the granting of additional days of annual leave in respect of each child: the granting of one day's leave at the beginning of the school year: the granting of time off work on Mother's Day; daily breaks for women working on keyboard equipment or employed as typists or switchboard operators; the granting of extra points for pension rights in respect of the second and subsequent children; and the payment of an allowance to mothers who had to meet the costs of nurseries or childminders.

The Commission accepted that some of those special rights may fall within the scope of the derogations in the Equal Treatment Directive. It submitted, however, that the French legislation, by its generality, made it possible to preserve for an indefinite period measures discriminating as between men and women contrary to the directive. The ECJ accepted the Commission's views on these points and France was ordered to amend its legislation.

The objection to the provision at issue was mainly that it was general and applied for an indefinite period. Thus, France had gone beyond what was necessary and had thus violated the principle of proportionality.

The interpretation of the new provision in Article 141(4) was addressed by the ECJ *Abrahamsson*<sup>104</sup> case. The ECJ confirmed that positive action aiming to promote women in those sectors of the public service where they are under-represented has to be considered as compatible with EU law. It clarified the conditions in which positive action can be applied and stated that the male and the female candidates must have equal or almost equal merits. The automatic and absolute preference of a candidate of the underrepresented sex who had a sufficient but lower qualification was by contrast incompatible with the principle of equal treatment.

*Schnorbus*<sup>105</sup> concerned the automatic preference accorded to male candidates who had completed compulsory military or civilian service for (all) positions as legal adviser in Land Hessen, Germany. The German court asked the ECJ:

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<sup>104</sup> Case C-407/98, *Abrahamsson* [2000] ECR I-5539.

<sup>105</sup> Case C-79/99 *Schnorbus* [2000] ECR I-10997.

“4. Is the fact that the rule automatically results in the preferential admission of men to training without a decision on the matter being subject to an assessment of the individual circumstances or of other relevant factors meriting consideration in the interests of the remaining applicants sufficient to preclude justification of the rule under Article 2 (4) of Directive 76/207/EEC because it is to that extent more than a measure to promote equal opportunity?”

The ECJ established that a measure that accords preference to persons who have completed compulsory military or civilian service constitutes indirect discrimination in favour of men. The ECJ found however that the provision at issue, which took account of the delay experienced in the progress of their education by applicants who had been required to do military or civilian service, was objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay. The automatic preference accorded to men was therefore not regarded as contrary to the Equal Treatment Directive. Judged on the basis of the principle of proportionality, the preference accorded to men did not go beyond what was necessary to compensate for the disadvantages entailed by compulsory military or community service.

Beyond the preference accorded to men who had completed compulsory military or civilian service, there was a possibility of taking particular hardship into account. This must be viewed in connection with the fact that the measure concerned all the positions as legal adviser in Land Hessen.

The *Lommers* case<sup>106</sup> concerned a Netherlands scheme under which the Minister for Agriculture made available subsidized nursery places to female officials. Women were given priority with regard to all the nursery places made available by the employer save in the event of an emergency, to be determined by the Minister. Thus, men could only obtain a nursery place from the employer in question if there was an emergency. In this case the ECJ made explicit reference to the principle of proportionality and established<sup>107</sup> that in cases involving preliminary questions it is, in principle, the task of the national court to ensure that the principle of proportionality is duly observed. However, the ECJ may provide the national court with an interpretation of Community law on all such points as may enable the court to assess the compatibility of a national measure with Community law. The Netherlands scheme was regarded as compatible with the Equal Treatment Directive.

To sum up, the ECJ disallowed positive action measures in the *Commission v France*, *Kalanke* and *Abrahamsson*, and approved such measures in *Marschall*, *Badeck*, *Schnorbus* and *Lommers*. Positive action is unlawful if the

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<sup>106</sup> Case C-476/99, *Lommers* [2002] ECR I-2891.

<sup>107</sup> In paragraph 40.

measure is very general and applies for an indefinite period, or if the method selected is disproportionate to the aim pursued (Abrahamsson). There is considerable latitude for applying gender quota arrangements when appointing people to training places/positions (Badeck). Although priority may be given automatically to one sex as regards access to employment and working conditions, eg nursery places (Schnorbus and Lommers), the opposite sex must not be excluded from all possibilities of obtaining a position or a working condition of the kind concerned (Kalanke, Marschall, Lommers).

#### *4.8.4. The principle of proportionality*

The general principle underlying ECJ case-law on positive action is that the principle of proportionality shall be observed. This means that any special measures that favour one sex shall serve a lawful purpose, they shall be appropriate and necessary for the attainment of this goal, and they must not go beyond what is necessary to attain it. In order for positive action measures to be lawful their purpose must be to ensure equality between men and women or as Article 141(4) expresses it 'full equality in practice.' The freedom to take positive action cannot be invoked when differential treatment of men and women is practised for commercial purposes.

### **4.9. Equality Mainstreaming Procurement Processes**

#### *4.9.1. Concept of mainstreaming*

The concept of gender mainstreaming is not clearly defined.<sup>108</sup> Many have used the metaphor of equality as something that flows in its own subsidiary stream. With the mainstreaming strategy equality is lifted into the main stream understood as the ordinary organisational, political and legal system.

In the current action plan for gender equality<sup>109</sup> it is - after noting that there are still structural gender inequalities - stated:

This situation can be tackled efficiently by integrating the gender equality objective into the policies that have a direct or indirect impact on the lives of women and men. Women's concerns, needs and aspirations should be taken into account and assume the

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<sup>108</sup> See generally on gender mainstreaming and the legal sources requiring or recommending it [http://europa.eu.int/comm/employment\\_social/equ\\_opp/gms\\_en.html](http://europa.eu.int/comm/employment_social/equ_opp/gms_en.html).

<sup>109</sup> COM(2000)335, Community Framework Strategy on Gender Equality (2001-2005) available at [http://europa.eu.int/comm/employment\\_social/equ\\_opp/strategy/2\\_en.html](http://europa.eu.int/comm/employment_social/equ_opp/strategy/2_en.html).

same importance as men's concerns in the design and implementation of policies. This is the gender mainstreaming approach, adopted in 1996 by the Commission<sup>110</sup>

In this programme the mainstreaming strategy is described as a pro-active strategy which integrates the gender aspect into all areas covered by Community competence and is complemented by specific actions with a view to enhance women's position in society. In the Council of Europe's report on mainstreaming from 1998<sup>111</sup> it is defined in the following way:

Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.

It is further explained that gender mainstreaming can mean that the policy process is reorganised so that ordinary actors know how to incorporate a gender perspective. It can also mean that gender expertise is made a normal requirement for policy-makers.

#### *4.9.2. Methods of Mainstreaming*

Gender mainstreaming implies that the gender dimension is made visible and taken into account at an early stage of the planning and design of rules and policies before anyone has actually suffered discrimination so that sex discrimination (direct and indirect discrimination, harassment and sexual harassment) is prevented from happening. There is no general agreement on how this should be done. Different actors use different methods, often of a socio-economic and not strictly legal nature.

In Sweden the so-called 3R method has been widely discussed. It is a review and analysis tool<sup>112</sup> which serves as an aid in systematically compiling facts and information about the situations of women and men in a given operation or transaction. The three R's stand for Representation (how many women and how many men?), Resources (how are the resources – money, space and time – distributed between women and men?) and Realia (how come representation and resource distribution are divided between the sexes in the way they are?).

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<sup>110</sup> COM(96)67, Commission Communication of 21 February 1996, Incorporating equal opportunities for women and men into all Community policies and activities.

<sup>111</sup> Gender Mainstreaming. Conceptual framework, methodology and presentation of good practices, Strasbourg, May 1998, available at [www.coe.int/T/E/Human\\_Rights/Equality/02.\\_Gender\\_mainstreaming/](http://www.coe.int/T/E/Human_Rights/Equality/02._Gender_mainstreaming/)

<sup>112</sup> See further Just Progress! Applying gender mainstreaming in Sweden, [http://naring.regeringen.se/pressinfo/infomaterial/pdf/N2001\\_052.pdf](http://naring.regeringen.se/pressinfo/infomaterial/pdf/N2001_052.pdf)

So far, the Commission has mainly pursued its gender mainstreaming strategy by means of gender-disaggregated statistical data, bench marking, gender impact assessments and socio-economic gender equality indicators.

#### *4.9.3. Fragmentary duty to mainstream public procurement*

The mainstreaming principle was first applied in the context of international development aid where it has been used since the mid 1980's.<sup>113</sup>

#### *4.9.4. The EU duty of gender mainstreaming*

The EU has practised the gender mainstreaming strategy by means of soft law since the early 1990's in the field of employment and occupation and increasingly also in other fields such as development aid and research.<sup>114</sup> The first binding EU measure on gender mainstreaming was the Regulation on gender mainstreaming activities in the area of development cooperation.<sup>115</sup>

The Community's mainstreaming obligation was (as from 1 May 1999) reinforced by the Amsterdam Treaty which elevated it in the hierarchy of the sources of law to Treaty level and extended its material scope to all areas covered by Community competence.

Under Article 2 EC, the Community shall have as its task to promote equality between men and women. Article 3(2) EC states that in the context of the activities referred to in Article 3(1) EC carried on for the purposes set out in Article 2 EC: 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women.' In the Equal Treatment Directive as amended in 2002<sup>116</sup> these Treaty provisions are summarised as follows (emphasis added):

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<sup>113</sup> See further Razavi, Shakra og Carol Miller: Gender Mainstreaming. A Study on the Efforts by the UNDP, the World Bank and the ILO to Institutionalize Gender Issues, Occasional Paper Series, Fourth World Conference on Women, OP 4, UNRISD (United Nations Research Institute for Social Development), August 1995 and Programme of Action for the mainstreaming of gender equality in Community Development Co-operation COM(2001)295.

<sup>114</sup> See Council Resolution of 20 May 1999 on women and science, OJ 1999 C 201.

<sup>115</sup> Council Regulation (EC) No 2836/98 of 22 December 1998 on integrating of gender issues in development cooperation. This Regulation will expire in December 2003. In the Commission's work programme for 2003, COM (2002)590, it is announced that it will be revised taking into account the main elements of the Programme of Action for the mainstreaming of gender equality in Community Development Co-operation COM(2001)295.

<sup>116</sup> Recital 4 of Directive 2002/73/EC.

Equality between women and men is a fundamental principle, under Article 2 and Article 3(2) of the EC Treaty and the case-law of the Court of Justice. These Treaty provisions proclaim equality between women and men as a "task" and an "aim" of the Community and impose a *positive obligation* to "promote" it in all its activities.

Article II-23 of the draft Constitution for the EU provides that equality between men and women must be ensured in all areas, including employment, work and pay. Article III-3 puts an obligation upon the Member States to integrate the aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation when defining and implementing all the policies and activities referred to in Part III of the draft Constitution.

#### 4.9.5. *The ECJ*

In *Dory*<sup>117</sup> AG Stix-Hackl argued that there is an obligation for the ECJ to interpret anti-discriminatory Community measures<sup>118</sup> in light of the mainstreaming provision in Article 3(2)EC, see the following:

.. in my opinion, in interpreting the scope of Directive 76/207, Article 3(2) EC must now also be taken into account. That provision of primary law was not yet in force at the time when the directive was drawn up. However, the Community is now expressly required by that provision actively to promote equality between men and women.

103 As regards the scope of Article 3(2) EC, it may be seen that it applies to the Community's 'activities referred to' in Article 3(1) EC. Community law concerning the equal treatment of men and women in access to employment may be regarded as 'social policy' within the meaning of Article 3(1)(j) EC. (48) As regards the 'activities referred to', Article 3(2) EC imposes an obligation on 'the Community'. That presumably includes the Court when dealing, in connection with a reference for a preliminary ruling, with the interpretation of secondary law in the field of social policy.

That principle will apply equally or *a fortiori* to the Directive on equal treatment in the provision of goods and services.<sup>119</sup>

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<sup>117</sup> Case C-186/01, *Alexander Dory v Deutschland* [2003] ECR I-2479, point 102-3.

<sup>118</sup> In *Dory* the old Equal Treatment Directive 76/207/EEC.

<sup>119</sup> 2004/113/EC.

4.9.6. *National courts' duty of gender mainstreaming under Community law*  
In 1984, in *Colson*,<sup>120</sup> and *Harz*,<sup>121</sup> the ECJ laid down an obligation for all the authorities of the Member States, and especially the courts, to interpret national law in conformity with Community law. AG Mancini, in *Jongeneel Kaas* described the national courts also as Community courts, see the following:<sup>122</sup>

The general principles ... of Community law ... may be relied upon by individuals before the national court which, as is well known, is also a Community court.

AG Léger in *Köbler*<sup>123</sup> similarly stated that the European Communities have been developed and consolidated essentially through law. Since the national courts have the function of applying the law, including Community law, they inevitably constitute an essential cog in the Community legal order.

Because all national courts are, under EU law, also Community courts the national courts presumably have mainstreaming obligations under Article 3(2) EC similar to those of the ECJ.

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<sup>120</sup> Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>121</sup> Case 79/83 *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 1921.

<sup>122</sup> Case 237/82, *Jongeneel Kaas* [1984] ECR 483.

<sup>123</sup> Case C-224/01, *Köbler* [2003] ECR I-00000 (nyr).

## Part II.

To what extent can or must gender, race, etc be taken into account at different stages of the procurement process?

## 5. Are Non-commercial Criteria Lawful in Public Procurement?

A number of provisions in the Procurement Directive<sup>124</sup> deal more or less explicitly with the possibility to take gender, race, etc into account at various stages of the procurement process.

### 5.1. An Internal Market and a Fundamental Rights Perspective

The problems discussed in this paper are mainly interesting in two different contexts: an internal market and a fundamental rights perspective.

Seen in isolation, EU procurement law is rather narrowly aimed at fulfilling economic purposes of a commercial nature. In the Green Paper on Public Procurement, 1996<sup>125</sup> the primary objectives of the Union's public procurement policy are said to be:

- to create competitive conditions in which public contracts are awarded without discrimination through the choice of the best bid submitted;
- to give suppliers access to a single market with major sales opportunities;
- and to ensure the competitiveness of European suppliers.

In the White Paper, *Growth, Competitiveness, and Employment. The Challenges and Ways Forward Into the 21st Century*,<sup>126</sup> issued by the Directorate General for the Internal Market it was, however, argued that procurement should be targeted to promoting *sustainable* growth.

The Procurement Directives contain more specific statements concerning the purpose of procurement rules. According to the Preamble to the Utilities Directive the aim is to promote sound commercial practice.<sup>127</sup>

45. Whereas the rules to be applied by the entities concerned should establish a framework for *sound commercial practice* and should leave a maximum of flexibility;

In the Preamble to a number of the relevant provisions the public procurement rules' purpose is described in terms of *fair competition* and similar expressions.

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<sup>124</sup> 2004/18/EC.

<sup>125</sup> COM(96)583.

<sup>126</sup> COM(93)700 final.

<sup>127</sup> 2004/17/EC recital 9 and 28.

In contrast, equality law has, since the early 1970's, been based on a dual economic and social objective. The EU has always had economic policy objectives but it was not until the amendment of the EC Treaty by the Treaty on the European Union<sup>128</sup> that social and labour market policy was established as an independent policy area in Article 3 EC. The Amsterdam Treaty of 1997 will bring further amendments to Articles 2 and 3 to strengthen the labour law objectives including equality between men and women.

The EU and EC Treaties contain provisions on the general purposes of EU law which cover all areas of law and both social and economic aspects of them. This applies for example to the general provision in Article 2 EC.

*Fair competition* is also called for in Council Resolution of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union where it is seen as the basis of secure employment:<sup>129</sup>

- a market economy based on free and fair competition is the foundation for a dynamic development of the internal market and the creation of new and secure employment,

## **5.2. Main Arguments For or Against Social Considerations in Public Procurement**

The wording of GPA differs from that of the EC Procurement Directives. Article VI on technical specifications refers, for example, explicitly to specifications laying down the characteristics of the products or services to be procured, such as the processes and methods for their production while there is no reference to production processes and methods in the texts of the Procurement Directives. Article VIII on qualification of suppliers provides that any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. There is no similar explicit provision in the Procurement Directives but arguably they must be interpreted to that effect. Article XIII on award criteria requires the contract to be awarded either to the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be *the most advantageous*. Unlike the corresponding provisions in the Procurement Directives the word *economically* is not used. It is, however, the view of important actors, for example the European Commission, that the GPA should be interpreted as prescribing

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<sup>128</sup> Which entered into force as at 1.11.1993.

<sup>129</sup> OJ 1994 C 368/6.

award decisions to be made on the basis of economic and not political considerations, see below on the Burma case.

#### *5.2.1. Arguments for a restrictive interpretation*

Generally the main arguments in favour of putting a narrow and restrictive interpretation upon the GPA and the procurement related provisions in the EC Treaty and the procurement directives are that procurement law is:

- 1) aimed at fulfilling economic purposes
- 2) which are of a strictly commercial nature and
- 3) closely related to the particular contract at issue.

According to this view the primary objective of procurement law is to create competitive conditions in which public contracts are awarded without discrimination through the choice of the best bid submitted, ie the bid which offers best value for money. In order to secure this objective procurement processes must be *transparent*. Use of public procurement to promote employment related policies may put this goal at risk.

#### *5.2.2. Arguments for considering it lawful to use public procurement as an instrument to promote employment policies*

There is a wide range of argument in favour of a broader interpretation of the procurement rules enabling procurement processes to serve employment related purposes.

Firstly, it may be argued that the contention that procurement law has a narrow competition orientation and commercial purpose is ill-founded. There is no support for this view in the EC Treaty. Procurement law cannot be interpreted in isolation but must be read in the light of the general objectives in Article 2 EC and in connection with other areas of law such as EU labour law. The Social Action Programme 1995-97 adopted following the Maastricht Treaty declared the economic and social dimensions to be interdependent. There cannot, according to that Programme, be social progress without competitiveness and economic growth. Conversely, it is not possible to ensure sustainable economic growth without taking the social dimension into account. Social progress and social solidarity must form an integral part of the European approach to competitiveness. A new balance must be achieved between the economic and social dimensions, in which they are treated as mutually reinforcing, rather than conflicting, objectives. Integration of equality policies into all areas of law, including competition law, is also required by the new provision added to Article 3 EC by the Amsterdam Treaty.

There is also no support in the EC Treaty or the case law of the ECJ for the view that the concept of “economic” in an EU context should be interpreted as commercial.

As regards service contracts they will typically be limited in time to 3-5 years whereas the need they are designed to fulfill continues to exist for many more years so that a consecutive series of contracts will have to be entered into. Even though it is unlawful to put a service contract out for tender for an indefinite period or for a longer period than 3-5 years that cannot mean that it should be unlawful to think more than 3-5 years ahead and assess the value of a tender in a more long-term perspective than that of the particular contract at issue. If the economic objectives pursued by public procurement are not limited to the particular contract at issue but can also relate to sustainable economic growth which according to Article 2 EC is one of the aims of the European Union, the economic objectives cannot be achieved without taking the employment dimension into account.

A tenderer’s staff is one of its technical resources within the meaning of the Procurement Directives. It is clearly lawful to require a certain number of staff and a certain level of qualification.

The *ECJ* has accepted employment related clauses in contracts concluded by tendering, see the *Beentjes* case<sup>130</sup> where the Court held that a condition relating to the employment of long-term unemployed persons is compatible with the Works Directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. When employment related conditions are lawful, tenderers who cannot fulfil them are not qualified to perform the contract and must be de-selected for that reason. If the employment related contractual condition is phrased in a flexible way, for example, as a requirement that the contract should be performed by a workforce which to the largest possible extent is composed equally of men and women, the degree to which different tenderers can meet the requirement will vary. If it is lawful to use such a contractual condition it seems logical also to allow it being taken into consideration when awarding the contract.

In accordance with the principle of subsidiarity the problem discussed in this Chapter is a matter that should be left to the Member States. There is nothing in the wording of neither the EC Treaty nor the Directives which preclude such an interpretation and EU law should not interfere more than necessary with national competences. Accordingly Member States who wish to pursue social policy by public procurement can do so. Member States who do not wish to pursue such policies can abstain from doing so.

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<sup>130</sup> Case 31/87 [1988] ECR 4635.

### 5.3. Views of different actors

Different actors have expressed different views.<sup>131</sup>

The *European Commission* is by and large in favour of a narrow competition promoting interpretation of the Procurement Directives limiting them to allow strictly commercial criteria in order to ensure effective competition by increasing the transparency of the procedures. According to this view, the Directives establish objective criteria strictly relevant to the particular procurement decision and uniformly applicable to all tenderers. The Commission has, for example expressed this view in its Green Paper on Public Procurement in 1996<sup>132</sup> and in its Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement.<sup>133</sup>

The Action Programme relating to the implementation of the Community Charter of Fundamental Social Rights for Workers 1989<sup>134</sup> declared that:

"the Commission could formulate a proposal aiming at the introduction of a 'social clause' into public contracts".

So far, no such proposal has been put forward but a comparative survey of contract compliance has been undertaken in respect of the promotion of equal opportunities for women.<sup>135</sup> The *European Parliament*, on the other hand, has proposed to see procurement in a broader legal context.

The *ECJ* has accepted employment related clauses in contracts concluded by tendering. The case law of the ECJ on the matters is rather limited. The most important cases are the *Beentjes* case<sup>136</sup> and *Commission v France* (Nord Pas Calais).<sup>137</sup> In *Beentjes* the ECJ held that with regard to the award of a public works contract falling within the scope of Directive 71/305/EEC:

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<sup>131</sup> See further Fernández Martín (1996) Chapters 2 and 3.

<sup>132</sup> COM(96)583.

<sup>133</sup> COM(2001) 566.

<sup>134</sup> COM (89) 568 p 24.

<sup>135</sup> McCrudden (1995).

<sup>136</sup> Case 31/87 [1988] ECR 4635.

<sup>137</sup> Case C-225/98 *Commission v France* [2000] ECR I-7445.

“(i) the criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors pursuant to Articles 20 and 26 of the works directive.  
(ii) the criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents;  
(iii) the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.”

The second question in the *Beentjes* case was

“(2) Does Directive 71/305/EEC allow a tenderer to be excluded from a tendering procedure on the basis of considerations such as those mentioned in paragraph 6.2 of (the national court' s) judgment if in the invitation itself no qualitative criteria are laid down in this regard (but reference is simply made to general conditions containing a general reservation such as that relied upon by the State in this case)?”

As regards that question, the Court added that the considerations referred to in the national court' s judgment concern the reasons for which *Beentjes'* tender was rejected by the awarding authority, which considered that *Beentjes* lacked sufficient specific experience for the work in question, that its tender appeared to be less acceptable and that it did not seem to be in a position to employ long-term unemployed persons. On the question whether it is lawful to reject a tender because it is less acceptable, the ECJ held in grounds 25-27:

“25. The exclusion of a tenderer because its tender appears less acceptable to the authorities awarding the contract was provided for, as appears from the documents before the Court, in Article 21 of the Uniform Rules. Under Article 21 (3), "the contract shall be awarded to the tenderer whose tender appears the most acceptable to the awarding authority ”.

26. The compatibility of such a provision with the directive depends on its interpretation under national law. It would be incompatible with Article 29 of the directive if its effect was to confer on the authorities awarding contracts unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer.

27. On the other hand, such a provision is not incompatible with the directive if it is to be interpreted as giving the authorities awarding contracts discretion to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 29 (2) of the directive.”

In the Conclusion of the judgment the ECJ stated:

“The criterion of “the most acceptable tender”, as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It follows from Article 29 (1) and (2) of the Directive that where the authorities awarding contracts do not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents.”

This seems to allow for a broad range of criteria to be taken into account when deciding which tender is the economically most advantageous as long as those criteria are objective and do not involve an element of arbitrary choice. See further on the *Nord-Pas-Calais* case and *Beentjes* below under award criteria.

## **6. Definition of the subject-matter of the contract**

### **6.1. Publicity**

In order to meet the Procurement Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given sufficient publicity by the authorities awarding contracts.<sup>138</sup>

### **6.2. Contractual Clauses or Conditions for the Execution of the Contract**

Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. Article 26 of the Procurement Directive provides:

Conditions for performance of contracts. Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

The clauses or conditions regarding execution of the contract must comply with Community law and, in particular, not discriminate directly or indirectly against non-national tenderers. By way of example, a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body, for instance

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<sup>138</sup> See point 21 and 28 in Case 31/87 *Beentjes* [1988] ECR 4635.

for the execution of a works contract, should not, a priori, amount to discrimination against tenderers from other Member States.<sup>139</sup>

In addition, such clauses or conditions must be implemented in compliance with all the procedural rules in the Directive, and in particular with the rules on advertising of tenders.<sup>140</sup> They should not be (disguised) technical specifications.

In the Commission's view such clauses should not have any bearing on the assessment of the suitability of tenderers on the basis of their economic, financial and technical capacity, or on the award criteria. Indeed, the contract condition should, in the view of the Commission, be independent of the assessment of the bidders' capacity to carry out the work or of award criteria.<sup>141</sup> That is, in my view, a too narrow interpretation, see below on qualitative selection and award criteria.

A public contract should, in any event, be executed in compliance with all applicable rules, including those in the social and health fields.

Contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. A bid from a tenderer who has not accepted such conditions would not comply with the contract documents and could not therefore be accepted. In *Storebælt*,<sup>142</sup> the ECJ stated that a contracting authority must reject bids which do not comply with the tender conditions to avoid infringing the principle of equal treatment of tenderers.

Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations. In its Communication on the possibilities for integrating social considerations into public procurement the Commission gave the following examples of lawful social clauses:

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<sup>139</sup> See for the same view COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p 16 note 61.

<sup>140</sup> See point 31 in Case 31/87 *Beentjes* [1988] ECR 4635.

<sup>141</sup> COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p 16 with note 64.

<sup>142</sup> Case C-243/89 *Commission v Denmark* [1993] ECR I-3353.

the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;

the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity. In the case of services contracts, this might for example involve establishing a policy aimed at promoting ethnic and racial diversity in the workplace, through instructions given to the persons in charge of recruitment, promotion or staff training. It may also involve the appointment by the contractor of a person responsible for implementing such a policy in the workplace.

the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;

the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.

In the Commission's opinion it would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are executed, since the imposition of clauses requiring changes to the organisation, structure or policy of an undertaking established on the territory of another Member State might be considered discriminatory or to constitute an unjustified restriction of trade.

### **6.3. Consulting on Possible Solutions**

It may be helpful for a contracting authority to explore with external suppliers how its objectives, including race and gender equality objectives, could be realized. Drawing on the knowledge and experience of different suppliers may suggest a wider range of options for promoting race or gender equality within the context of the contract, as well as any accompanying risks. The Procurement Directive provides for a new procurement procedure: competitive dialogue. It is a procedure in which any economic operator may request to participate and

whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender. Competitive dialogue may be used when the contract is particularly complex. Including equality aspects in a contract may contribute to it becoming particularly complex.

## 6.4. Variants

Article 24 of the Procurement Directive on variants empower the contracting authorities to authorize tenderers to submit variants where the criterion for award is that of the most economically advantageous tender. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.

Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards equality policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

Using variants - eg contracts with more or less ambitious equality content - enables the contracting authority to take the cost of equality into account without using the equality criterion as an award criterion - the lawfulness of which is still contested, see below.

## 6.5. Subcontracting

In the contract documents, the contracting authority may under Article 25 of the Procurement Directive ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend

In the US subcontracting is used to improve procurement opportunities for small businesses, including minority women-owned small businesses, see the following:<sup>143</sup>

Both the public and private sectors have long recognized federal subcontracting as an important source of procurement opportunities. Indeed, federal policy mandates that various categories of small businesses have the "maximum practicable opportunity to participate" as subcontractors in federal contracts above \$ 100,000. Additionally, the Small Business Act specifically requires large businesses with prime contract awards in excess of \$ 500,000 (\$ 1,000,000 for construction) to negotiate subcontracting plans with goals that represent the maximum practicable participation of various categories of small businesses. FASA amended the Small Business Act to afford women-owned

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<sup>143</sup> Sirmons, Denise Benjamin: Federal Contracting with Women-owned Businesses: an Analysis of Existing Challenges and Potential Opportunities, Public Contract Law Journal 2004 p 725.

small businesses the maximum practicable opportunity to become subcontractors and to be included in the required subcontracting plans of large prime contractors.

Similarly the UK Commission for Racial Equality in its guidelines on Race Equality and Public Procurement recommends promotion subcontracting opportunities for small firms and ethnic minority businesses.<sup>144</sup>

## **7. Exclusion and Qualitative Selection of Tenderers**

The suitability of suppliers should be assessed on the basis of their economic and financial standing, and their technical capacity to carry out the contract in question. For this purpose, technical capacity can encompass capacity to meet race relations and gender equality legislation and any race or gender equality requirements for performance of the contract.

### **7.1. Discrimination as Grave Misconduct**

Under Article 45 of the Procurement Directive any economic operator may be excluded from participation in a contract where that economic operator:

- (c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any *offence* concerning his professional conduct;
- (d) has been guilty of *grave professional misconduct* proven by any means which the contracting authorities can demonstrate;

Recital 43 in the public sector Directive on public procurement provides that (emphasis added):

Non-observance of national provisions implementing the Council Directives 2000/78/EC and 76/207/EEC concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered *an offence concerning the professional conduct* of the economic operator concerned or *grave misconduct*.

Directive 2000/78/EC prohibits discrimination on grounds of religion or faith, age, handicap and sexual orientation in the employment field. Directive 76/207/EEC prohibits discrimination on grounds of sex in the employment field. As appears the Race Directive is not mentioned in the Procurement Directive which must, however, be interpreted so that violations of national provisions implementing the Race Directive may be also considered an offence

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<sup>144</sup> Race Equality and Public Procurement, CRE, UK, [http://www.cre.gov.uk/duty\\_proc\\_pa.pdf](http://www.cre.gov.uk/duty_proc_pa.pdf) p 61.

concerning the professional conduct of the economic operator concerned or a grave misconduct. The Gender Equality (Goods and Services) Directive is also not mentioned in the Procurement Directive from March 2004 but that is because it was only adopted in December 2004. By way of analogy violations of national provisions implementing the Gender Equality (Goods and Services) Directive may be also considered an offence concerning the professional conduct of the economic operator concerned or a grave misconduct.

## **7.2. Approved Lists of Economic Operators**

The Procurement Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State.

Contracting authorities with mainstreaming duties must see to it that such lists include a reasonable number of minority owned or women owned businesses and there must be no discrimination on grounds of race or sex when setting up such lists.

## **8. Award of the contract**

Neither gender nor ethnic origin or other workforce criteria are explicitly mentioned as award criteria in the Procurement Directive. Article 53 on contract award criteria provides:

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:
  - (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion, or
  - (b) the lowest price only.

The question discussed here is whether the provisions on award criteria in the procurement directives restrict the freedom of Member States to pursue policies by means of procurement further than what follows from the Treaty provisions.

Recital 1 in the Preamble to the Directive states that the Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the

public concerned, including in the environmental and/or social area, provided that such criteria are

linked to the subject-matter of the contract,  
do not confer an unrestricted freedom of choice on the contracting authority,  
are expressly mentioned  
and comply with the fundamental principles mentioned in recital 2.<sup>145</sup>

The above provisions in the Procurement Directive builds on the practice of the ECJ, in particular the judgement in the Finnish Bus Case.<sup>146</sup>

Article XIII of GPA on submission, receipt and opening of tenders and awarding of contracts provides in subsection 4.

“(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

(b) unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other parties, is either the lowest tender or *the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.*

(c) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

The GPA thus only requires the evaluation criteria by which it is determined which tender is the most advantageous to be made known in advance. It does not lay down any restrictions as to what criteria may be used. Compared to the EU rules it is worth noticing that the term *economically* most advantageous is not used.

In relation to the problem discussed here the question is whether the criterion ‘economically most advantageous’ may cover equality related considerations or whether it should be limited to commercial criteria.

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<sup>145</sup> In the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

<sup>146</sup> Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki og HKL-Bussi liik en ne* [2002] ECR I-7213.

In favour of a broad interpretation it may be argued that the ECJ has consistently held that a body may be engaged in economic activities and be regarded as an "undertaking" for the purposes of Community law though it does not operate with a view to profit. In this context it is worth noticing that the Court has developed its interpretation on the basis of the general provision in Article 2 EC and a cross-disciplinary discussion of cases. A good example of this is provided by the infringement case<sup>147</sup> against England concerning the Transfer of Undertakings Directive.<sup>148</sup> Advocate General van Gerven underlined that the Court had already accepted that economic cannot be reduced to commercial in competition law and social law - two areas of law that were not usually dealt with in the context of each other before the development of the EU. The ECJ has dealt with employment related criteria in two procurement cases: *Randstad* and *Beentjes*.

In *Randstad*<sup>149</sup> an unsuccessful service provider (a temporary staff agency) applied for annulment of a decision of the European Commission by which the Commission rejected the applicant's offer to make temporary staff available. The European Court of Justice accepted criteria concerning wages and employment conditions. It held

“39. Even assuming that in a procedure for request for tenders the Commission chose an undertaking whose offer was higher in price than the others, that is not in itself decisive.

40. Other factors referred to by the Commission to justify its choice, in particular the references of *Randstad* and the fact that the salary paid by it to temporary staff was, in relation to the prices paid by the Commission, among the highest, came within the considerations of a technical nature which it could take into account under Article 59 (2) of the financial regulation for the purpose of making its choice.”

In a case against Italy<sup>150</sup> the ECJ held

“For the purposes of Article 29 (1) of Directive 71/305 concerning the coordination of procedures for the award of public works contracts the award of a contract on the basis of the criterion of the most economically advantageous tender presupposes that the authority making the decision is able to exercise its discretion in taking a decision on the basis of qualitative and quantitative criteria that vary according to the contract in question and is not restricted solely to the quantitative criterion of the average price stated in the tenders.

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<sup>147</sup> Case C-382/92 *Commission v United Kingdom* [1994] ECR-I-2435.

<sup>148</sup> 77/187/EEC.

<sup>149</sup> Case 56/77 *Agence européenne d' intérim SA v Commission* [1978] ECR 2215.

<sup>150</sup> Case 274/83 *Commission v Italy* [1985] ECR 1077.

3. The member states are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the treaty and the measures adopted by the institutions pursuant thereto are applied.”

In *Beentjes*<sup>151</sup> the ECJ ruled in point 18:

“As far as the criteria for the award of contracts is concerned, Article 29 (1) provides that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

19. Although the second alternative leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous.

and in the Conclusion:

The condition relating to the employment of long-term unemployed persons is compatible with the Directive if it has no direct or indirect discriminatory effect on tenderers from other member states of the community. An additional specific condition of this kind must be mentioned in the contract notice.”

In *Commission v France (Nord Pas Calais)*<sup>152</sup> the ECJ held on the lawfulness or otherwise of using an additional criterion related to employment as an award criterion:

50. None the less, that provision [the provision on award criteria] does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, *Beentjes*, paragraph 29).

51. Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising (see, to that effect, on Directive 71/305, *Beentjes*, paragraph 31). It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence (see, to that effect, *Beentjes*, paragraph 36).

52. As regards the Commission's argument that *Beentjes* concerned a condition of performance of the contract and not a criterion for the award of the contract, it need

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<sup>151</sup> Case 31/87 [1988] ECR 4635.

<sup>152</sup> Case C-225/98 *Commission v France* [2000] ECR I-7445.

merely be observed that, as is clear from paragraph 14 of *Beentjes*, the condition relating to the employment of long-term unemployed persons, which was at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract.

On a narrow view Article 53 at least allows for the use of equality as an ‘additional’ award criterion. The concept of an additional criterion was first mentioned in the *Beentjes*, where the Court held that a criterion relating to the employment of long-term unemployed persons was not relevant either to the checking of a candidate's economic and financial suitability or of the candidate's technical knowledge and ability, or to the award criteria listed in the relevant directive. The Court also held that this criterion was nevertheless compatible with the public procurement directives if it complied with all relevant principles of Community law.

In the Commission’s interpretation,<sup>153</sup> the ECJ in *Commission v France* (Nord Pas Calais) held that contracting authorities can base the award of a contract on a condition related to the combating of unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent tenders. This condition was regarded by the Member State in question as an additional, non-determining criterion and was considered only after tenders were compared from a purely economic point of view. Finally, the Court of Justice stated that the application of the award criterion regarding combating unemployment must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to ascertain that such a condition existed. This might also be the case for other conditions in the social field such as equality conditions.

The UK Commission for Racial Equality in its guidelines on Race Equality and Public Procurement takes a similar view:<sup>154</sup>

For some contracts, there may be factors relating to the promotion of race equality that are not core requirements, but which you consider to be desirable and that would add value to the authority in its duty to promote race equality and other policy commitments. You might be able, in certain contracts, including those subject to EC directives, to take account of tenderers’ ability to meet an additional race equality

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<sup>153</sup> See COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p 15.

<sup>154</sup> Race Equality and Public Procurement, CRE, UK, [http://www.cre.gov.uk/duty\\_proc\\_pa.pdf](http://www.cre.gov.uk/duty_proc_pa.pdf) p 54.

criterion, if you needed to decide between tenders that otherwise appear to offer equivalent value for money. This means that, in the exceptional case where you had evaluated two or more tenders as being equally economically advantageous for the authority, they could be compared against a further race equality factor. You could only do this if this additional criterion had been stated in your invitation to tender or contract notice, and if it does not breach EC law. You should get legal advice before including an additional criterion.

In my view that is a too narrow interpretation. There is nothing in the wording of the judgement that suggests this limited interpretation and - at least in respect of gender equality - it is contrary to the gender mainstreaming duty under Article 3(2) EC.

## Part III

### Enforcement and Remedies

## 9. General EU Law Requirements Concerning Enforcement and Remedies

According to settled case-law, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction, to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, and to choose the relevant remedies.<sup>155</sup>

The choice of penalties thus remains within the discretion of the Member States but their choice must be exercised with respect for the general EU law principles of equivalence, effectiveness and proportionality. In 1989, in *Commission v Greece*<sup>156</sup> the ECJ laid down some minimum Community conditions to be applied to the national rules. First, conditions attached to the national rules must not be less favourable than those attached to similar national actions. Second, the national rules must not be framed so as to render virtually impossible the exercise of Community rights. In any event, the remedy must be effective, proportionate and dissuasive.

Article II-47 of the draft Constitutional Treaty provides for a right to an effective remedy and to a fair trial before a tribunal (tribunal in French, Gericht in German). The first paragraph of Article II-47 is based on Article 13 ECHR<sup>157</sup> The second paragraph of Article II-47 corresponds to Article 6(1) ECHR but goes a little further in that it also covers public law, see below in part 7.<sup>158</sup> The ECJ has referred to Articles 6 and 13 ECHR as expressions of

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<sup>155</sup> See, in particular, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraph 17; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 46; Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 47; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 18, Case C-78/98 *Preston* [2000] ECR ECR I-3201 paragraph 31.

<sup>156</sup> Case C-68/88 *Commission v Greece* [1989] ECR 2979.

<sup>157</sup> Article 13 ECHR reads: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>158</sup> Article 6 ECHR reads: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly....

underlying general principles of Community law in *Johnston* and a number of subsequent judgments. Article II-47 applies to the institutions of the EU and of the Member States when they are acting in the sphere of EU law.

Under the *acquis communautaire* Member States are bound by the fundamental rights including for example the fundamental right not to be discriminated against on grounds of sex when they act within the sphere of Community law as for example within the scope of one of the contract law directives. It follows, for example, that the procurement directive makes sex discriminatory contractual practices and terms unlawful. A person who can only rely on the fundamental right not to be discriminated against on grounds of sex is, however, in a fairly weak position if she wants to enforce her right. The appropriate remedy depends on the circumstances. Remedies may include: a declaration of rights, damages, an injunction ordering a party not to do something or to do something.<sup>159</sup>

In addition to the above general principles, which apply in all matters governed by Community law, Member States will be required to comply with the specific requirements provided for in the Remedies Directive on public procurement<sup>160</sup> and the Race Directive<sup>161</sup> and the Gender Equality (Goods and Services) Directive.<sup>162</sup> Those directives lay down provisions on judicial and administrative procedures, compensation or reparation, legal standing, dialogue with organisations, time limits, burden of proof and specific equality bodies to control that the principle of equal treatment is observed.

## 9.1. The principle of proportionality

In *Colson*,<sup>163</sup> AG Rozes argued that the deterrent effect of the sanctions must be assessed on the basis of the principle of proportionality and compared to sanctions imposed in national law to other offences of the same gravity. The ECJ held that it is impossible to establish real equality of opportunity without an appropriate system of sanctions. Although full implementation of the employment directives does not require any specific form of sanction, it does

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<sup>159</sup> See eg the UK Sex Discrimination Act Section 66(2) SDA.

<sup>160</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

<sup>161</sup> 2000/43/EC.

<sup>162</sup> 2004/113/EC.

<sup>163</sup> Case 14/83, *Colson* [1984] ECR 1891.

entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer.

## 9.2. The principle of effectiveness

The classic formulation of the principle of effectiveness was introduced in *Comet*.<sup>164</sup> Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.<sup>165</sup>

In *Heylens*<sup>166</sup> the ECJ found that there must be a remedy of a judicial nature against the refusal of the French Minister to recognize a diploma. The Court held that since free access to employment is a fundamental right which the EC Treaty confers individually on each worker in the community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the ECJ held in *Johnston* that requirement reflects a general principle of community law which underlies the constitutional traditions Common to the member states and has been enshrined in articles 6 and 13 ECHR.

In *Colson*,<sup>167</sup> the ECJ struck down a German rule providing for reliance damages as insufficient to deter employers from discriminating on grounds of sex, see for more details below on reliance damages.

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<sup>164</sup> Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043 and Case 33/76 *Rewe-Zentral Finanz eG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>165</sup> See, for example, Case C-326/88 *Anklagemyndigheden v Hansen & Søn I/S* [1990] ECR I-2911.

<sup>166</sup> Case 222/86 *Heylens* [1987] ECR 4097.

<sup>167</sup> Case 14/83, *Colson* [1984] ECR 1891.

### 9.3. The principles of equivalence

The infringement actions<sup>168</sup> against UK for failure to implement the original collective redundancies and transfer of undertakings directives addressed the problem that employee representation in undertakings within the UK was based on voluntary recognition of trade unions by employers and for that reason there was no remedy against an employer who did not recognize a trade union. The ECJ considered this state of law incompatible with the duty of the Member States to contribute to the effective application of Community law. In this case the UK treatment of information and consultation of employees in matters covered by Community law was the same as the treatment of information and consultation of employees in national matters not covered by Community law, namely a totally voluntary solution. The principle of equivalence was thus fulfilled but the principle of effectiveness was violated.

### 10. Enforcement and Remedies under the Procurement Rules

The Remedies Directive on public procurement<sup>169</sup> puts an obligation on Member States to ensure that decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement. Under Article 2 of the Directive:

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
  - (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
  - (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
  - (c) award damages to persons harmed by an infringement.

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<sup>168</sup> Case C-382/92, *Commission v United Kingdom* [1994] ECR I-2435 and Case C-383/92, *Commission v United Kingdom* [1994] ECR I-2479.

<sup>169</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.
  3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.
  4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.
  5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.
  6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.
- Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

As appears from the above, legislative options are to some extent left to Member States as to whether the review should be a matter for courts, for special courts, for administrative bodies created for public procurement remedies - or for already existing bodies within national public administration legal infrastructure. The functional requirements on the remedies may be stated in statutes (general or specifically aimed at public procurement activities), in regulations or else satisfy the requirements set in the Directive provisions.

An important element in the enforcement system for infringements is the basic idea that remedies must be effectively available horizontally between the competing candidates or tenderers contesting contracting authority's activities. This brings the remedy system down to private law and civil procedure and the law on enforcement measures for disputes in this respect.<sup>170</sup>

## **11. Enforcement and Remedies under the Equality Rules**

The Race Directive and the Gender Equality (Goods and Services) Directive<sup>171</sup> contain a number of similar provisions on enforcement and remedies.

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<sup>170</sup> See further Kai Krüger, Ruth Nielsen and Niklas Bruun: *European Public Contracts in a Labour Law Perspective*, DJØØF Publishing, Copenhagen 1998 chapter III.

<sup>171</sup> 2000/43/EC and 2004/113/EC.

### 11.1. Access to Courts

Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under the directives are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

### 11.2. Shift in the Burden of Proof

The ECJ has repeatedly stated<sup>172</sup> that it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of discrimination lies with the person who, believing him- or herself to be the victim of such discrimination, brings legal proceedings with a view to removing the discrimination.

In *Danfoss*,<sup>173</sup> the ECJ held (emphasis added) that the Equal Pay Directive<sup>174</sup> must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his *practice* in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

It is clear from the case-law of the ECJ that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 141 EC, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on

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<sup>172</sup> See for example Case C-127/ 92, *Enderby* [1993] ECR I-5535 paragraph 13.

<sup>173</sup> Case C-109/88, *Danfoss* [1989] ECR 3199.

<sup>174</sup> 75/117/EEC.

grounds of sex.<sup>175</sup> Article 8 of the Gender Equality (Goods and Services) Directive and Article 8 of the Race Directive require Member States to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The above does not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. It does not apply to criminal procedures.

### **11.3. Social dialogue**

Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules.

### **11.4. Bodies for the Promotion of Equal Treatment**

Member States shall designate a body or bodies 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 charged at national level with the defence of human rights or the safeguard of individuals' rights. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

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<sup>175</sup> Case 170/84, *Bilka-Kaufhaus* [1986] ECR 1607, at paragraph 31, Case C-33/89, *Kowalska* [1990] ECR I-2591, at paragraph 16, C-184/89, *Nimz* [1991] ECR I-297, at paragraph 15 and Case C-127/ 92, *Enderby* [1993] ECR I-5535 paragraph 13.

## 12. Do the Two Sets of Remedies Fit Together?

The Remedies Directive on public procurement and the directives on ethnic and gender equality in the provision of goods and services contain provisions on remedies and enforcement. In this part the interplay between the two different sets of rules on remedies and enforcement are discussed.

### 12.1. Compensation/Damages

Under Article 15 of the Race Directive, Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to the Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

The Gender Equality (Goods and Services) Directive contains a slightly differently worded provision in Article 8(2) requiring Member States to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation. See further below in the section on compensation/damages.

The latter provision is in broad terms similar to Article 6(2) of the amended equal treatment directive<sup>176</sup> which provides:

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

#### 12.1.1. Requirement of fault

In *Dekker*<sup>177</sup> the Hoge Raad (the Dutch Supreme Court) referred the question whether it is compatible with the Equal Treatment Directive that, if the

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<sup>176</sup> 2002/73/EC.

<sup>177</sup> Case C-177/88, *Dekker* [1990] ECR I-3941.

infringement of the principle of equal treatment is established, for the award of the claim it is also necessary that the employer has committed a fault.

The ECJ held that the refusal to engage a pregnant woman on the ground that she is pregnant constitutes a form of direct discrimination on the grounds of sex. Furthermore, proof of such discrimination is not contingent upon a comparison with the treatment of a male employee. The ECJ stressed that the primary liability for a breach of the Equal Treatment Directive is upon the employer and that he or she cannot rely upon exemptions, exclusions or justifications available in national law to justify discrimination against a pregnant employee.

In *Draempaehl*,<sup>178</sup> the ECJ again discussed the question as to whether a requirement of fault in national law is consistent with EU law. The following preliminary question was referred to it:

1. Does a statutory provision which makes it a condition for an award of compensation for discrimination on grounds of sex in the making of an appointment that there must be fault on the part of the employer conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions?

The Court referred to its judgment in *Dekker* and concluded that the equal treatment directive precludes provisions of domestic law which, like §611a(1) and (2) of the BGB, make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault. That conclusion could not be affected by the German Government's argument that proof of such fault is easy to adduce since, in German law, fault entails liability for deliberate or negligent acts.

The above rule on no-fault liability will probably apply correspondingly to sex discrimination outside of employment. In existing national law there are, however, examples of stricter liability rules in the employment field than outside of employment. The Norwegian Gender Equality Act Section 17 on liability for damages thus provides:

Any job seeker or employee who has been subjected to differential treatment in contravention of sections 3 to 6 shall be entitled to compensation regardless of the fault of the employer. Compensation shall be fixed at the amount that is reasonable, having regard to the financial loss, the situation of the employer and the employee or job seeker and all other circumstances.

In all other respects, the general rules regarding liability for damages in the event of wilful or negligent contravention of the provisions of this Act shall apply.

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<sup>178</sup> Case C-180/95, *Draempaehl* [1997] ECR I-2195.

Similarly, in the UK damages cannot be awarded for indirect discrimination in the provision of goods and services under the UK SDA<sup>179</sup> if the respondent proves that the requirement or condition in question was not applied with the *intention* of treating the claimant unfavourably on the ground of his or her sex. The requirement of intention as a precondition for damages makes the UK ban against indirect discrimination in matters of goods and services weak compared to the standard provided for in employment and in the proposed Directive on equal treatment in contracts for the provision of goods and services.

#### *12.1.2. Reliance or Expectation Damages*

Reliance damages restore the injured party to his or her original pre-contractual position. Job-seekers whose right are violated, eg by discrimination, will often have incurred only limited economic loss such as the costs of stamps and an envelope. A duty to pay compensation for such costs will not be effective in deterring employers from discriminating.

In *Colson*<sup>180</sup> the ECJ ruled in a case where rejected applicants under German law received reimbursement of their application costs and nothing more. The Commission considered that although the directive is intended to leave to Member States the choice and the determination of the sanctions, the transposition of the directive must nevertheless produce effective results. The principle of the effective transposition of the directive requires that the sanctions must be of such a nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on an expectation (*Vertrauensschaden*) is not sufficient to ensure compliance with that principle.

The ECJ held that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the Equal Treatment Directive.

In procurement law it is normally up to national law to determine the more precise rules. Reliance damage is a typical sanction in most Member States. Expectation damages will usually only be awarded if it is clear that the complainant would have won the contract if there had been no violation of the

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<sup>179</sup> See further section 66 SDA.

<sup>180</sup> Case 14/83, *Colson* [1984] ECR 1891.

procurement rules. In cases concerning discrimination in public procurement the minimum standard prescribed in the discrimination directives must be observed which may result in reliance damage being insufficient in line with the ECJ's ruling in *Colson*.

### *12.1.3. Upper limit for compensation and exclusion of interest*

The question as to whether the Member States can put a ceiling on compensation was at issue both in *Marshall*<sup>181</sup> and in *Draempaehl*.<sup>182</sup>

Miss Marshall was dismissed in 1980 at the age of 62, in a situation in which a man would have been dismissed at the age of 65. In *Marshall (1)*,<sup>183</sup> the ECJ ruled that this was in conflict with article 5 of the Directive on Equal Treatment,<sup>184</sup> which created direct effects *vis-à-vis* a public employer. Marshall then made a claim for compensation.

The dispute in *Marshall (2)*<sup>185</sup> arose because the Industrial Tribunal,<sup>186</sup> to which the Court of Appeal remitted the case to consider the question of compensation, assessed Miss Marshall's financial loss at 18.405£, including 7.710 £ by way of interest, and awarded her compensation of 19.405 £, including a sum of 1.000£ compensation for injury to feelings. According to the then relevant provision of the SDA, where an Industrial Tribunal found that a complaint of unlawful sex discrimination in relation to employment was well founded, it should, if it considered it just and equitable to do so, make an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a County Court to pay to the complainant. Under the then section 65(2) of the SDA, however, the amount of compensation awarded could not exceed a specified limit, which at the relevant time was 6.250 £. At that time an Industrial Tribunal had no power - or at least the relevant provisions were ambiguous as to whether it had such a power - to award interest on compensation for an act of unlawful sex discrimination in relation to employment. The House of Lords referred a number of questions to the ECJ concerning the extent to which these restrictions complied with Article 6 of the Directive on Equal Treatment:

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<sup>181</sup> Case C-271/91, *Marshall (No 2)* [1993] ECR I-4367.

<sup>182</sup> Case C-180/95, *Draempaehl* [1997] ECR I-2195.

<sup>183</sup> Case 152/84, *Marshall (1)* [1986] ECR 723.

<sup>184</sup> 76/207/EEC.

<sup>185</sup> Case C-271/91, *Marshall (No 2)* [1993] ECR I-4367.

<sup>186</sup> The then competent English tribunal, today it would be an employment tribunal.

1. Where the national legislation of a Member State provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC is the Member State guilty of a failure to implement Article 6 of the Directive by reason of the imposition by the legislation of an upper limit on the amount of compensation recoverable by such a person?
2. Where the national legislation provides for the payment of compensation is it essential to the due implementation of Article 6 of the Directive that the compensation to be awarded:
  - a) should not be less than the amount of the loss found to have been sustained by reason of the unlawful discrimination
  - b) should include an award of interest on the principal amount of the loss so found from the date of the unlawful discrimination to the date when the compensation is paid?

The ECJ understood the questions put by the House of Lords as asking, in essence, whether it follows from the Directive on Equal Treatment that a victim of sex discrimination is entitled to (emphasis added) *full reparation for the loss and damage he or she had sustained*.

The Court held that although the Equal Treatment Directive leaves Member States, when providing a remedy for breach of the prohibition against discrimination, free to choose between the different solutions suitable for achieving the objective of the directive, it nevertheless entails that if financial compensation is to be awarded where there has been discrimination such compensation must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules. Accordingly, the interpretation of Article 6 of the Equal Treatment Directive must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid. The response of the ECJ was that Article 6 should be interpreted such that damages for a loss, suffered by a person in the context of a dismissal which is discriminatory on the basis of gender, may not be restricted to a maximum amount determined *a priori*, and that interest must be awarded as compensation for a justified loss, in respect of the time elapsed until the damages are actually paid.

In *Draempaehl*<sup>187</sup> the national court referred questions for a preliminary ruling on whether it is in conflict with the Equal Treatment Directive that a statutory provision prescribes an upper limit of three months' salary as compensation for discrimination on grounds of sex in the making of an

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<sup>187</sup> Case C-180/95, *Draempaehl* [1997] ECR I-2195.

appointment - in contrast to other provisions of domestic civil and labour law - for applicants of either sex who have been discriminated against in the procedure, but who would not have obtained the position to be filled even in the event of non-discriminatory selection by reason of the superior qualifications of the applicant appointed.

The national court also asked if a statutory provision is in conflict with the Equal Treatment Directive if it prescribes an upper limit of three month's salary as compensation for discrimination on grounds of sex in the making of an appointment - in contrast to other domestic provisions of civil and labour law - for applicants of either sex who, in the event of non-discriminatory selection, would have obtained the position to be filled. Finally it asked whether it is in conflict with the Equal treatment Directive if a statutory provision, where compensation is claimed by several parties for discrimination on grounds of sex in the making of an appointment, prescribes an upper limit of the aggregate of six months' salary for all persons who have suffered discrimination - in contrast to other provisions of domestic civil and labour law

The ECJ held that the Equal Treatment Directive does not preclude provisions of domestic law which prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant where the employer can prove that, because the applicant engaged had superior qualification, the unsuccessful applicant would not have obtained the vacant position, even if there had been no discrimination in the selection process. In contrast, the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where that applicant would have obtained the vacant position if the selection process had been carried out without discrimination.

Finally the ECJ held that the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, impose a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment.

#### *12.1.4. Compensation for non-material damage*

In *Leitner*,<sup>188</sup> the ECJ was asked whether Article 5 of the package travel directive<sup>189</sup> is to be interpreted as meaning that compensation is in principle payable in respect of claims for compensation for non-material damage.

The Commission argued that the term damage is used in the Directive without any restriction, and that, specifically in the field of holiday travel, damage other than physical injury is a frequent occurrence. It then noted that liability for non-material damage is recognised in most Member States, over and above compensation for physical pain and suffering traditionally provided for in all legal systems, although the extent of that liability and the conditions under which it is incurred vary in detail. The Commission maintained that it is not possible to interpret restrictively the general concept of damage used in the Directive and to exclude from it as a matter of principle non-material damage.

The ECJ noted that it was not in dispute that, in the field of package holidays, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that, as the Commission has pointed out, non-material damage is a frequent occurrence in that field. Furthermore, the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers. It is in light of those considerations that Article 5 of the Directive is to be interpreted.

Although the first subparagraph of Article 5(2) merely refers in a general manner to the concept of damage, the fact that the fourth subparagraph of Article 5(2) provides that Member States may, in the matter of damage other than personal injury, allow compensation to be limited under the contract provided that such limitation is not unreasonable, means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage. The answer to the question referred was therefore that Article 5 of the Directive is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.

With regard to sex discrimination in the provision of goods and services national law also provide for compensation for non-material damage to a

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<sup>188</sup> Case C168/00, *Leitner* [2002] I-2631.

<sup>189</sup> 90/314/EEC.

varying degree.<sup>190</sup> The distortion of competition argument is probably weaker in this field than with regard to package holidays. The principle of effectiveness will often require compensation to be paid for non-material damage because there will typically be no physical injury and the economic loss sustained may be so small that compensation only for economic loss will not be sufficient for the sanction to act as a deterrent, see above on the *Colson* case.<sup>191</sup>

## **12.2. Competing/complementing enforcement bodies**

There are - and must under Community law be - special bodies for enforcing equality/discrimination law. In regard to public procurement it is a possibility which has been put into practice in some countries, eg Denmark. The fact that a complaint may be brought before different bodies may give rise to uncertainties.

## **12.3. Monitoring, Managing, and Enforcing Contracts**

When there are equality clauses in the conditions of a contract failure by the contractor to comply with them lead to default. The UK Commission for Racial Equality states in its guidelines on Race Equality and Public Procurement:<sup>192</sup>

If race equality contract requirements are to have any real effect, you must have effective procedures for monitoring and managing the contract.

Officers with responsibility for monitoring and managing the contract may need briefing on the race equality requirements, and also training.

You are more likely to achieve your objectives if you can establish and maintain a positive partnership with the contractor.

You should ensure that the contractor understands from the outset their responsibilities for race equality performance, and for monitoring and reporting.

Prompt and effective action should be taken whenever monitoring indicates inadequate performance of race equality obligations.

After award, it may be possible to secure voluntary agreement by the contractor to take further steps to promote race equality, including workforce matters, positive action, and promoting subcontracting opportunities for small firms and ethnic minority businesses.

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<sup>190</sup> See from national law section 66 (4) of the UK SDA which provides for compensation for injury to feelings.

<sup>191</sup> Case 14/83, *Colson* [1984] ECR 1891.

<sup>192</sup> Race Equality and Public Procurement, CRE, UK, [http://www.cre.gov.uk/duty\\_proc\\_pa.pdf](http://www.cre.gov.uk/duty_proc_pa.pdf) p 64.

A review of the success or failure of the contract in meeting race equality objectives will offer lessons for future contracts.