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Directorate General for Research

WORKING PAPER

PROSPECTS
FOR AN ANTI-DISCRIMINATION POLICY

POTENTIAL FOR IMPLEMENTING ARTICLE 13 OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

SOCIAL AFFAIRS SERIES

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1. Introduction

"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." (Article 13 of the EC Treaty).

Discrimination against people on the grounds of specific characteristics, especially on the grounds of their association with a group to which they have not chosen to belong, is not only unfair and an infringement of the general principle of equality, it also has an economic and social cost. This cost is borne both by the person affected and by countries, communities, social systems and companies, because people who are discriminated against often do not have the same standard of living as others and are reliant upon aid. Discrimination is also a distorting factor in the common market, because it hampers the exercise of fundamental freedoms, especially the free movement of people.

It is therefore up to both the Member States and the European Union to help stamp out discrimination as far as possible and Article 13 (ex Article 6a), which was included in the Treaty establishing the European Community (EC Treaty) pursuant to the Treaty of Amsterdam, offers new prospects for doing so. First, because it expressly authorises the Council to take appropriate action within the limits of the powers of the Community and, secondly, because it comes under the heading "Principles" in Part One of the Treaty and therefore has tremendous symbolic importance.

Action by the EU to target discrimination would send out a clear signal that the Member States and the EU are taking the action needed to ensure that people previously discriminated against are fully integrated into society and that they are fighting for real equal opportunities for all citizens. This would be an important step on the road towards a highly cohesive society and would have a positive impact on the quality of life of the people in question. It might also help to reinforce the concept of European citizenship because there would be real, identifiable civil rights advantages.

This working document should be understood in this context; its purpose is to define the content of Article 13 of the EC Treaty and to identify the possibility and prospects for effective implementation of the standard. It therefore starts by defining the terms "discrimination" and "discriminatory practices" (Chapter 2). It goes on to discuss the main features of the new Article 13 of the EC Treaty by explaining its position, its nature and its objective (Sections 3.1. and 3.2.), its legal nature (Section 3.3.), its scope *ratione materiae et personae* (Section 3.4.) and its relationship to the rest of the EC Treaty (Section 3.5.).

The second part of this study (Chapter 4) summarises how Community anti-discrimination policy developed up to the Amsterdam review of the Treaty and the introduction of Article 13. This gives us a framework within which to analyse the strategic options and prospects for implementing Article 13 of the EC Treaty (Chapter 5).

2. The concept of "discrimination"

2.1. Definition of the concept of "discrimination"

There are various starting points for a definition of this concept. According to *Zuleeg*, "discrimination" is to be understood as "the negligent treatment, in comparison to others, of one or more persons of which the legal order or society does not approve"[1]. In the case law of the European Court of Justice, discrimination is defined as "the application of different rules to comparable situations or the application of the same rule to different situations"[2]. This corresponds to the case law of the European Court of Human Rights in Strasbourg[3].

Discrimination also includes so-called "indirect discrimination". According to the case law of the European Court of Justice, both "direct" or "open" and "indirect" or "concealed" forms of discrimination are prohibited. This applies even though indirect discrimination is not expressly prohibited. There is indirect or concealed discrimination when a specific standard or a specific action is formally applied to everyone uniformly but in fact discriminates against certain groups of people. A recent example of case law concerned regulations which discriminate against part-time workers, because they usually affect women[4], whereby it was found that it was sufficient if the measure had an adverse impact on substantially more members of one or other sex[5]. In cases affecting the freedom of movement of workers, the European Court of Justice was satisfied merely with the probability that a regulation would only affect foreign workers[6].

This shows that discrimination does not depend upon intent; more importantly, it does not depend upon a negative attitude on the part of the discriminator against the person subject to discrimination.

There is no discrimination if there are objective grounds which justify the unequal treatment[7]. For example, a pregnant woman or a disabled person cannot perform certain activities on health grounds. However, views often differ as to what grounds justify unequal treatment and they therefore need to be set out in legislation as precisely as possible.

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[1] Zuleeg, "Der Inhalt des Article 13 EC Treaty", in *Article 13 - Anti-discrimination: the way forward*, p. 104.
[2] Cf. e.g. European Court of Justice of 27.10.1998, C-411/96 - Boyle -, Rep. 1998, p. 6401, margin note 39 or European Court of Justice of 14.2.1995, C-279/93 - Schumacker -, Rep. 1995, p. 225, margin note 30. In detail on the concept of discrimination in EC law: Ellis, "The Definition of Discrimination in European Community Sex Equality Law", *European Law Review* 1994, p. 563 ff.
[3] Cf. e.g. Belgian Linguistics (1986), 1 EHHR 252, § 10.
[4] e.g. C-127/92 - Enderby - , Rep. 1994 I, p. 5535; this raises various legal problems which we cannot go into here, cf. e.g. Allen, "Article 13 and the Search for Equality in Europe: an overview", in: *Article 13* (cf. FN 1), p. 77 ff.; Ellis, "Recent Developments in European Community Sex Equality Law", *Common Market Law Review*, p. 379 ff., Ellis, "The Definition of Discrimination in European Community Sex Equality Law", cf. FN 2
[5] C-411/96 - Boyle - , margin note 76, cf. FN 2 and Directive 97/80/EC.
[6] C-237/94 - O'Flynn - , Rep. 1996 I, p. 2417, margin notes 20, 21.
[7] C-170/84 - Bilka -, Rep. 1986 I, p. 1607.

2.2. Discriminatory practices

Discrimination comes in a multitude of forms. The following are frequent examples[8]:

- refusing to conclude a contract, e.g. a contract of employment, a tenancy agreement or a business contract;
- hampering promotion in the form of direct or indirect discrimination;
- failing to take account of special needs on the basis, for example, of religion (food in canteens) or disability (access to buildings);
- refusing government services, tax incentives and other financial discrimination;
- slander, libel, inciting hatred, calling for discrimination.

Indirect discrimination is often not recognisable at first glance.

[8] Cf. Heymann-Doat, "Gründe der Diskriminierung", in: *Article 13* (FN 1), p. 89.

3. The content of Article 13 of the EC Treaty

3.1. The position of Article 13 of the EC Treaty

Article 13 of the EC Treaty stands in an outstanding position in Community law, namely in Part One of the EC Treaty entitled "Principles". It is an expression of the European Union's faith in respect for human rights, especially the fundamental rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the general principles of Community Law, as they result from the constitutional traditions common to the Member States (Article 6 of the EU Treaty). It also reflects the general principle of non-discrimination recognised by the European Court of Justice in its case law[9].

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that the enjoyment of the rights and freedoms set forth in the 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. It does not therefore establish an independent ban on discrimination, but interacts with the other provisions of the Convention[10].

At international level, the International Covenant on Civil and Political Rights of the United Nations, which all Member States have signed, is also of significance. Contrary to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 26 of the International Covenant on Civil and Political Rights represents a basic right to non-discrimination, stating that:
"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[11]

Article 136 of the EC Treaty, which states that "the Community shall have as its objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion", must also be seen in connection with Article 13.

Article 13 of the EC Treaty is not conceived as an individual fundamental right; on the contrary, it is seen as the task of the three most important Community institutions, namely the Council, the Commission and the European Parliament. However, the view is taken in literature that Article 13 is a framework provision, in the light of which the whole Treaty must be interpreted[12]. This is quite decisively supported by its position in the chapter entitled "Principles" (cf. 3.4. below on the scope of Article 13).

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[9] Cf. C-248 and C-249/95 - SAM Schiffahrt GmbH - (1997), margin note 50 and C-354/95 - The Queen v. Minister for Agriculture - (1997), margin note 61.

[10] Allen, *op. cit.,* p. 78 with further notes.

[11] Although all Member States are contracting parties to the International Covenant, monitoring is patchy and its fundamental rights cannot be implemented in practice.

[12] Dentici, L.M., "L'Eguaglianza fra i sessi nell'Europa di Amsterdam", appears shortly in *Il Diritto del Lavoro*.

3.2. Nature and objective of Article 13 of the EC Treaty

"...to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

The aim of Article 13 of the EC Treaty is to combat discrimination. As grounds for discrimination it quotes sex, race, ethnic origin[13], religion, belief, disability[14], age and sexual orientation. It is clear from the specific wording of the article that, contrary to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, this list is conclusive rather than open to analogy.

Some of the grounds quoted (e.g. sex, race, religion) are familiar from bans on discrimination in national constitutions, the simple rule of law and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Nonetheless, several grounds, especially some of those listed in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (e.g. political opinion or other opinion, trade union membership) are not included in Article 13 of the EC Treaty.

The Community legal system already has an instrument to combat discrimination based on sex in the form of Article 141 (ex Article 119) of the EC Treaty. Ethnic origin comes under the ban on discrimination based on nationality - which, according to the case law of the European Court of Justice, only applies to EU nationals[15] - and has been included in Community legislation since the early years. Nonetheless, Article 13 goes further still, in that it also grants protection to nationals from third countries (cf. 3.3.2 below). While religion and belief have long qualified for protection in Europe, disability and, in particular, age and sexual orientation are truly innovative grounds for protection[16].

"...the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action..."

The procedure set forth in Article 13 of the EC Treaty centres on the Council. The Council unanimously adopts proposals presented by the Commission. Parliament can exert an influence on the measures to be taken, but only under the consultation procedure. The fact that the Member States have not allowed the European Parliament greater involvement shows that the views of the governments of the Member States on the scope of anti-discrimination policy still vary widely. That is the reason for choosing the principle of unanimity, which will make it difficult in practice to take really effective measures.

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[13] Note that linguistic and cultural discrimination against minority groups (e.g. against nationals of a Member State whose land of origin lies outside Community territory) must count as discrimination on the grounds of ethnic origin, as language and culture clearly belong to this area. This view is also based on Article 151 (ex Article 128) of the EC Treaty, which states that "the flowering of the cultures of the Member States" is one of the objectives of the Community, whereby "national and regional diversity" must be respected. Cf. Koukoulis-Spiliotopoulos, "Scope *ratione materiae* of Article 13", in*: Article 13, Anti-discrimination: the way forward*, p. 112. On the problem of the scope for third country nationals, cf. 3.3.2. below.

[14] Some take the view that the concept of disability must be widely interpreted so that both physical and mental disability in the strict sense of the word and illnesses such as AIDS are included in it; cf. Koukoulis-Spiliotopoulos, *op. cit.*, p. 111.

[15] C-122/96 - Saldanha -, Rep. 1997 I, p. 5325, margin note 25.

[16] In the USA on the other hand, the public has been sensitive to "age discrimination" in particular for a long time and reference could be made to experience from anti-discrimination policy in the USA.

"*...appropriate action to combat discrimination...*"

The concept of appropriate action to combat discrimination is so wide that it could include several different types of action. In theory, the possibilities range from encouragement or information and education campaigns and recommendations to set up action programmes, the promotion of groups discriminated against through financial aid and other perquisites and even horizontal discrimination bans, i.e. bans which must also be directly observed by private individuals.

However, it should be noted in this context that, depending on how they are interpreted, the words "*within the limits of the powers conferred by [the Treaty] upon the Community*" (cf. 3.4. below) again limit the type of action.

3.3. Legal nature of Article 13 of the EC Treaty

Article 13 of the EC Treaty now expressly allows the Community to take joint action in the form of an anti-discrimination policy. However, because of the "may" construction, Article 13 has no direct application or direct effect. It therefore does not grant individuals any rights which can be enforced before national courts or the European Court of Justice[17].

However, Article 13 of the EC Treaty may be a step towards practical protection against discrimination, in that its wording is such that it demands specific measures to protect against discrimination and could be used by the European Court of Justice as the basis for building up case law in this area.

3.4. Scope of Article 13 of the EC Treaty

"*...within the limits of the powers conferred by [the Treaty] upon the Community..*"

3.4.1. Scope ratione materiae

The authority granted under Article 13 of the EC Treaty is expressly limited to the powers conferred on the Community by the Treaty. However, this wording is open to interpretation and has already been contested in literature.

Some authors assume that Article 13 does not presuppose that the powers have already been exercised, i.e. that the word "powers" is to be interpreted as "scope of application" as in Article 12 of the EC Treaty[18]. This would be an interpretation in accordance with the "*effet utile*" principle (principle of practical effect), as often practised by the European Court of Justice, whereby provisions are to be interpreted in the way which best furthers the objectives of the Treaty and safeguards the Communities' ability to function[19]. Given that, in the meantime,

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[17] Cf. Bergmann in: Bergmann/Lenz (published): *Der Amsterdamer Vertrag*, Chapter 1, margin note 30; Thun-Hohenstein, *Der Vertrag von Amsterdam*, 1997, p. 25; this is also quite clear from the case law of the European Court of Justice in Grant v. South-West Trains, C-249/96, Rep. 1998 I, p. 621.

[18] Bergmann, cf. FN 17; Thun-Hohenstein, *op. cit.*, p. 26.

[19] E.g. in C-6/64 - Costa/Enel -, Rep. 1964, p. 1251; C-6/90 and C-9/90 - Francovich - . Rep. 1996 I, 5357.

almost every political area has, to some extent at least, been included in the EC Treaty, interpreted thus, this clause would not represent a real restriction and would allow the Council to take any appropriate action within the scope of application of the EC Treaty.

This view is supported by the position of the provision in the chapter entitled "Principles" and the unanimity requirement[20]. It would make no sense to include the requirement for the Council to decide unanimously in Article 13 if the action also required a special basis for authority in another part of the Treaty, especially as these bases are often configured around the majority principle in the Council.

However, it is contradicted by the wording, especially in the various languages, which are all binding for the purposes of interpretation. The English version uses the phrase "within the limits of the powers conferred by [the Treaty] upon the Community", but uses the phrase "scope of application of [the] Treaty" in Article 12 of the EC Treaty, i.e. it makes a similar distinction to the German version, thereby narrowing the scope of Article 13. In Article 5 of the EC Treaty, the English version makes a distinction between "powers" and "competencies". However, the French, Italian and Portuguese versions of Article 13 of the EC Treaty use the words "compétences/competenze/competencias" for "powers" and the German version uses the word "Zuständigkeiten". A literal interpretation does not therefore get us very far and may not have the same meaning as in national legal systems[21].

According to the narrower interpretation of Article 13, the Treaty must contain an express basis for authority which allows action to be taken in a specific area. Treaty objectives alone are not enough. This means that Article 13 of the EC Treaty does not confer comprehensive law-making powers with respect to the forms of discrimination quoted[22].

The decisive difference between these two interpretations lies in the fact that, with the narrower interpretation, only action expressly allowed by the Treaty can be taken whereas, with the wider understanding, any form of action can be taken on the basis of Article 13, including in areas in which the Treaty hardly confers any powers on the Community, such as, for example, in the area of training. However, this gives rise to the problem that the other provisions of the Treaty would be undermined by Article 13, especially where harmonisation of laws and regulations is excluded (e.g. Articles 149 para. 4 and 151 para. 5 of the EC Treaty).

Bell therefore suggests that Article 13 should also apply in the area of training, precisely because combating discrimination is prerequisite to the objectives of Articles 149 and 150 of the EC Treaty, especially encouraging mobility of students and teachers, developing exchanges, facilitating adaptation to industrial changes through vocational training and retraining, improving initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market etc. Excluding harmonisation of laws and regulations should not prevent the acceptance of common binding provisions since, otherwise, powers in the training area would be worthless. The provision must be understood to mean that it only refers

[20] Cf. also Allen, *op. cit.*, p. 80.

[21] For details cf. Bell, "The New Article 13 ECT: A sound basis for European anti-discrimination law*?", Maastricht Journal of European Law* 1999, p. 5, 8 ff.

[22] Cf. Zuleeg, *op. cit.*, p. 105; Langrish, "The Treaty of Amsterdam: Selected highlights", *European Law Review* 1998, p. 15.

to the internal organisation of training systems and the syllabus of training courses and does not exclude common provisions on access to training systems[23].

According to this view, action under Article 13 should also be possible in the housing area, despite the fact that the EC Treaty does not expressly refer to it. This is because housing and work are very closely interconnected in that a place to live is a basic requirement in getting a job and difficulties in finding somewhere to live can also hamper vocational mobility. Article 136 of the EC Treaty therefore refers to "living and working conditions" and Regulation 1612/68 on the freedom of movement for workers refers in the recitals to the need to combat discrimination in housing and stipulates in Article 9 para. 1 that migrant workers have the same rights and advantages with regard to housing as nationals. Even the European Court of Justice has already decided on the basis of Article 12 of the EC Treaty that a national law only allowing nationals to own property in certain regions violated EC law[24]. Insofar as it is affected by the powers of the EC Treaty, housing could therefore also be included in action under Article 13.

In all events, the scope *ratione materiae* of Article 13 EC Treaty includes the areas covered by the Treaty[25], whereby it will be of particular significance to the internal market and implementation of the five fundamental freedoms (especially access to goods and services), visa/asylum/immigration, employment policy, social policy, general and vocational training, culture and health. There should, however, be agreement as to the fact that the new policies introduced into the EU Treaty (Common Foreign and Security Policy and police and judicial Cupertino in criminal matters) are not covered by Article 13 as Article 13 has been included in the EC but not in the EU Treaty[26].

3.4.2. Scope **ratione personae**

Article 13 of the EC Treaty contains no statement on the scope *ratione personae* of anti-discrimination policy. Some literature assumes that Article 13 is only intended to protect individuals and not groups[27]. However, it is perfectly conceivable that juristic persons and other groups of persons which have no legal capacity might profit from the action to be taken or from the indirect protection which Article 13 may offer.

The question of the scope *ratione personae* would appear to be more important in the case of nationals of non-Member States of the Community. Unlike the proposal by the so-called "Kahn Commission", Article 13 contains no provisions to the effect that action can also be taken to protect third country nationals. However, it is precisely these people who are often the victims of racial discrimination[28]. In this respect, they too should qualify for protection under Article 13,

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[23] Bell, *op. cit.*, p. 16 f.

[24] C-305/87- Commission/Greece - , Rep. 1989 p. 1461.

[25] Article 1 of the draft directive on racial and religious discrimination by the "Starting-Line" group, a group of experts from six Member States set up in 1991, defined the scope of Article 13 of the EC Treaty as the exercise of a professional activity, access to jobs or office, dismissal and other working conditions, social security, health and welfare services, education and training, careers advice and vocational training, housing, the provision of goods and services, the exercise of duties by any official forum and participation in political, economic, social, cultural, religious life or any other public area, thereby partly going beyond the EC Treaty.

[26] Cf. also Weidenfeld, *Amsterdam in der Analyse*, p. 179.

[27] Cf. Heymann-Doat, *op.cit.*, p. 88.

[28] European Council Consultative Commission on Racism and Xenophobia *(Kahn-Commission*), Final Report, Ref. 6906/1/95, Rev 1 Limite RAXEN 24 (General Secretariat of the Council of the European Union, 1995).

at least in employment, given that Article 137 para. 3 of the EC Treaty makes provision for the Council to decide on conditions of employment for third country nationals legally residing in Community territory. This is supported by the fact that, according to the case law of the European Court of Justice, ex Articles 117 and 118 (now Articles 136 and 137) apply to the living and working conditions of everyone resident in the Community[29].

However, insofar as anti-discriminatory action is taken in areas other than employment, the extent to which it can protect third country nationals is questionable and the relevant provisions of the Treaty need to be interpreted in order to answer that question[30].

3.5. The relationship between Article 13 and the rest of the Treaty

"*Without prejudice to the other provisions of this Treaty...*"

This wording means that the other provisions of the Treaty should not be limited by Article 13 of the EC Treaty. Its relationship with other articles of the Treaty therefore needs to be examined[31].

- Article 3 of the EC Treaty

Article 3 of the EC Treaty sets out the general activities of the Community and does not, per se, establish any Community powers. However, a general ban on discrimination is implied in Article 3 para. 2 of the EC Treaty, in that it states that the Community, in all the activities referred to, shall aim to eliminate inequalities and to promote equality between men and women. By comparison, Article 13 is more specific.

- Articles 136 and 137 of the EC Treaty

Article 136 of the EC Treaty states that the Community and the Member States, having in mind fundamental social rights such as those set out in the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour and the development of human resources with a view to lasting high employment and *the combating of exclusion.* In order to achieve these objectives, the Community may, having regard (Article 137 para. 2 of the EC Treaty) to the conditions and technical rules obtaining in each of the Member States, adopt minimum requirements by means of directives to be implemented gradually, in addition to supporting and complementing activities by Member States in this field. This is governed by the codecision procedure described in Article 251 of the EC Treaty (ex Article 189b), i.e. the European Parliament has powers of codecision on the measures and only a qualified majority is required in the Council.

According to the wording, recourse may also be taken to this provision in order to combat discrimination. The advantage here, compared with Article 13, is that unanimity does not need to be achieved in the Council and Parliament is more closely involved. The choice of legal basis

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[29] C-281, C-283 to C-285, 287/85 - Germany *et al* / Commission - , Rep. 1987, p. 3203.

[30] For details, cf. Bell, *op. cit.*, p. 19 ff.

[31] Cf. Zuleeg, *op. cit.*, p. 105 f.

must therefore be made very carefully in order to ensure that the procedure is legally correct. Nonetheless, account should be taken of Article 137 para. 3 of the EC Treaty, which again requires unanimity in the Council and only involves Parliament for the purposes of consultation[32].

- Article 141 of the EC Treaty

Article 141 para. 3 (ex Article 119 para. 3) of the EC Treaty authorises the Council to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment. In other words, as far as employment is concerned, this Article is a special standard in relation to Article 13 of the EC Treaty. The procedure is again governed by Article 251 of the EC Treaty and Article 13 is superseded in this respect.

- Article 308 of the EC Treaty

According to the wording of Article 308 (ex Article 235) of the EC Treaty, this clause is covered by Article 13. However, it cannot intervene in the areas in which provision to combat discrimination is made on the basis of Article 13 or Article 141 of the EC Treaty. It was included before Article 141 para. 3 of the EC Treaty was drafted, in order to justify legal acts for which the necessary powers were not provided in the Treaty.

- Article 95 of the EC Treaty and Declaration no. 22 to the final act of Amsterdam

Declaration no. 22 to the final act of the Treaty of Amsterdam is not, per se, part of Community law but it does relate to Article 95 (ex Article 100a) of the EC Treaty and may be important for the purposes of interpreting this article. It states that, when drawing up measures to approximate laws in the internal market under Article 95 of the EC Treaty, the institutions of the Community shall take account of the needs of persons with a disability. This declaration reinforces the efforts to avoid discrimination on the grounds of disability expressed in Article 13 of the EC Treaty.

- Other provisions

The ban on discrimination in Article 12 (ex Article 6) of the EC Treaty would appear to overlap partly with Article 13 of the EC Treaty, in that it is based on nationality and discrimination on grounds of ethnic origin may coincide with discrimination on the grounds of nationality. However, as Article 12 of the EC Treaty represents a directly applicable ban on discrimination, the Council does not need to act first on the basis of Article 13 of the EC Treaty in order to take action against discrimination on the grounds of nationality. Under Article 34 para. 2, sub-para. 2 (ex Article 40 para. 2) of the EC Treaty, any discrimination between producers or consumers is prohibited within the agricultural market. This special standard does not overlap with Article 13 of the EC Treaty.

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[32] Namely: social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers, including co-determination, conditions of employment for third country nationals, financial contributions for promotion of employment and job creation.

4. The anti-discrimination policy of the EU prior to the Amsterdam Treaty: the route to Article 13 of the EC Treaty

4.1. The contribution of the European institutions in the fight against discrimination on the grounds of race and ethnic origin

Although, with the exception of one regulation[33], the EU has not adopted any legal acts to combat racism, xenophobia or ethnic exclusion, the European institutions have repeatedly recognised the persistence of racist and xenophobic attitudes as a distorting factor in the social and economic cohesion of the Union and have highlighted the importance of combating racism and xenophobia.

The problem of racism was first raised as a central issue within the European institutions at the beginning of the 1980s. Efforts to develop an overall European Union strategy against racism and xenophobia were initiated by the European Parliament, which instructed a committee of inquiry to draft a report on the revival of fascism and racism in Europe[34]. The so-called "Evrigenis report"[35], which was concluded in December 1985, recommended a series of measures to combat racism, xenophobia, anti-Semitism and intolerance at Member State level, which could be supported by further measures and action at Community level. The report suggested, as a starting point, that the European institutions should agree on a joint declaration, which could be used as a basis for Community action in the fight against racism and xenophobia.

In 1986, the European Parliament, the Council, the Commission and the Member States' representatives in the Council signed a Declaration against Racism and Xenophobia[36]. In this declaration, the European institutions "vigorously condemn all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences"[37]. They also highlighted the need "to ensure that all acts or forms of discrimination are prevented or curbed"[38].

It was hoped at the time that the Declaration would be the first Community step towards combating racism. However, the joint resolve announced in the Declaration to take all the action needed to step up the fight against racism was soon lost in subsequent years in the wake of the debate on the powers of the Community in this area. Parliament called for the adoption of non-discrimination legislation at European level in its resolution on the Declaration against Racism and Xenophobia and in a Council action programme[39]. This request was rejected by the Commission on the grounds of a lack of legal basis. Instead of a binding legal act, the Commission presented a proposal for a Council resolution to combat racism and xenophobia[40], which called on the Member States to supplement

[33] Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia (OJ No. L 151/1 of 10.6.1997).
[34] The reason for setting up the committee of inquiry was the extraordinary success of the extreme right-wing parties in the 1984 European elections. The *Front National* alone won 10 of France's 80 seats.
[35] Report by the committee of enquiry on the revival of fascism and racism in Europe, European Parliament 1985.
[36] OJ No. C 185/1 of 25.6.1986.
[37] *Ibid.*
[38] *Ibid.*
[39] OJ No. C 69/12 of 20.3.1989.
[40] OJ No. C 214/32 of 29.6.1988.

their existing anti-discrimination legislation or to rectify shortcomings in it by extending the definition of the concept of "discrimination" and making it easy for individuals to take direct access to the courts.

It was not until two years later that the Council of Ministers agreed on this proposal[41]. Although the Member States and all the institutions acknowledge that it is imperative to combat discrimination based on racism and ethnic origin, their opinions on the question of the limits of Community action in this area vary widely.

On this basis, Parliament instructed another committee of inquiry to conduct a detailed analysis of increasingly racist and xenophobic attitudes in the Community. The so-called "Ford report"[42] again pointed to the spread of racism, xenophobia, anti-Semitism and intolerance in the EU and to the electoral successes of the extreme right-wing political groups and stressed that racist and xenophobic action could be countered by legal or institutional action. The "Ford report" contained a total of 77 proposals for action and legal acts to combat all forms of racial discrimination both at Member State and Community level. In all events, the proposals were not accepted or implemented due to the lack of political will on the part of the Council of Ministers or the lack of a legal Community basis. Nonetheless, Parliament repeatedly expressed its view during the 1990s that precise and practicable measures were both advisable and necessary in the area of anti-discrimination policy at EC level in order to combat discrimination on grounds of race and ethnic origin. It called on the Commission in two resolutions on racism and xenophobia[43] to draft without delay a directive containing measures to strengthen the legal instruments in the Member States in this area on the basis of the document drafted by the "Starting Line Group"[44].

Since 1991, the European Council has also recognised the need for consistent action in the fight against racism, xenophobia and other forms of discrimination in the conclusions adopted at the summits in Maastricht (1991), Edinburgh (1992), Copenhagen (1993) and Corfu (1994). However, the political will has been lacking to implement the non-binding declarations in practice. In 1995, two Council resolutions were accepted on the response of educational systems to the problems of racism and xenophobia[45] and on the fight against racism and xenophobia in the fields of employment and social affairs[46].

In addition, the consultative commission on racism and xenophobia (“Kahn Commission”)[47] was instructed to formulate recommendations in collaboration with the Member States and the numerous social actors on the promotion of respect, tolerance and solidarity in dealings with persons or groups of different ethnic or cultural origin. The Kahn Commission concluded that it was imperative to adopt binding legal acts to combat racism and xenophobia at European level and that the Treaty needed to be reviewed and special powers to combat racism needed to be expressly conferred on the

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[41] OJ No. C 157 of 27.6.1990.
[42] Report by the committee of inquiry for racism and xenophobia, European Parliament 1991.
[43] OJ No. C 342/19 of 20.12.1993 and OJ No. C 323/154 of 20.11.1994.
[44] For "Starting Line" Group, cf. FN 25.
[45] OJ No. C 312/1 of 23.11.1995.
[46] OJ No. C 296/13 of 10.11.1995.
[47] The Kahn Commission was made up of one representative from each Member State, two Members of the European Parliament, one representative of the European Commission and one representative of the Council of Europe with observer status.

Community if discrimination on the grounds of race and ethnic origin was to be efficiently combated at Community level.

The Commission followed up the results of the Kahn inquiry by issuing a communication on racism, xenophobia and anti-Semitism in 1995[48]. The Commission reported in its communication on all previous action taken to combat racism and xenophobia and expressed its firm conviction that the Treaties of Rome and the Treaty on European Union should be amended at the intergovernmental conference in 1996 by introducing Community powers in the area of the fight against racism[49]. This reflected the view expressed by the European Parliament in the resolution on racism, xenophobia and anti-Semitism that Article 6 of the EC Treaty should be extended to ban all forms of discrimination[50].

Since 1995, the European institutions have been particularly active in the fight against racism and this has helped to develop a new framework for Community action in the fight against racism and xenophobia. Taking account of the numerous resolutions by Parliament against racism and xenophobia[51], the Commission presented a draft Council decision to designate 1997 the European Year against Racism[52]. Regulation 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia was adopted in 1997. The purpose and remit of the Monitoring Centre is to "provide the Community and its Member States with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism … within their respective spheres of competence" [53].

In 1998, the Commission issued a communication on an action plan against racism[54]. The purpose of the action plan was to introduce the "mainstreaming" concept[55] to combat racism and xenophobia, to prepare legislative initiatives in this area, to develop networks and to strengthen the exchange of information and communications. Parliament pointed out that the action plan contained few specific proposals with the relevant objectives, deadlines and potential funding and called on the Commission, inter alia, to present a proposal for a directive against racial discrimination under Article 13 of the EC Treaty as quickly as possible[56].

4.2. … based on disability

Before the revision of the Treaty in Amsterdam, the EC Treaty only banned discrimination based on nationality (ex Article 6 of the EC Treaty) or sex (ex Article 119 of the EC Treaty) or in relation to fundamental freedoms (free movement of goods and persons, right of establishment and freedom of provision of services) in the common or internal market (ex Articles 30, 48, 52 and 59 of the EC Treaty). There was no ban on discrimination based on disability.

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[48] COM(95)0653 (OJ No. C 250/96 of 13.12.1995).
[49] Cf. *ibid.*
[50] Cf. OJ No. C 308/140 of 20.11.1995.
[51] Cf. e.g. OJ No. C 150/127 of 31.5.1993; OJ No. C 342/19 of 21.12.1993; OJ No. C 323/154 of 21.11.1994; OJ No. C 126/76 of 22.6.1995.
[52] OJ No. C 308/140 of 20.11.1995.
[53] *Ibid.*
[54] COM(98)0183 final (OJ No. C 98/491 of 9.4.1999).
[55] Inclusion of the principle of equal opportunities and non-discrimination in all Community concepts or areas of competence, cf. 5.3.5 below.
[56] OJ No. C 98/491 of 9.4.1999.

Even the European Court of Justice has never recognised protection against discrimination based on disability in its case law, although it has, for example, recognised equal treatment of both sexes. However, we must not forget that, according to Article 6 para. 2 (ex Article F II) of the Treaty on European Union, it is required to comply in its case law with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the basic rights as they result from the constitutional traditions common to the Member States. As discrimination based on disability is not expressly referred to in the European Convention for the Protection of Human Rights and Fundamental Freedoms and as the constitutional and legal traditions of the individual Member States differ considerably in this area, it is not surprising that the European Court of Justice has not yet helped to ensure that the principle of non-discrimination includes the disabled[57].

Parliament has repeatedly indicated in its resolutions since the beginning of the 1990s that "the status of disabled people in the Treaties is that of 'invisible citizens'"[58] and that "human rights violations against disabled people take place in every area of daily life throughout the European Union in the form of discrimination on the grounds of disability"[59].

Given the fact that "the rights guaranteed in the Treaty on European Union are being denied to disabled people"[60], that "Union legislation discriminates against disabled people"[61], for example by not taking into account their specific needs when harmonising social rights and that "the present framework of Community legislation requires action in only a limited area of matters of relevance"[62] (e.g. in employment and vocational training), Parliament has called repeatedly on the Commission and the Member States to revise the EC Treaty and include an anti-discrimination clause based on disability[63].

The need to combat discrimination based on disability and to recognise the need for equal opportunities for the disabled as one of the main disability issues at Community level was first acknowledged by the Commission in its White Paper entitled "European Social Policy - a Way Forward for the Union"[64], in which the Commission announced its intention of preparing suitable instruments to establish equal opportunities for the disabled.

As a result, action programmes for the benefit of the disabled were prepared (HELIOS), in order to increase awareness of the rights and problems of these groups of people among institutional representatives at various levels, to develop a code of conduct for the implementation of programmes and measures for this group of people (e.g. monitoring systems, logistic and financial support) and to promote a multilateral exchange of information and experience. The

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[57] The same applies to discrimination based on race or ethnic origin. Only disabled persons defined as "employees" can claim the protection against discrimination guaranteed by the EC Treaty. Cf. Whittle, "Disability Discrimination and the Amsterdam Treaty", in: *European Law Review* 1998, p. 51 and European Court of Justice of 7.11.1996, C-77/95 -Züchner - Rep. 1997/359; European Court of Justice 31.5.1989, C-344/87 - Bettray -, Rep. 1989/1621.

[58] OJ No. C 17/196 of 22.1.1996; cf. also the resolutions on the social situation of handicapped women (OJ No. C 158/383 of 26.6.1989), on the rights of autistic persons (OJ No. C 152/87 of 27.5.1996) and on the rights of the mentally handicapped (OJ No. C 284/49 of 2.11.1992).

[59] *Ibid.*

[60] OJ No. C 17/196 of 22.1.1996.

[61] *Ibid.*

[62] OJ No. C 20/389 of 20.1.1997.

[63] Cf. e.g. Resolutions on the human rights of disabled people (OJ No. C 17/196 of 22.1.1996 or OJ No. C 20/389 of 20.1.1997).

[64] COM(94)0333 final.

objective of this programme was, inter alia, to include the problems of this section of the population in a wider discussion on the fight against all forms of discrimination and exclusion.

4.3. …based on age

Before the Amsterdam revision, the Treaties contained no express ban on discrimination based on age whatsoever. However, older people could have been included in a wide interpretation of some of the provisions of the EC Treaty[65].

It was not until the beginning of the 1990s that the view began to take hold that it was the task of the European Union to guarantee older people a legitimate place in society and unlimited protection of their civil rights by combating discrimination based on age and social exclusion.

The European Parliament has concluded that "the older segment of the population [has] an appropriate share in the increase in economic productivity and prosperity"[66]; however it has also pointed out that older people are particularly prone to discrimination not only in working life but in everyday life in general[67] and has therefore called repeatedly for the principle of equal opportunities and equal treatment in accordance with recommendation no. 162 of the ILO to be applied to older employees and for targeted positive measures to be taken in order to improve the working conditions of this group of employees[68]. It has also called on the Commission, Member States, companies and both sides of industry to set a good example and not to discriminate against older employees during recruitment[69], to create legal rights against discrimination in the job market, especially during recruitment, further training and redundancies, to promote lifelong learning, to gear training, continuing training, further training and retraining measures to the needs of older employees and to open education systems to persons no longer in employment[70].

Parliament has taken the view since the Amsterdam review of the Treaty that the Commission [should] present legislative proposals based on Article 13 in conjunction with Article 137 of the EC Treaty to combat discrimination and social exclusion based on age[71].

The Commission has tried to contribute to the fight against any form of stereotyping based on age by tabling proposals for non-binding legislation, i.e. recommendations and opinions, although it has concentrated on employment and social security, especially the establishment of common criteria concerning sufficient [resources and] social assistance in social protection

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[65] Such as ex-Articles 117 and 118 of the EC Treaty (combating of social exclusion), ex-Article 109p of the EC Treaty (guaranteeing a high level of employment), ex-Articles 126 and 127 of the EC Treaty (contributing to quality (vocational) training), ex-Article 129 of the EC Treaty (ensuring a high level of health protection).
[66] Resolution on senior citizens in the 21st century - a new lease of life (EP Doc. no. A4-0160/99, sent to the Council and Commission on 19.4.1999).
[67] *Ibid.*
[68] Resolution on Community actions for the elderly (OJ No. C 284/1469 of 12.11.1990), on the organization of the European Year of the Elderly and of Solidarity between Generations (OJ No. C 176/239 of 13.7.1992), on the European labour market after 1992 (OJ No. C 241/51 of 21.9.1992,) and on measures for the elderly (OJ No. C 77/24 of 14.3.1994).
[69] Resolution on measures for the elderly (OJ No. C 77/24 of 14.3.1994).
[70] Resolution on senior citizens in the 21st century - a new lease of life (FN 58) and on measures for the elderly (OJ No. C 77/24 of 14.3.1994).
[71] *Ibid.*

systems[72], the convergence of social protection objectives and policies[73] and flexible retirement arrangements[74]. Again in its White Paper "European Social Policy - A Way Forward for the Union", the Commission lists the promotion of the role of and opportunities for working pensioners, the drafting of solutions to improve the situation of older women, the transition from work to retirement and the integration of older people at risk of isolation as objectives to be pursued[75].

4.4. … based on sexual orientation

Before the Amsterdam revision of the Treaty, Community law offered no protection from discrimination based on sexual orientation as there were no provisions which banned this form of discrimination.

The case law of the European Court of Justice in this area varies. In the case of *P versus S and Cornwall City Council*, the European Court of Justice decided following the reference for a preliminary ruling from an English court that the equal treatment directive (76/207) was to be interpreted to mean that it prohibited the dismissal of an employee on the grounds of the fact that the employee wished to undergo a gender reassignment operation. According to the European Court of Justice, discrimination based on transsexuality is to be understood as discrimination based on sex as defined in this directive and Article 141 of the EC Treaty. In the Court's view, to tolerate such discrimination would be tantamount to a failure to respect the dignity and freedom which the Court has a duty to safeguard[76].

In the case *Lisa Jacqueline Grant versus South West Trains Ltd.*[77] on the other hand, the European Court of Justice found that the employer's refusal to grant concessions which qualified as part of the salary to a member of the same sex with whom the employee was in a stable relationship did not infringe Article 141 (ex Article 119) of the EC Treaty or Directive 75/117/EEC, even if such concessions were granted to persons of the opposite sex with whom employees were in a stable relationship. This highly criticised judgement by the Court did not return the judgement requested by the Advocate-General, which is rare, and was taken in plenary session, giving reason to believe that the Court was divided.

However, interestingly in this context, the Court referred to the new Article 13 of the EC Treaty which, at the time of the judgement, had not yet entered into force. Immediately after its finding that Article 119 of the EC Treaty could not be interpreted in a wider sense so that it also included sexual orientation, the European Court of Justice stated as follows:

"That being so, the scope of that article, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that Community law *as it stands* [author's italics] at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.

[72] Cf. OJ No. L 245/46 of 26.8.1992.
[73] Cf. OJ No. L 245/49 of 26.8.1992.
[74] Cf. OJ No. C 188/1 of 10.7.1993.
[75] Cf. COM(94)0333 final.
[76] C-13/94, Rep. 1996 I, p. 2143, margin note 22.
[77] C-249/96, Rep. 1996 I, p. 621.

It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union […] signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a [author's note: now Article 13] which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions […] to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation."

It may be, in the light of these comments that, as the Treaty now stands, a similar case would be decided differently. More importantly, Article 141 of the EC Treaty could now be interpreted in the light of Article 13 of the EC Treaty as banning discrimination based on sexual orientation and hence only indirectly based on sex.

The European Parliament has always backed equal treatment for all EU citizens irrespective of sexual orientation. The Committee on Social Affairs drafted a report as far back as 1984 on discrimination at the workplace based on sexual orientation, which called on the Commission to ban this form of discrimination[78]. In 1994, a detailed report on discrimination against homosexuals and lesbians ("Roth report") was adopted[79]. This was followed by a resolution by Parliament which stated that the European Community was obliged to implement the principle of equal treatment without consideration for the sexual orientation of a person in all legal provisions already adopted or adopted in the future[80] and called on the Community institutions to prepare the creation of a European agency, as part of the institutional reforms planned for 1996, which could ensure that equal treatment was applied without consideration for sex or sexual orientation[81].

Parliament adopted numerous resolutions in subsequent years calling for an end to discrimination against and unequal treatment of homosexuals[82].

4.5. … based on sex

The Community has a full repertoire of instruments to combat discrimination based on sex in employment. Even in the early years, the principle of equal pay was included in EC legislation under Article 119 of the EC Treaty. In subsequent years, this principle was extended into a sort of constitutional right by the case law of the European Court of Justice[83].

Equal opportunities and equal treatment of the sexes have been guaranteed by taking action which ranges from the application of the principle of equal pay and the creation of equal conditions for men and women with respect to access to employment, vocational training and retirement and in relation to working conditions to equal treatment of the sexes in the area of the *de jure* or *de facto* social security systems, the reversal of the burden of proof in cases of discrimination and positive discrimination to promote the under-represented sex.

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[78] Report for the Committee on Social Affairs and Employment on Sexual Discrimination at the workplace (Squarcialupi), EP document no. 1-1358/84 of 13.2.1984.
[79] Equal rights for homosexuals and lesbians in the EC ("Roth-Report"), EP document no. A3-0028/94.
[80] Resolution on equal rights for homosexuals and lesbians in the EC (OJ No. C 61/40 of 28.2.1994).
[81] *Ibid.*
[82] Cf. e.g. Resolutions on respect for human rights in the European Union 1994 and 1995 (OJ No. C 320/36 of 28.10.1996 and OJ No. C 132/31 of 28.4.1997).
[83] Cf. European Court of Justice 8.4.1976, C-43/75 - Defrenne I -, Rep. 1976/455; European Court of Justice 15.6.1978, C-149/77 - Defrenne III -, Rep. 1978/1365.

Over the years, Parliament has repeatedly fought for support for the rights and human dignity of women and the fight against violence against women or abuse and sexual exploitation of women[84]. It has also called on the Commission to take appropriate action on new working time arrangements, child minding methods and the professional reintegration of women who have taken time off to raise children, in order to achieve a real division of work between men and women and substantial equal treatment and equal opportunities.

4.6. … based on religion or belief

Before the Amsterdam review, the EC Treaty made no provision for discrimination based on religion or belief. Nor had Community legislation ever expressly addressed this issue.

However, Parliament was quick to point out the connection between racially motivated prejudice or xenophobia and forms of religious intolerance in its numerous resolutions on racism and xenophobia and it called repeatedly on the Member States, the Council and the Commission to pay particular attention to discrimination against religious minorities in the fight against xenophobia and racism[85].

[84] Cf. Resolutions on violence against women (OJ No. C 176/73 of 14.7.1986), on pornography (OJ No. C 20/546 of 24.1.1994), on [violations of] the freedoms and fundamental rights of women (OJ No. C 205/489 of 25.7.1994).
[85] Cf. Resolutions on racism, xenophobia and anti-Semitism (OJ No. C 342/19 of 20.12.1993 and OJ No. C 323/154 of 21.11.1994).

5. Article 13 of the EC Treaty: A new beginning in the fight against discrimination - Implementation options and prospects

5.1. Basic instruments and measures to combat discrimination at Community level

The Community is confronted, not for the first time, with the difficult task of choosing appropriate and suitable measures to combat discrimination and its effects. Since the early years, the Community has gained experience in the practical implementation of discrimination bans from providing protection against discrimination based on sex (e.g. equal opportunities, equal pay) and in connection with the exercise of the fundamental freedom of freedom of movement.

In principle, the following measures are available to combat discrimination at European level:

- Binding legal acts in accordance with Article 249 (ex Article 189) of the EC Treaty: directives, regulations, decisions;
- Non-binding legal acts (so-called "soft law"), e.g. recommendations, opinions, resolutions;
- Action programmes and grants;
- "Mainstreaming" approaches.

It will take a combination of all these measures if effective long-term action is to be taken against discrimination. Changing the legal situation alone can, it is true, be very helpful in individual cases, because the persons in question can protect themselves against specific discriminatory practices by taking recourse to the courts. But discrimination begins in the mind. A sea change in attitude is needed if discrimination is to be stamped out or, if it occurs, ended without litigation. Non-binding legal acts with symbolic significance can help here, especially action plans, funding plans and "mainstreaming" strategies.

In principle, Article 13 of the EC Treaty allows all types of action. However, as the Community must work within the framework of its powers or within its scope of application, depending on the interpretation (cf. 3.4 above), the quality of the measures basically depends on the possibilities granted to the Community by the EC Treaty. Of course, it also depends on specific needs in individual areas.

Binding legal acts banning discrimination are desirable, it is true; but because of the unanimity requirement, they presuppose not only a strong political will on the part of the Member States but, according to the strict interpretation, authority expressly granted in the area in question by the EC Treaty (cf. 3.4 above).

The purpose of non-binding legal acts is to raise the awareness of the public and of those responsible at national or European level, to demonstrate against social problems and discriminatory attitudes and to point out the need for measures and for action to be taken. In this way they help to identify and define objectives and tasks at Community level and to legitimate future Community intervention in the areas in question, thereby preparing the way for binding measures at a later date and encouraging Member States to take appropriate action at national level[86].

[86] Cf. Bell, *EU Anti-discrimination Policy*, p. 14 ff.

Non-binding legal acts therefore represent a third way, leaving the choice and scope of measures to Member States, promoting flexibility in the implementation of Community policies and taking account of the legal traditions and cultural differences of the individual Member States. Because they are compatible with the principle of subsidiarity and do not entail any loss of sovereignty for the Member States, they are more readily accepted by the Member States. However, the effect of non-binding acts is not immediately recognisable and, once they have been issued, it is up to the Member States to decide whether or not they implement an effective anti-discrimination policy.

Action programmes and grants may provide practical help in improving the quality of life of the people affected and illustrate that the Community really is fighting for the demands of the people subject to discrimination and can therefore make a very important contribution. The "mainstreaming" approach complements this by including anti-discrimination policy in all legal areas (cf. 5.3.6 below).

5.2. Fundamental considerations in the choice of the type of measure

As there is a whole series of possible measures, we must consider which are most suitable. In order to determine this, the following considerations may be taken as a starting point[87]:

- Which measures allow the Community to achieve added value?
- Which issues are central and need to be dealt with urgently?
- Is the solution proportionate and practicable?

By "added value" we mean the benefit which accrues over and above the improvement of the living conditions of the people affected. Anti-discrimination measures may work to the advantage of the Community. For example, the working of the internal market in particular may be improved by the presence of sufficiently qualified and flexible human resources. In order to safeguard this, the European Community must ensure that no-one is excluded from employment and that everyone can be deployed on the labour market in accordance with their skills[88]. In addition, added value may accrue as a result of the awareness that the EU is fighting for the demands of victims of discrimination, because this enhances identification with the European ideal and reinforces the concept of European citizenship[89]. In addition, care must be taken to ensure that Community measures really support the institutions already engaged in the fight against discrimination, thereby again achieving added value.

In order to define the *modus operandi* and the focus of measures at Community level, the Community must be quite clear from the outset as to which central issues in the field of anti-discrimination policy it considers are top priority issues. This can only be achieved if a fundamental analysis of the situation in relation to all forms of discrimination within the Community and the level of anti-discrimination policy in the individual Member States is carried out.

[87] Cf. Niven, "Fighting discrimination", in: *Article 13 - Antidiscrimination: the way forward*, p. 93f.

[88] Flynn, "Wien – Ein Neubeginn im Kampf gegen Diskriminierungen", in: *Article 13 - Antidiscrimination: the way forward*, p. 127.

[89] According to a working paper by the Committee on Employment and Social Affairs of the European Parliament of 5.2.1999 entitled "An action programme to combat discrimination at EU level on the basis of Article 13 of the Amsterdam Treaty", pp. 3, 5.

Community policies and action can only be planned properly if all the dimensions of the problem to be dealt with are known. Care must therefore be taken to ensure that the Community has all the necessary information on the situation of groups subject to discrimination and the measures which the Member States have already taken to improve it. Recourse can be taken here to the experience of non-governmental organisations.

Moreover, account must be taken during planning of the different situations in the Member States, especially historical facts and traditions. In addition, the Community must never lose sight of the principle of subsidiarity enshrined in Article 5 of the EC Treaty, as defined in the Protocol to the Amsterdam Treaty on the application of the principles of subsidiarity and proportionality[90], whereby Community measures are only warranted if:

- the area has transnational aspects which cannot be properly regulated by the Member States alone,

- measures solely by Member States or a lack of Community measures infringe the requirements of the Treaty (e.g. strengthening economic and social cohesion) or would otherwise have a considerable adverse effect on the interests of the Member States and

- measures at Community level, because of their scope or effect in comparison with measures at Member State level, have clear advantages.

5.3. Strategic options for implementing Article 13 of the EC Treaty

5.3.1. Establishing the principle of non-discrimination

The European Court of Justice has indeed defined the concept of discrimination in its case law (cf. 2.1 above); however, differing views continue to prevail in the Member States as to what discrimination means and whether or not they can tolerate it. For example, some Member States legally recognise and protect cohabitation between couples of the same sex while in others an awareness and acceptance of the problem are not very well developed[91].

The best starting point for effective implementation of Article 13 would therefore be to establish a generally valid principle of non-discrimination which lists the grounds referred to in Article 13. This could be done as part of a special EU catalogue of basic rights, as decided by the European Council at its meeting in Cologne in June for the next intergovernmental conference.

This would ensure that even countries which have not yet adopted the principle of non-discrimination as a basic right or national objective would recognise such a principle. At the same time, a generally valid definition of concepts would have to be found, while a standard principle of non-discrimination would facilitate and promote the introduction of the mainstreaming approach in all Community policies.

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[90] OJ C 340/105 of 10.11.1997, cf. Allen, *op. cit.*, p. 83.

[91] Cf. *Equality for Lesbians and Gay Men, A Relevant Issue in the Civil and Social Dialogue*; IGLA Europe, 1998.

5.3.2. Binding legal acts banning discrimination

Directly applicable discrimination bans represent one of the most effective weapons against discrimination. The question which arises is whether a horizontal approach under a framework discrimination directive should be preferred in that it would include all groups victim to discrimination, or whether individual situations should be dealt with under individual directives. The advantage of a horizontal approach is that it would ensure that all the groups referred to in Article 13 enjoyed the same protection and that improvements would result for everyone at one and the same time. However, the advantage of a sectoral approach is that it is better at dealing with the specific needs of the groups subject to discrimination and allows detailed provisions to be made.

The Commission appears to practise both approaches. On the one hand it is planning a framework directive in the area of employment, dealing generally with all forms of discrimination in the workplace. This will have a considerable impact because employment is an area which "represents the main guarantee against social exclusion and hence of full integration of the individual in economic, cultural and social life and of the enjoyment of basic rights and freedoms" and in which "all forms and grounds for discrimination exist"[92]. This is also expressly authorised in the EC Treaty, namely under Article 13 in conjunction with Article 137.

In addition, it has announced in the action programme against racism that a draft directive dealing specifically with the question of racial discrimination will be presented by the end of 1999. This directive will go beyond the workplace and will encompass other areas, such as the free movement of goods and people (Article 28 ff. and 49 ff. of the EC Treaty) and health and education (Article 152 and Article 149 f. of the EC Treaty)[93].

The European Parliament called on the Commission in the resolution on senior citizens in the 21st century - a new lease of life[94], to present legislative proposals to combat discrimination and social exclusion based on age in application of Articles 13 and 137 of the EC Treaty.

There is some doubt as to how far such directives can go. There is no doubt that the Community has powers in the area of employment pursuant to Article 137 para. 2 of the EC Treaty. In the other important areas such as social security, education and training and housing and health, the Community may be lacking powers with the Treaties as they now stand, depending on how Article 13 of the EC Treaty is interpreted (cf. 3.4 above).

The equal treatment directives could function as a model for a framework discrimination directive[95]. They contain provisions on the application of effective legal redress in the event of failure to comply with the principle of equal opportunity and provide employees with the possibility of enforcing their rights in such cases through the courts. Although the equal treatment directives represent a very important starting point for a new comprehensive framework discrimination directive, the weaknesses in Community legislation in the area of equal treatment of the sexes would need to be avoided. To

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[92] Flynn, *op. cit.*, p. 129.
[93] Cf. Flynn, *op. cit.*, p. 129.
[94] EP Doc. A4-0160/99 of 16.4.1999, sent to the Commission and the Council on 19.4.1999.
[95] Mainly Directive 76/207/EEC on equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, Directive 75/117/EEC on the application of the principle of equal pay for men and women and Directive 79/7/EEC on equal treatment for men and women in social security schemes.

be precise, it has been concluded that the directives have not resulted in better protection from discrimination for individuals in many Member States[96].

One reason for this is that the extremely high cost of proceedings and the length of time which proceedings are expected to take in some Member States discourage people from instituting proceedings. In theory, EU legislation should intervene here, so that rights can be implemented in practice. But then the problem arises as to whether the Community has the powers to do so, because procedural law and the judicial institutions are internal affairs in the Member States. However, the European Court of Justice has decided that the right of access to justice is a general principle of Community law and does not therefore come solely within the discretion of the Member States[97]. Even before Directive 97/80/EC calling for the burden of proof in cases of discrimination to be reversed was issued, the Court had intervened in the national rules of procedure and had established rules determining when the employer must prove that there was no discrimination[98]. This at least should also be possible for the new anti-discrimination legislation. There is also cause to examine if interest groups could be granted right of action because they would perhaps find it easier to conduct what may well be prolonged and nerve-racking cases. Care must also be taken to ensure that sufficient legal aid is available in all Member States as it is precisely those who have insufficient financial resources who are subject to discrimination.

Apart from the EC equal treatment directives, the proposals of the Council of Europe, the United Nations and non-governmental organisations and national legislation to combat discrimination[99] could also be used as an example when drafting a framework anti-discrimination directive.

The view is taken in literature that both framework directives and individual directives should be drafted in accordance with the minimum harmonisation approach, whereby the broad principles are formulated but the Member States are left to decide on numerous unavoidable exceptions in accordance with the principle of subsidiarity. This takes account of the various legal traditions in the individual Member States and of social and economic conditions and cultural differences, thereby guaranteeing wide acceptance of the measures[100].

The Member States should be encouraged to set up independent administrative authorities to provide financial and legal support to individuals who are subject to discrimination. In the countries in which they already exist, some of these agencies have been most efficient in helping to implement national and Community non-discrimination legislation in practice[101].

Criminal sanctions should also be provided for cases of particularly serious discrimination in order to make it clear that the Community will not tolerate this and wants to stamp out such behaviour in the future. However, the Member States alone have the powers to do this.

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[96] Cf. Bell, *EU Anti-Discrimination policy*, p. 19.

[97] C-222/86 - UNECTPF v. Heylens - Rep. 1987, 4097.

[98] e.g. C-109/88 - Danfoss - , Rep. 1989, 3199; C-127/92 - Enderby -, Rep. 1993 I, 5535.

[99] Cf. Wrench, *European Compendium of Good Practice for the Prevention of Racism at the Workplace* 1998.

[100] Cf. Taylor, "Political Instruments at Community Level - Report on über Workshop 3", in: *Article 13*, p. 117; Whittle, *op. cit.*, p. 57.

[101] Such institutions already exist in some Member States, such as the Ombudsman for Ethnic Discrimination (DO) in Sweden, the *Centre pour l' Egalité des chances et la Lutte contre le Racism* in Belgium, the Commission for Racial Equality (CRE) in Great Britain. For details cf. Bell, *EU Anti-Discrimination Policy*, p. 27-29.

5.3.3. Equal opportunities and instruction in the education system

The motives behind discrimination, generally prejudice and fear, are rooted in the human consciousness or sub-conscience. As the consciousness is not easily changed by standards, an attempt apart from legislative change must be made to create more understanding and tolerance in society of the groups which are prey to discrimination, especially through education and the media.

The fight against discrimination must be promoted through the education system both by guaranteeing equal opportunities within the education system and by spreading the idea of equality as part of the syllabus and fighting prejudice[102]. However, this rests primarily in the hands of the Member States, who are responsible for their own education systems. The Community can only promote collaboration between the Member States in this area under Article 149 of the EC Treaty by allocating grants and issuing recommendations. This is not expected to change with the entry into force of Article 13 of the EC Treaty as the express ban on any form of harmonisation of legal provisions in Article 149 para. 4 of the EC Treaty would be lost if Article 13 allowed this. This statement applies, in all events, as far as syllabuses are concerned (cf. 3.4 above).

5.3.4. Dissemination of information and Cupertino

Specific information on discriminatory practices and attitudes needs to be disseminated and passed on in order to interest the public and people in positions of political or social responsibility in this problem. More importantly, this information should be addressed to those institutions which can help to prevent discrimination (government agencies, trades union, employers, associations and federations)[103].

Information campaigns by the Community and the Member States to break down discrimination and prejudices are essential if this is to be achieved[104].

Cupertino is also needed in this context between the Community and responsible agencies engaged in the fight against discrimination at all levels. By expanding and improving information activities, the transfer of know-how and the exchange of knowledge, institutional communications can be stepped up and Cupertino agreed, knowledge can be pooled, mutual support increased and a better and more efficient concept of optimum procedures designed in order to fight discrimination[105].

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[102] Cf. Heymann-Doat, *op. cit.*, p. 90.
[103] Parliament has repeatedly called on Member States in its resolutions to train their social workers, police and other judicial servants so that they can help to fight discrimination and to provide "special training programmes for public servants, and especially the policy and judiciary, in order to promote tolerance and understanding […] and prevent discriminatory behaviour" (OJ No. C 308/140 of 20.11.1995).
[104] Cf. e.g. "European Year against Racism" campaign. Parliament has repeatedly stressed the important part which the media can play in countering hatred and prejudice and in promoting tolerance and solidarity (OJ No. C 308/140 of 20.11.1995).
[105] Cf. e.g. collaboration between the EU and the Council of Europe. The European Commission is represented as an observer at all current debates to discuss a general principle of equality in another additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The EU Member States and the European institutions are also endeavouring to coordinate collaboration with the Council of Europe in the "European Commission against Racism und Intolerance" set up under the aegis of the Council of Europe.

5.3.5. Positive discrimination

Positive discrimination (*affirmative* or *positive action*) is an efficient way of fighting discrimination because *de jure* equality alone is generally not enough to guarantee *de facto* equality. So-called positive action is used to grant preferences in a specific area to specific sections of the population which are under-represented in that area.

So far, positive discrimination has mainly been applied with respect to discrimination based on sex, for example in order to guarantee equal treatment of the sexes in employment. A distinction can be made between two different forms of positive discrimination. First, there are measures to support the groups discriminated against by setting up monitoring agencies, committees and working parties in government administration, trades union and economic and trade associations. Secondly, there is positive discrimination in the narrower sense, whereby provisions are established to grant members of under-represented groups an advantage or quota regulations are introduced. Since the Amsterdam review of the Treaty, Article 141 para. 4 of the EC Treaty now expressly states:

"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 *under-represented sex* [author's italics] to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

This wording would appear to be result of the "Kalanke case law" of the European Court of Justice[106]. The Court decided in this case that a national law which automatically granted a woman priority for promotion where, in addition to her, there was an equally qualified male candidate and women represented less than half the staff at that level, infringed Article 2 para. 4 of the equal treatment directive[107]. In the Marschall case[108], on the other hand, the European Court of Justice decided that there was no infringement of the principle of equal treatment where there was a rule, as in the Kalanke case, but the rule made provision for a saving clause if there were specific grounds for promoting the man. In this case, the Court found that, where male and female candidates are equally qualified, men tended to be preferred because of prejudices and stereotypes concerning the role and capacities of women in working life. In order to even out the resultant disadvantages, this sort of rule could be applied, provided that there was a saving clause. We must agree with this case law. Without a saving clause, there is a risk that men will be unfairly discriminated against, e.g. a single-parent man compared with a financially independent woman.

Positive discrimination is not undisputed and is considered unconstitutional in several Member States[109]. Under no circumstances can it be seen as a universal panacea because it is hardly satisfying for the person in question to know that they have only got the job because of their employer's statutory obligations. This may even give rise to a bad working environment and

[106] C-450/93, Rep. 1995 I, p. 3051.
[107] C-76/207, OJ L 39/40 of 1976.
[108] C-409/95.
[109] Positive discrimination in relation to the disabled has been criticised by associations of the disabled and experts who call for an anti-discrimination policy which develops the skills of each individual, including the disabled, and creates conditions which allow disabled people to take full part in society, rather than promoting the disabled generally by introducing quotas. Cf. European Forum for Social Policy, Workshop 3: Promoting the participation and rights of citizens 1998, p. 16. In France, positive discrimination is considered unconstitutional.

renewed discrimination from colleagues. The acceptance and qualifications of the people who are excluded is therefore far more important. As Article 141 para. 4 of the EC Treaty indicates, positive discrimination is, in any event, primarily a matter which concerns Member States.

5.3.6. Mainstreaming strategies

"Mainstreaming" means promoting an active and visible policy of including the dimension of equal opportunities in all political areas and programmes of the Community, the governments of the Member States and other agencies[110]. It assumed with mainstreaming strategies that the factors which give rise to discrimination can best be dismantled or reduced by action across a broad front in order to change the general structures of social life[111].

The mainstreaming strategy is a dual strategy: all EU policies must comply with the principle of equal opportunities and non-discrimination and must be actively mobilised in the fight against discrimination and focus on guaranteeing equal opportunities[112].

So far, at European level, the mainstreaming strategy has only been followed as part of the social policy action programme (1998-2000)[113], which sets great store on promoting equal opportunities of the sexes using the mainstreaming strategy. However, the Community is called upon in literature to introduce the mainstreaming approach against discrimination in all its policies and legislative measures[114].

5.3.7. Action programmes

The Commission will probably propose an action programme to strengthen collaboration between the Member States and the Community. It will need to focus on building up networks, improving knowledge and disseminating good anti-discrimination practices throughout the Union[115]. Action plans need to be preceded by thorough and systematic (independent) investigation and studies, especially in areas on which there is still insufficient knowledge, such as discrimination based on age or sexual orientation.

Action plans can be used to identify and suggest changes to policies, legislation or administrative practices which are discriminatory or which encourage discrimination. Similarly, action plans can be drawn up and implemented at Member State level. The facility for constant monitoring of progress in action plans or implementation strategies should continue to be provided, so that improvements can be undertaken promptly. Annual progress reports for each area and final evaluation reports should be prepared on the basis of information provided by Member States and independent studies carried out on behalf of the Commission. This monitoring is instrumental to the success of all measures to be taken, including the effects of legal acts.

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[110] European Commission, Equal opportunities for women and men in the European Union - 1998 annual report (COM(99)0106 final), p. 5.
[111] European Forum for Social Policy, *op. cit.*, p. 16.
[112] Cf. Bell, *EU Anti-Discrimination Policy*, p. 40.
[113] COM(98)0259.
[114] Cf. Niven, *op. cit.*, p. 92/94.
[115] Cf. Flynn, *op. cit.*, p. 129.

Initiatives within this framework which foster the anti-discrimination policy could be supported financially.

5.3.8. Structural Funds

The Structural Funds are the most important instrument for promoting cohesion in the Community. This strategy has two components: a geographical dimension, which aims to dismantle socio-economic differences between the Member States and regions, and a social dimension, which is geared to promoting equal opportunities for all groups in society throughout the Union.

The reform of the Structural Funds, which Article 13 has already influenced, entered into force in June 1999[116]. In addition to promoting the development and structural adjustment of regions lagging behind (Objective 1) and supporting the economic and social conversion of regions in structural difficulties (Objective 2), there is now Social Fund support for adjusting and modernising education, training and employment policies and systems (Objective 3). Recital no. 5 already partly reflects Article 13:

"… whereas the Funds' operations may also make it possible to combat any discrimination on the grounds of race, ethnic origin, disability or age by means in particular of an evaluation of needs, financial incentives and an enlarged partnership".

It is noticeable and incomprehensible that there is no mention here of discrimination based on religion or belief, or on sexual orientation. If, because of this, initiatives in these two areas which otherwise qualify for support are not supported, then the Community itself will be guilty of discrimination for which there would appear to be no justification. This would deal a huge blow to the credibility of the anti-discrimination policy.

The Commission has started a new initiative to fight discrimination and exclusion on the labour market under the Social Fund (EQUAL). This is a human resources initiative, which builds on experience from other initiatives on employment and upgrading human resources such as NOW[117], HORIZON[118] and INTEGRA[119] and should develop real transnational Cupertino in order to clarify what action against discrimination and inequalities on the labour market has proven to be successful and to what degree[120].

5.3.9. Employment guidelines

The European employment strategy is a good example of the practical implementation of Article 13 of the EC Treaty in policies which have not been developed for the purposes of the anti-discrimination policy. The employment guidelines for 1999 set particular store on promoting a labour market which is open to everyone, with the Member States called on to pay particular

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[116] Council Regulation (EC) No 1260/1999 of 21.6.1999 laying down general provisions on the Structural Funds, OJ No. L 161/1 of 26.6.1999.
[117] This is an initiative to promote equal opportunities for women on the labour market.
[118] This is an initiative to extend employment prospects for the disabled.
[119] INTEGRA is a programme for other groups subject to discrimination on the labour market, such as ex-convicts.
[120] Cf. Flynn, *op. cit.*, p. 129.

attention in their employment strategies to the needs of the disabled, ethnic minorities and other disadvantaged groups.

The provisions of the chapter in the Amsterdam Treaty on employment represent a model for EU activity in the area of social policy, for which Member States continue to be primarily responsible. The approach laid down implies agreement on basic common objectives at EU level, with suitable strategies and action to attain these objectives being decided by the Member States. Its basic features include consensus on a common objective, decisions on elementary political guidelines, the development of national action strategies, exchange of information and a procedure for regular reporting and qualified review.

These provisions could therefore be used as an example in order to create an action framework against discrimination at Community level.

5.4. Prospects for the implementation of Article 13 of the EC Treaty by:

- the Member States

Even after the introduction of Article 13, the implementation of an effective anti-discrimination policy will still depend first and foremost on the will of the Member States; first, because Article 13 requires unanimity in the Council and, secondly, because the Community cannot really take comprehensive action; it can only take action insofar as it has the powers to do so and provided that it complies with the principle of subsidiarity.

- trades union and employers

Obviously, employers and the trades union have an important part to play in the employment sector. The trades union should try to ensure that all contracts of employment avoid discrimination and should provide support in the workplace for people subject to discrimination[121].

Employers too are called upon to help eliminate discrimination. They should not see this merely as a moral obligation but should recognise that this is fully to their advantage. Some companies have already joined forces in the European Business Network for Social Cohesion (EBNSC). In 1997, they set up the "Gaining from Diversity" programme to foster an awareness of the need for companies to react to the cultural, social and ethnic changes in Europe and use the differences between people to the benefit of their company. Anti-discrimination policy need not mean abandoning the performance principle; on the contrary it should result in optimum deployment of all human resources[122].

- non-governmental organisations

By drawing attention to discrimination and making demands on politicians and society, non-governmental organisations will certainly also be one of the driving forces in the future. They are best placed for this as they work in all sections of society (e.g. the health sector, housing,

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[121] Brittan, *op. cit.*, p. 121.

[122] Cf. Shaw, "The Balance between Legal Standards and Voluntary Action: Experiences in the Business Sector", in: *Article 13*, p. 98 ff.

with the socially excluded, immigrants and refugees, in education etc.) and have practical experience of discrimination. They will need to engage in lobbying activities and influence public opinion at local, regional, national and European level. Finally, they are an indispensable source of information for politicians and should always be included in the decision-making process[123].

[123] Cf. Brittan, *op. cit.*, p. 121.

6. Summary

The introduction of Article 13 in the EC Treaty by the Amsterdam Treaty has opened new prospects for an anti-discrimination policy in Europe.

The aim of Article 13 of the EC Treaty is to fight discrimination based on sex, race, ethnic origin, religion or belief, disability, age or sexual orientation. It represents a basis for action by the Council within the framework of the powers conferred on the Community by the Treaty; hence there will be no direct application of or direct effects from this provision. Moreover, it does not confer comprehensive law-making powers as regards the various forms of discrimination.

Although not conceived as an individual fundamental right, it is an expression of the human rights dimension of the Union as set out in Article 6 of the EU Treaty and has been included in Part One of the EC Treaty entitled "Principles". It can therefore be seen as a framework provision against which Community action must be measured. Article 13 also expresses the will of the Community to take effective action against discrimination and it therefore has tremendous symbolic significance.

The European institutions have repeatedly recognised the persistence of discriminatory attitudes and practices as a distorting factor to social and economic cohesion and have stressed the need to combat all forms of discrimination, not only in employment, but in all areas of Community life.

Parliament in particular has endeavoured to introduce a Community strategy to combat discrimination. In its numerous resolutions on all forms of discrimination, it has repeatedly called on the Commission, the Member States and the Council to take immediate, precise and practicable measures in the area of EU anti-discrimination policy and to revise the EC Treaty in order to include an anti-discrimination clause.

The introduction of Article 13 of the EC Treaty marks a new beginning in the fight against discrimination which no longer need be based solely on declarations of intent of a symbolic nature. The Community has a whole range of binding and non-binding instruments which it can use to ensure that Article 13 EC Treaty is implemented consistently and effectively. There is some disagreement as to how far action under Article 13 can go. Some take the view that only action which is expressly permitted in the Treaty can be taken, while others accept that any instruments can be used in the Community's field of activity.

It would be helpful, if the Community is to take strategic action to implement Article 13 of the EC Treaty, to have a legal definition of "discrimination" and "discriminatory practices" which standardises national definitions of these concepts and which could then be used as a basis for drawing up action plans setting out strategies to combat discrimination at both national and Community level and suggesting changes to discriminatory legislation and practices. Grants could be given to support groups fighting discrimination.

Positive discrimination is one important way of combating discrimination. Its aim is to dismantle *de facto* discrimination by giving preference to the members of the under-represented group.

Discrimination bans in an anti-discrimination directive might well be the most effective weapon in the fight against discrimination. It would have the greatest effect if it accurately defined its scope *ratione materiae*, guaranteed free access to justice, granted individual right of action and imposed sanctions for failure to apply the principle of non-discrimination. Finally, special directives should be drafted in accordance with the minimum harmonisation approach and should take account of multiple forms of discrimination.

The introduction of the mainstreaming approach, which includes the equal opportunities dimension in all political areas and programmes in the Community is often proposed in order to enhance the effectiveness of Community acts and measures. Under it, all EU policies must comply with the principle of equal opportunities and non-discrimination and must be actively mobilised in the fight against discrimination.

Discrimination begins in the mind. Apart from legislation, an effort must be made to create a social climate in which there is no place for discrimination. The education system and the media have an important part to play here and it is also vital to disseminate and improve information and know-how by stepping up collaboration between the Community and those responsible at all levels.

However, the Member States, the social partners and non-governmental organisations must help by demonstrating that they are willing to take Article 13 of the EC Treaty seriously and introduce appropriate action if this article is to be implemented effectively.

Finally, we must concede that the type and extent of the action taken on the basis of Article 13 are, as yet, an unknown quantity. How effectively Article 13 is implemented will depend on the willingness of the Community, the Member States and, of course the people of Europe. In all events, a new chapter in the fight against discrimination has begun.

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