

## **Note for the Colloquium on Comparative and Global Public Law**

**Wednesday October 19, 2016**

The attached paper is a very preliminary draft. The issues are sketched out rather than developed in detail, and the data is very incomplete. I welcome any and all feedback, suggestions, comments and criticisms. In particular, I would welcome views on whether the paper should focus only on the puzzle of the low numbers of cases referred to the Court of Justice on the various grounds of discrimination, and should omit the part of the paper which describes the substance of the rulings and the approach of the Court in the cases which have arisen before it. Special thanks are due to Paul Dermine, Franco Peirone, Oliver Persey and Thomas Streinz for their excellent research assistance.

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### **The Decline of the EU Anti-Discrimination Law?**

#### **Introduction:**

Over the first four decades of European integration, EU law in the field of anti-discrimination – which was concerned at that time almost exclusively with workplace-related sex discrimination – was robustly interpreted by the European Court of Justice in a steady line of cases mostly brought under the preliminary reference procedure.<sup>1</sup> While there have been critiques of the Court's approach to particular issues in this field such as the line between pay and social security, or its moves back and forth on the merits and legality of affirmative action, or the emphasis on sex equality in the marketplace to the detriment of a family life/work balance, the Court of Justice was on the whole widely perceived to be in the vanguard of the promotion of equality between men

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<sup>1</sup> The preliminary reference procedure is one of the most important sources of the European Court of Justice's jurisdiction. Cases are referred to the ECJ under this procedure from national courts, where national judges may, and in some cases must (where there is no further appeal from their ruling) refer a question concerning the interpretation of EU law which arises in the case to the Luxembourg court (ECJ).

and women and pressuring the Member States to promote such equality. The Court helped to create or develop important legal doctrines and devices to strengthen equal treatment and anti-discrimination law – doctrines which were later incorporated into legislation but which were first outlined by the Court itself – such as the notion of indirect discrimination, the device of shifting the burden of proof, the notion of victimization as discrimination, pregnancy discrimination as sex discrimination, and more.

Since those first decades, the scope and breadth of EU anti-discrimination and equality law has been expanded significantly due to political and institutional initiatives emerging from beyond the Court. Several major changes took place around the beginning of the millennium. With the entry into force of Article 19 TFEU after the adoption of the Amsterdam Treaty in 1999, following decades of lobbying and strategizing by NGOs, a new legal basis for action to combat discrimination on a number of grounds other than sex was created.<sup>2</sup> This new treaty provision formed the basis for two important new pieces of legislation which followed shortly afterwards, namely Directive 2000/43, known as the Race Directive, which prohibits discrimination on grounds of racial and ethnic origin in a range of contexts;<sup>3</sup> and Directive 2000/78, known as the Framework Employment Directive, which prohibits discrimination in the field of employment on the grounds of religion, belief, disability, age, and sexual orientation. These two laws cover the remaining grounds listed in Article 19 other than racial or ethnic origin, and sex; so that there is now EU legislation in place to implement the principle of equal treatment across all of those listed grounds. Article 21 of the EU's Charter of Fundamental Rights contains an even longer and non-exhaustive list of prohibited grounds of discrimination, but the EU has express legislative competence to act to prohibit discrimination only in relation to the grounds set out in Articles 19 and 157 TFEU, namely gender, sexual orientation, race, age, disability, and religion.

Hence, following four decades during which the Court took the lead in the field of EU sex equality law (via its interpretation of the 1970s EU directives on sex equality), the enactment and promotion of a wider and stronger body of anti-discrimination law at the beginning of the millennium came

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<sup>2</sup> Around the same time that EU political action was being adopted to expand the grounds of discrimination, the Court also began to invoke a general EU law principle of equal treatment outside of the area of sex equality. On transgender discrimination see cases C-13/94 *P v S* [1996] ECR I-2143, C-117/01 *KB v NHS* [2004] ECR I-541, where the CJEU extended protection against discrimination on the basis of transsexuality and C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585. On the general principle of non-discrimination on grounds of age, see Cases C-144/04 *Mangold* [75] and C-555/07 *Kucukdeveci* [2010] ECR , and on a possible general principle of EU law concerning non-discrimination on grounds of sexual orientation, see C-147/08 *Römer*, EU:C:2011:286

<sup>3</sup> Council Dir 2000/43, [2000] OJ L180/22.

largely at the initiative of the EU political and legislative institutions, rather than solely or mainly through judicial expansion.<sup>4</sup> The year 2000 can be identified as the high point of EU equality and anti-discrimination law, with the drafting of the EU Charter of Fundamental Rights and Freedoms in 1999 being rapidly followed by the enactment of these two important anti-discrimination Directives.

This article examines (i) what has become of EU anti-discrimination law since that high point in 2000, and (ii) whether the Court of Justice has retained its vanguard role in the promotion and elaboration of the newer and expanded body of EU anti-discrimination law. These questions have been prompted by two apparent trends since the anti-discrimination Directives came into force in 2003, almost a decade and a half ago. The first is what seems to be a surprisingly low number of cases involving the directives which have been referred from national courts to the Court of Justice, particularly in relation to certain grounds of discrimination. The second is the apparently more cautious approach of the Court in its rulings in the cases referred. Taken together, these trends at first glance seem to point to a decline in EU anti-discrimination law, suggesting that the new legislation has not (or not yet) elicited the extensive litigation and robust jurisprudence that was seen during the comparable period for the EU sex equality directives, nor had as yet (at least doctrinally speaking) the same kind of transformative effect. It would be implausible to suggest that the reason for any such 'decline' is the success of anti-discrimination law; namely a diminution or disappearance of the kinds of issues addressed by the directives, namely individual acts and entrenched patterns disadvantaging or marginalizing people on the basis of factors such as their racial or ethnic origin, sexual orientation, religion or disability. Hence the larger underlying question is whether, despite the contrary appearance created by the introduction of the various new Treaty articles and Directives expanding its scope of coverage, EU anti-discrimination law is in decline.

The paper investigates that question by focusing both on the relative paucity of cases to come before the Court of Justice from national courts in relation to some of the newer grounds of discrimination and some possible reasons for this, and secondly by considering whether - and if so why - the Court has thus far adopted a less ambitious and expansive role in relation to the newer

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<sup>4</sup> The Court had interpreted the Equal Treatment directive to cover the situation of persons who had undergone gender reassignment surgery in the case of *P v S*, but refused to extend it to cover sexual orientation discrimination in *Grant v South West Trains*.

grounds of discrimination than it did in relation to sex discrimination in earlier decades.

The paper proceeds as follows. The content of the two anti-discrimination directives is first briefly summarised, along with the recent proposal for a third directive which has not (yet) been adopted. Second, the volume of preliminary references made to the Court of Justice invoking the different grounds of discrimination under two directives is examined, and the approach of the Court to each ground in turn is scrutinised. Next, some explanations for the relatively low number of references from national courts in relation to certain grounds of discrimination are proposed, looking in particular at the number of cases coming before the national courts involving claims of discrimination covered by the directives. Finally, some explanations for the apparently cautious approach by the Court on the substance of the rulings are proposed. The article concludes with some reflections on the broader question of whether EU anti-discrimination law is indeed in decline.

### ***The Article 19 Anti-Discrimination Directives***

The two anti-discrimination Directives enacted by the EU legislature in 2000 introduced a number of new legal requirements into EU law, which in turn required enactment into national law.<sup>5</sup> The Race Directive (Directive 2000/43/EC<sup>6</sup>), as it is generally called, prohibits direct and indirect discrimination on grounds of racial or ethnic origin, while the framework employment Directive (Directive 2000/78/EC<sup>7</sup>) prohibits direct and indirect discrimination on ground of (i) religion or belief, (ii) disability, (iii) age and (iv) sexual orientation. The scope of both directives follows that of the EU's earlier sex discrimination directives by requiring protection of individuals in the fields of employment and vocation training, but the Race directive importantly goes beyond this to prohibit discrimination in the fields of education, social security and healthcare, and access to and supply of goods and services, including housing. Finally, following the Court's jurisprudence on the earlier sex discrimination directives, both of the newer anti-discrimination directives also prohibit harassment, instruction to discriminate and victimisation; and they require Member States

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<sup>5</sup> For an appraisal of the impact of the Directives after 10 years, see the Opinion of the [Fundamental Rights agency, \*The Situation of Equality in the EU 10 years on from initial implementation of the Equality Directives\*](http://fra.europa.eu/en/opinion/2013/fra-opinion-situation-equality-european-union-10-years-initial-implementation-equality) <http://fra.europa.eu/en/opinion/2013/fra-opinion-situation-equality-european-union-10-years-initial-implementation-equality>.

<sup>6</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22

<sup>7</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

to provide efficient sanctions and remedies.

The personal scope of the two directives is also quite wide, covering all persons within the EU, including public and private actors alike. Their scope is, however, expressly limited in respect of third-country nationals, pointing to the thorny relationship between discrimination, race, and migration in Europe.<sup>8</sup> While non-EU nationals are formally protected from discrimination on grounds of race and ethnic origin whilst on EU territory, Article 3(1) of the Framework Employment Directive and Article 3(2) of the Race Directive indicate that they do not cover nationality-based discrimination and are ‘without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals’ and to ‘any treatment which arises from the legal status of the third-country national concerned’.

The only two explicit ‘exceptions’, if they can be termed so, to the prohibition in the Race Directive on *direct* discrimination on grounds of racial or ethnic origin are the provisions concerning ‘positive action’ and those concerning ‘genuine occupational requirements’. Indirect discrimination on the basis of racial or ethnic origin, however, may be objectively justified by a ‘legitimate aim’ where the means of achieving that aim are ‘appropriate and necessary’. By comparison with the Race Directive the Framework Employment Directive contains, in addition to these same three ‘exceptions’, a number of other specific exclusions or qualifications to its prohibition on discrimination. These qualifications concern employment in the armed forces, state social security and social protection schemes, references to marital status and retirement ages, as well as measures which are adopted to maintain public security, public order, prevent crime and protect of the rights of others. There are also several other more specific exceptions to the prohibition of direct discrimination on the grounds of disability, age, and religion in Article 6: thus direct age discrimination is permitted *inter alia* in pursuit of legitimate employment or labour market policy; the general ‘occupational requirement’ exception in Art 4 contains a more specific version for ‘churches and other public or private organizations’, and there are provisions relating to Northern Ireland which has a particular history of religious conflict and extensive domestic anti-discrimination law on the subject. Finally, the Framework Employment Directive contains an obligation to provide reasonable accommodation for people with disabilities.<sup>9</sup>

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<sup>9</sup> L Waddington, ‘When is it Reasonable for Europeans to be Confused? Understanding when a Disability Accommodation is “Reasonable” from a Comparative Perspective’ (2008) 29 Comparative Labor Law and Policy Journal 317.

The procedural and institutional provisions of both Directives are similar: they contains measures on burden-shifting, minimum standards, effective sanctions, information and monitoring requirements, and a role for civil society and social partners in supporting complainants and otherwise.<sup>10</sup>

### *The Proposed New Article 19 Directive on Equal Treatment*

Hence it is clear from the above that the two anti-discrimination directives adopted in 2000 differ in their material scope, with Directive 2000/78 covering a wider range of grounds but being confined to the employment context and permitting an extensive set of justifications or exceptions, while the Race Directive prohibits discrimination on grounds of racial and ethnic origin only, but across a wider range of areas of social and economic life and with fewer justifications or exceptions. It has been argued by numerous commentators that these differences establish a kind of 'hierarchy of equality' – often in unjustifiable ways - as between the various EU anti-discrimination directives, and as between the various grounds, with the promotion of race and gender equality enjoying (to different degrees) a stronger level of legal intervention than other grounds.<sup>11</sup>

In 2008 the Commission responded to these criticisms by proposing legislation under Article 19(1) aiming to 'equalize' standards of protection against discrimination across all of the prohibited grounds in Article 19, namely age, disability, sexual orientation, and religion or belief, though leaving aside race and sex, given the stronger EU legislation already existing in these two areas.<sup>12</sup> The Commission proposal adopted most of the same terms, definitions, principles, substantive provisions, and exceptions as are contained in the Race Directive 2000/78 and the consolidating

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<sup>10</sup> Notably however, there is no requirement under the Framework Employment Directive, as there is under the Race Directive, for Member States to establish or designate an equality body or institution charged with promoting equal treatment in these fields (although many member states in practice have established such bodies.

<sup>11</sup> L Waddington and M Bell, 'More Equal than Others: Distinguishing European Union Equality Directives?' (2001) 38 CMLRev 587; P Skidmore, 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?' (2001) 30 ILJ 126; E Howard 'The Case for a Considered Hierarchy of Discrimination Grounds in EU law' (2006) 13 Maastricht Journal of European and Comparative Law 445.

<sup>12</sup> Commission Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008)426 and the Working Document accompanying the proposal, SEC(2008)2180. For some analyses of the proposed measure and its context see L Waddington 'Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive' (2011) 36 ELRev 163; E Howard 'EU Equality Law: Three Recent Developments' (2011) 17 ELJ 785.

Gender Equality Directive 2006/54 (which replaced all the previous EU sex discrimination directives), including positive action, reasonable accommodation, and remedial provisions. The material scope of the proposed new measure is similar to that of the Race Directive, covering social protection, health, education, and access to and supply of goods and services provided in the context of a commercial activity. The range of exceptions is broadly similar to those under the Framework Employment Directive.

The Commission based its proposal on Article 19 TFEU, which requires the assent of the European Parliament and unanimity in the Council. And although the Commission's draft was approved in 2009 by the Parliament,<sup>13</sup> it has remained stuck in the Council of Ministers where consent has not been forthcoming. The German Government has persistently raised objections based on the subsidiarity principle (i.e. the alleged inappropriateness of adopting this measure at EU level rather than leaving it to the Member States to regulate) and about the cost to business of the proposed measure, whereas other governments have opposed the inclusion of 'access to social protection' within its scope. Other states, perhaps surprisingly, have argued that the provisions on disability in the proposed directive are insufficiently strong. There has been considerable frustration on the part of equality bodies and NGOs with the failure of the legislation to progress,<sup>14</sup> but as of now it seems difficult to envisage the legislation being adopted in the current political climate.

Hence we are left with the two antidiscrimination directives of 2000, with their somewhat uneven coverage and scope in relation to discrimination on grounds of race/ethnic origin, sexual orientation, disability, age and religion/belief.

### ***What volume of cases have the two EU anti-discrimination directives generated?***

Both of the directives were adopted in 2000, and the deadline for their implementation by the member states expired in the middle and at the end of 2003. This means that they have been in force as EU law for 16 years, and have been either implemented into domestic law or directly

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<sup>13</sup> The Parliament's legislative resolution of 2 Apr 2009, T6-0211/2009, approving the Commission's draft.

<sup>14</sup> See the letter signed by 6 NGOs in July 2014 on the sixth anniversary of the publication of the initial proposal for the Directive, <https://euobserver.com/opinion/124834>.

effective in national law for 13 years.

During that time, there have been approximately<sup>15</sup> 52 preliminary references made to the Court of Justice, covering all five grounds of discrimination. 36 have been on age discrimination, 7 on disability, 5 on sexual orientation, 4 on race.<sup>16</sup> No cases on religious discrimination have yet been decided, but the first two preliminary references which raise issues of religious discrimination under Directive 2000/78 are currently pending before the Court.<sup>17</sup> At first glance, with the exception of age discrimination, these numbers seem remarkably low, given that we are considering a thirteen-year period. But in order to introduce an appropriate perspective in temporal terms, those numbers can be set alongside the number of cases on sex discrimination which were referred to the Court of Justice during the comparable initial period of 13 years following the coming into force of the two sex discrimination directives.<sup>18</sup> In the first 13 years following the coming into force of Directives 76/207 (sex equality in conditions of work) and 75/115 (sex equality in workplace pay), 24 cases raising substantive issues under these directives were referred to the Court of Justice. In other words, of all the grounds covered by the two directives of 2000, only the ground of age discrimination has generated a volume of litigation which is at all comparable to that generated by the ground of sex discrimination in its first 13-year period in force. The numbers for disability, sexual orientation, race and religion have been very much lower. Further, it has to be factored in that during the first 13 years following the date for implementation of the sex discrimination directives in the 1970s, the EU was composed of between 9 and 12 member states only; whereas during the first 13 years following the date for implementation of the anti-discrimination directives of 2000, there were 25 member states (15 members for the first year, then 25-28 for the next ten), thus greatly expanding the size of the population affected and the potential pool from which litigation could emerge. Given that the EU membership had doubled

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<sup>15</sup> Cases which have been referred to the Court but where there has not yet been an advocate general's opinion are not included in these numbers since they will fall to be decided in a future year, but cases which are pending where an advocate general has already given an opinion are included in the count.

<sup>16</sup> Although allegations of race discrimination were raised in a number of other cases (*Agafitei* and *Runic-Vardyn*), there have only been four cases raising significant questions of discrimination on grounds of racial or ethnic origin which were addressed by the court (*Firma Feryn*, *Servet Belov*, *Nikolova*).

<sup>17</sup> *Achbita* and *Bougnaoui*.

<sup>18</sup> There were two sex discrimination directives, Equal Treatment Directive 76/207 governing conditions of work (including recruitment and dismissal) and the Equal Pay directive 75/117 governing remuneration, whereas the two sets of issues (conditions of work and pay) are combined in a single measure in the Race Directive and the Framework Employment Directive of 2000.



in size from the time the sex discrimination directives were in force until the anti-discrimination directives of 2000 were adopted, we might have expected significantly more litigation to arise under these measures, yet given the vast increase in population and membership, even the number of cases referred on the ground of age discrimination does not look particularly high. Further, apart from this ground, the number of cases referred in relation to the other four ‘new’ grounds of discrimination has been very low.

If the case law of the European Court of Human Rights on sexual orientation, racial, religious and disability discrimination is considered, by comparison, it seems that a much more consistent and substantial stream of cases been brought before that Court on each of these grounds.<sup>19</sup> Particularly striking is the issue of religious discrimination in the workplace, in relation to which not a single case under Directive 2000/78 had come before the European Court of Justice until a Belgian case and French case concerning various forms of prohibition on wearing a headscarf at work were referred late last year.<sup>20</sup>

We will return further below to reflect on the reasons why there may be so few references being made on the various grounds of discrimination. But first, a brief analysis of the approach the Court of Justice has adopted in its rulings on the various grounds under the two anti-discrimination directives will be provided, with a view to appraising whether the Court is maintaining its earlier ‘vanguard role’ in the development of EU anti-discrimination law.

What kind of rulings has the Court so far given in the cases arising under the two Directives?

### ***i. Discrimination on the ground of disability***

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<sup>19</sup> A methodologically careful search for the number of ECHR cases on these grounds has not yet been conducted, but even a look at the very useful ‘factsheet’ summaries (which do not claim to be exhaustive or comprehensive) prepared by the ECHR registry on each of the fields of discrimination demonstrates that the numbers are significantly higher. There are recent factsheets available on racial discrimination, disability and religious discrimination and sexual orientation. Conversely, and interestingly, there seem to be significantly fewer cases concerning age discrimination brought before the ECHR.

<sup>20</sup> R. Holtmaat *European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012)

As noted above, there have been seven cases referred to the ECJ under Directive 2000/78 on disability discrimination.<sup>21</sup> One of the earliest was the case of *Coleman*, in which the Court interpreted the scope of the Employment Equality Directive so as to prohibit discrimination by association in the field of disability. The case concerned the alleged constructive dismissal of an employee who was not herself disabled, but who had been subjected to adverse treatment by her former employer in connection with the disability of her child.<sup>22</sup> The Court ruled that the prohibition of direct discrimination in Directive 2000/78 is not limited to people who are themselves disabled, but applies also to an employee who is treated less favourably than another employee if the adverse treatment is related to the disability of her child, whose care is provided primarily by that employee.

There have also been several cases concerning the definition of ‘disability’, in the absence of a precise definition in the Directive or in the UN Convention on the Rights of Persons with Disabilities, which the EU concluded and ratified.<sup>23</sup> In *Chacón Navas* the Court distinguished illness from disability (with the Directive covering disability but not illness),<sup>24</sup> but later ruled in *Ring and Skouboe Werge* that a disability could nevertheless *result* from an illness, curable or otherwise, where it “entails a limitation which results...from physical mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one”.<sup>25</sup> In *FAO/Kaltoft* the Court ruled that while the Directive does not cover discrimination on grounds of obesity, nevertheless obesity, just like illness, may result in a disability where it entails a limitation of the kind described in *Ring and Skouboe Werge*, which hinders equal participation in the workplace.<sup>26</sup>

These rulings together adopt a cautiously inclusive approach to disability, by allowing for

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<sup>21</sup> For an overview, see C O'Brien ‘Equality’s false summits: new varieties of disability discrimination, “excessive” equal treatment and economically constricted horizons’ (2011) 36 ELRev 26.

<sup>22</sup> Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603.

<sup>23</sup> See SWD(2014)182 for a report by the Commission on the EU’s implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD). For discussion of the extent to which the EU and the CJEU are following the CRPD’s lead in the development of disability discrimination law in the framework directive, see L Waddington ‘Future prospects for EU equality law: lessons to be learnt from the proposed Equal Treatment Directive’ (2011) 36 ELRev 163.

<sup>24</sup> C-13/05 *Chacón Navas* [2006] ECR I-6467.

<sup>25</sup> [C-335/11](#) and C-337/11, *Ring and Skouboe Werge v Dansk almennyttigt Boligselskab* EU:C:2013:222

<sup>26</sup> C-354/13, *Fag og Arbejde* (FOA) EU:C:2014:2463.

conditions like illness and disability to amount to disability covered by the directive where they constitute a sufficient hindrance; Nevertheless the cases also indicate clearly that the Court is only prepared to consider disabilities which hinder a person's capacity to participate in the employment market, hence hewing closely to the employment-related focus of the Directive.

In a particularly harsh ruling to this effect in *Z*, the Court rejected the claim that the inability to bear a child due to having being born without a uterus constituted a disability within the meaning of the Directive, since according to the CJEU it did not hinder the woman from participating normally in the workforce.<sup>27</sup> The result was that, even though she was in a disadvantaged position as compared with other women following the birth of a child in so far as she could not take paid maternity or adoptive leave because her child was born by surrogate, the Court decided this was not discrimination covered by the Directive.<sup>28</sup> The case is surprising in several ways, including the Court's dismissive treatment of the UN Convention on the Rights of Persons with Disabilities, but it certainly underscores the limited employment-related scope of the Directive, insofar as a woman born without a womb and therefore incapable of bearing a child could not be considered to have a disability for the purposes of EU law since it did not hinder her participation in the employment market. The *Z* case might also be considered as a case of intersectional discrimination – a case in which it is the intersection of different factors that is the source of unfair or differential treatment, and where the combination of these factors blurs the question of who the appropriate comparator is for the purposes of the discrimination inquiry: In *Z* it was the intersection of gender (a breastfeeding mother wanting to take time off work without losing all pay) and disability (albeit a disability that did not in the eyes of the court affect her participation in the job market) but the Court decided that none of these in themselves entitled her to be treated in the same way as a breastfeeding mother who had given birth herself to the child.

In a less restrictive judgment in *Ring and Skoube Werbe*, however, the CJEU ruled that the existence of a disability for the purposes of the Directive does not have to mean that the person is unable to participate at all in the workforce, but simply that there is a *hindrance* to participation.

However, in *Glatzel*, the Court ruled that differential treatment on grounds of disability, in circumstances where the applicant was refused a driving licence on the ground that the visual

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<sup>27</sup> C-363/12 *Z. v A Government department*, EU:C:2014:159.

<sup>28</sup> The Court also held that there was no discrimination on grounds of sex. *Ibid*, [55]-[57]. See further below.

acuity in one of his eyes did not meet the minimum requirement established by an EU Directive (even though his vision was normal when using both eyes together), could be justified as a proportionate pursuit of the legitimate aim of improving road safety.<sup>29</sup> The case has been criticized for imposing a conservative approach to EU disability law, and for an excessively deferential and inappropriately precautionary approach given the basic rights concerned.<sup>30</sup>

What we see in the field of disability then, is quite a modest amount of case law – 7 cases at the time of writing – in which the Court has for the most part been balanced if cautious, veering between a reasonably progressive approach – *Coleman, Ring and Skouboe Werbe, FAO/Kaltoft, and Odar*<sup>31</sup> – and a more restrictive approach, as seen in *Chacon Navas* on sickness, *Z* on surrogacy, and *Glatzel* on driving with a disability. The Court has firmly emphasized the labour market focus of the Directive: so that while illness and obesity can amount to disabilities once they begin to hinder participation in the labor market; the inability to bear a child due to the absence of a womb could not count as a disability under EU law because the court concluded that it did not necessarily hinder her participation in the labour market (although arguably it did in fact by creating different consequences for her as compared with other mothers where she took off time to breastfeed and care for her new child born by surrogate). Perhaps most surprisingly, the Court in *Z* (by comparison with its approach in *Ring and Skouboe Werbe*) refused to take account of the meaning of disability under the UN Convention on the Rights of Persons with Disabilities (CRPD), or whether the inability to bear a child due to not having a womb would constitute a disability within the meaning of the CRPD; by simply deeming the entire Convention to be ‘too programmatic’ to be capable of being invoked in EU litigation.

## ***ii. Discrimination on the ground of sexual orientation***

Following its pre-Directive 2000/78 ruling in *Grant*,<sup>32</sup> in which the Court ruled that sexual orientation discrimination lay outside the scope of EU law, the Court has addressed sexual orientation discrimination in 5 main cases following the adoption of the Directive.

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<sup>29</sup> C 356/12 *Glatzel* EU:C:2013:350.

<sup>30</sup> Charlotte O’ Brien, Maastricht Journal

<sup>31</sup> In C-152/11 *Odar v Baxter Deutschland* EU:C:2012:772, there was indirect discrimination on grounds of disability due to the special calculation method used to determine compensation for employees over the age of 54, which operated to the disadvantage of disabled employees who would be entitled to an early disability pension

<sup>32</sup> C-249/96 *Grant v SouthWest Trains* [1998] ECR

Four of these dealt with equal treatment in access to workplace benefits for same-sex couples. In *Maruko*, the Court indicated that – despite Recital 22 of Directive 2000/78 (‘this Directive shall be without prejudice to national laws on marital status and the benefits dependent thereon’) - once a Member State treated registered life partnerships and marriages as comparable for the purposes of survivors’ benefits, the exclusion of life partners from a scheme of survivor’s benefits under an occupational pension scheme constituted discrimination on the basis of sexual orientation.<sup>33</sup> Similar rulings were given in *Römer* as regards a supplementary pension,<sup>34</sup> in *Dittrich* as regards payments for civil servants in the event of illness,<sup>35</sup> and in *Hay* as regards benefits such as special leave and salary bonuses under the terms of a collective agreement.<sup>36</sup> In other words, once member states choose to equate same-sex relationships with marriage for the purposes of specific benefits, they cannot offer different pension benefits, payments, leave or bonuses to the two grounds.

Again, like the disability jurisprudence, these are cautiously progressive rulings by the Court, leveraging the progressive changes made already by member states to insist that once they have recognised a degree of relationship-status-comparability between same-sex relationships and marital relationships, they must treat them equally for the purposes of workplace benefits.

Leaving aside these 4 cases of employment-related benefits, probably the most important ECJ ruling (at least symbolically) in the field of sexual orientation is *Asociația Accept*.<sup>37</sup> The case (brought by an NGO) centred on the question whether the homophobic remarks of a leading shareholder of a soccer club, to the effect that he would never hire a player who was homosexual, could be attributed to the club itself, as well as whether the penalties available were appropriate and sufficient. The Court ruled that the statements in question were indeed attributable to the club, given the prominent position and leadership role within the club of the shareholder who had made them, and despite the fact that he did not have legal capacity to bind the club. The fact that the

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<sup>33</sup> Case C-267/06 *Maruko* .

<sup>34</sup> C-147/08 *Römer v Freie und Hansestadt Hamburg* EU:C:2011:286 See also staff case F-86/09 *W v Commission*, EU:F:2010:125.

<sup>35</sup> C-124/11, 125/11, 143/11 *Dittrich, Klinke and Müller* EU:C:2012:771.

<sup>36</sup> C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* EU:C:2013:823.

<sup>37</sup> C-81/12, *Asociația Accept* EU:C:2013:275

club had apparently taken no steps to distance itself from his comments could also contribute to the perception of the public and potential players that the club had a recruitment policy which discriminated on grounds of sexual orientation. On the remedial side the Court held that a national rule which made it impossible to impose a fine any later than six months after the discriminatory statements were made was incompatible with the Directive, and that a purely symbolic sanction would be incompatible with the effective implementation of the Directive .<sup>38</sup>

The overall picture as far as the ground of sexual orientation discrimination in EU law is concerned, therefore, is that of this small group of five cases referred to the ECJ, there have been no path-breaking cases or legal principles established, but the Court ruled positively in favour of the litigant in all 5.

### **iii Discrimination on the ground of racial or ethnic origin**

There have been four cases referred to the Court of Justice which dealt substantially with claims of discrimination on the basis of racial or ethnic origin,<sup>39</sup> but the most important two are *Firma Feryn* and *Nikolova*. In *Firma Feryn* the Court treated a public statement by an employer who was seeking to recruit fitters that it ‘could not employ immigrants because its customers were reluctant to give them access to their private residences’ as equivalent to a statement that it would not employ people of a certain racial or ethnic origin.<sup>40</sup> On the other hand in the *Servet* case, a challenge by an Albanian national against Italy’s refusal to grant him a housing benefit on the basis that he was a third country national was dismissed by the Court, which ruled firmly that Directive 2000/43 does not cover discrimination based on nationality.<sup>41</sup>

While the Court rejected an important opportunity in the *Belov* case (against the advice of its

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<sup>38</sup> C-81/12, *Asociația Accept* EU:C:2013:275 [64].

<sup>39</sup> Two other cases referred to the ECJ in which race discrimination was pleaded were not very significant - *Runevič-Vardyn and Wardyn* on the requirement of the use of letters of the national Lithuanian language only in official documents, and alleged discrimination against ‘certain socio-political classes’ in *Agafitei*, and the Court quickly dispatched the claims that there was any issue of racial or ethnic origin discrimination at play.

<sup>40</sup> Case C-54/07 *Firma Feryn* [2008] ECR I-5187, [16], [25], [34]. The CJEU did not directly address the specific question—which was posed to it by the referring Brussels Labour Court in question 4(d) of its reference, at [18] of the judgment—whether a statement of refusal to hire *immigrants*, combined with the failure to hire any employees of a non-indigenous ethnic background, gave rise to a presumption of indirect discrimination on racial or ethnic grounds.

<sup>41</sup> Case C-571/10 *Servet Kamberaj*. EU:C:2012:233 [48]-[50].

Advocate General) to rule on issues of discrimination against Roma communities in Bulgaria,<sup>42</sup> another very similar case – that of *Nikolova* – was waiting in line and this time, with the assistance of the Open Society Justice initiative, was referred by a national court to the ECJ.<sup>43</sup> In *Nikolova* the Court ruled that the siting by an electricity company of electricity meters at an inaccessible height in a district densely populated by Roma could constitute discrimination on the grounds of ethnic origin when such meters were installed in other districts at a normal accessible height. A number of aspects of the Court’s judgment are significant – first that *direct* discrimination will be found where the disadvantage or different treatment in question was imposed for reasons related to ethnic origin or race. Secondly, that if the evidence did not support direct discrimination, there could be indirect discrimination (which might be capable of being objectively justified) even if the meters were sited high due to concerns about instances of tampering in that particular district. And third – a somewhat controversial finding – that a claim of discrimination could be brought by someone who is not a person of the ethnic or racial origin targeted by the measure, but who is disadvantaged by it: in this case Ms Nikolova was a Romanian shopkeeper not of Roma origin, but living in that district.

Finally, in *Meister*, a case which turned on procedural rights, the CJEU rejected the applicant’s claim that Article 8 of the Race Directive 2000/43 (or Article 10 of Directive 2000/78) entitled her, where she was unsuccessful in her application for an advertised job, to be given access to information indicating whether the employer eventually employed another person at the end of the recruitment process.<sup>44</sup>

Thus the Court has heard only four cases, and given just two substantively important rulings in the area of race discrimination: *Feryn* and *Nikolova*. And while the tiny trickle of cases concern race discrimination being referred is a factor largely outside the control of the CJEU, nevertheless the Court did not exactly embrace all the opportunities which were provided to address some possibly important questions of racial and ethnic discrimination, notably the *Belov* case; but also perhaps the *Runevič-Vardyn* case on accommodation of ethnic and linguistic minorities in the rules

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<sup>42</sup> C-394/11 *Belov v CHEZ Elektro Balgaria AD* EU:C:2013:48. The Court decided on rather formal grounds that the body which had made the reference should not be considered as a ‘court or tribunal’ for the purposes of Article 267. For a critique, see Mathias Möschel, ‘Race discrimination and access to the European Court of Justice: *Belov*’ (2013) 50 CMLRev 1433.

<sup>43</sup> C-83/14, *CHEZ (Nikolova)*, 2015. For comments and critiques see C. Mc Crudden, *European Equality Law Review* and S. Atrey, *Public Law*

<sup>44</sup> C-415/10 *Meister v Speech Design Carrier Systems* EU:C:2012:217.

governing official documents.<sup>45</sup>

In all, therefore a combination of certain aspects of the legislation itself, the paucity of references, and the Court's substantive approach have rendered the Race Directive, an instrument of only slight utility, thus far, in the corpus of EU equality law.

#### *iv Discrimination on the ground of religion*

Thus far, as noted above, the Court has not decided a single case which has been referred to it claiming discrimination on the basis of religion under the Directive. However, the first two references have recently been made to the court, the *Achbita* case referred from a Belgian court,<sup>46</sup> and the *Bougnaoui* case referred from a French court.<sup>47</sup> Following the rulings of the Advocate General in each of the cases (each Advocate General reaching a somewhat different conclusion – AG Sharpston in *Bougnaoui* being much more sceptical as to the justifiability of a workplace ban on wearing the headscarf, while AG Kokott in *Achbita* took the view that such a ban could fairly readily be justified), the judgments of the Court are expected soon.

#### *v. Discrimination on the ground of age*

As we have seen, this is by far the largest group of anti-discrimination cases referred under the directives. Much of the case law which has come before the ECJ has been preoccupied with questions of when and on what grounds can age discrimination be justified. Since the Framework Employment Directive 2000/78 (unusually) permits justification of direct discrimination on grounds of age, some of the case law turns on the different grounds of justification for direct as compared with indirect discrimination.

It is not so easy to sum up a larger body of case law such as the 36 cases decided in this field, some of which have been brought by NGOs, some by litigants with the support of equality bodies or

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<sup>45</sup> The Court in *Runevič-Vardyn* gave no real attention to the issue of national minority groups, which is an important issue in many EU member states. For critical commentaries, see H van Eijken, (2012) Common Market law review, pp. 809–826, and Egle Dagilyte, Panos Stasinopoulos, and Adam Lazowski “The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights” *Croatian Yearbook of European Law and Policy*, Vol 11, pp. 1-45, 2015

<sup>46</sup> C-157/15 *Achbita*

<sup>47</sup> C-188/15 *Bougnaoui*



NGOs, and some by individuals.<sup>48</sup> Overall, however, the Court's case law has largely reflected the terms of the legislation, which qualifies the degree of legal protection against age discrimination in a range of different ways. By comparison with the other grounds of discrimination, the Directive allows for extensive justification of all forms of age discrimination, direct as well as indirect. Overall the Court has accorded quite some latitude to the states, particular in their assertion of legitimate objectives underpinning legislative policies. On the other hand it has applied the proportionality principle in a reasonably rigorous way in other cases (for example in cases of compulsory retirement, or maximum and minimum ages, when public health, public safety and occupational qualification defences or justifications are raised), regularly finding that the policies do not bear a sufficient relationship to the aim.

Hence of all the grounds of discrimination under the two Directives, age is the field in which most litigation has been brought, and the Court has given a fairly balanced series of rulings in the area. It has shown deference to states in their employment and pension policy choices, and to the wide language of the Directive, but has also prodded employers at times to justify more clearly their age-based assumptions and measures.

[Interestingly, there is no case law as yet on "positive action" – as affirmative action is known under EU law - in any of the fields covered by the two anti-discrimination directives. The only existing positive action case law is in the field of gender, and there are 'reasonable accommodation' cases on the issue of disability.]

#### *Summary reflections on the jurisprudence of the Court*

Overall, then, is it possible to distill and compare, in a broad sense, the jurisprudence of the Court of Justice on the 'newer' grounds of discrimination law under these two directives with its earlier jurisprudence on the sex equality directives? Is it fair to say that the Court is taking a more cautious

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<sup>48</sup> Perhaps the most famous age discrimination case before the Court was brought not under the preliminary reference procedure, and hence not initiated by an individual or an NGO, but by the Commission under the infringement procedure. This was the case against Hungary, C-286/12 *Commission v. Hungary* EU:C:2012:687, in which the ECJ found the national scheme requiring the compulsory retirement of judges, prosecutors and notaries at age 62 to be disproportionate, despite its ostensibly legitimate aim of establishing a more balanced age structure in these professions..

role and less obviously interested in developing and promoting the equal treatment principle in these newer fields than it was for years in the area of sex equality? The analysis of the case law provided above in relation to most of the grounds in which case law has arisen would seem to support the view that the Court has not adopted a leading or pro-active stance in relation to the new grounds of equal treatment. It has for the most part adopted a careful interpretation of the provisions of the Directives, and has probably most consistently provided rulings in favour of the litigant's claims in the area of sexual orientation discrimination, where the numbers have in any case been very small and the issues arising have all been rather similar. With race discrimination, as we have seen, the Court has not been eager to tackle all of the cases or all of the issues which have arisen, although it did give two important rulings in *Feryn* and *Nikolova*; and with disability discrimination it moved to de-link its jurisprudence in some ways from the UN CRPD and has adhered to a fairly narrow employment-related focus for the definition of a disability. The bulk of the cases on age discrimination involve a reasonably balanced analysis of the circumstances in which discrimination may be justified.

None of this is to say that the Court is no longer a proponent of equal treatment, or that it is unnecessarily limiting the scope and impact of the anti-discrimination directives. But it may suggest that the Court is not playing the vanguard role it occupied in relation to sex equality for many years, when it played a key part in developing new legal principles to promote and strengthen sex equality law. It did this *inter alia* by asserting the direct effect of EU directives and of treaty articles between private parties; developing a broad notion of indirect discrimination; shaping rules on the burden of proof and victimization and deeming pregnancy discrimination to be sex discrimination. There were many striking and ground-breaking judgments in that field over several decades. It may be argued, of course, that the Court does not need to take such a bold or creative role in the development of EU anti-discrimination law at the current time, since virtually all of the doctrines that it shaped and developed in the context of sex discrimination law have now been incorporated through legislation into the newer anti-discrimination directives (and also into the consolidated Gender equality directive of 2006). Yet this would not be an adequate answer, since there are clearly a great many other legal issues to be shaped and clarified in the context of the newer grounds of discrimination, and thus far the Court has not shown itself to have an appetite for creative or bold rulings. In relation to the newer grounds, the most striking cases are probably

*Coleman* (on disability discrimination by association), *Firma Feryn* and *Associata Accept* (in treating overt forms of prejudice as discrimination), and *Nikolova* on direct race discrimination. But many of the other cases are quite guarded or cautious, avoiding difficult issues, and adhering to a careful balancing of the rights of states to pursue their preferred policies against the rights of individuals claiming indirect discrimination.

Based on a substantive analysis of the case law thus far, the suggestion of a field of EU anti-discrimination law in decline since the high point of enactment of these two directives, may be overstating the case. Yet the combination of a very low number of cases being referred across many of the grounds, and a more cautious court in those cases which do come before it certainly presents a different picture of EU anti-discrimination law to that which characterized previous phases of the Court's jurisprudence dealing with the sex discrimination directives. Further, even if there seem to be two separate issues being addressed here, one being the volume of litigation which has come before the ECJ, and the other being how the Court has dealt with the cases which have come before it, it is possible that they are connected in certain ways. In particular, as litigants and lawyers observe the rulings coming from ECJ on questions of discrimination, they may be encouraged (or discouraged) from seeking to have other cases referred to the ECJ, rather than settling for the decision of the national court, or perhaps bringing a case to the ECtHR in Strasbourg.

### **Explaining the low volume of cases referred under the anti-discrimination directives**

Let us return then to the issue of the very low number of cases referred under the anti-discrimination Directives of 2000. Given an EU of 28 member states with approximately 508 million inhabitants, is the small number of cases referred to the ECJ under these Directives in particular in relation to certain grounds indicative of some kind of decline in the influence of EU anti-discrimination law? What is it that might explain the paucity of cases being referred to the ECJ, other than in the field of age discrimination?

To take the exceptional case of age discrimination first, it seems striking that there has been so

much more litigation in this field. A first possible explanation for the discrepancy is that age discrimination potentially affects everyone, all sexes, races, disabled or not, and often the old and the young alike; so that there are many more potential litigants. A second is that direct age discrimination is usually highly visible, and very common, since there has been (and perhaps still is) a fairly broad social consensus that it is more readily justifiable than other forms of more invidious discrimination. What may make age discrimination invidious and impermissible will depend on a careful appraisal of factors; whereas direct (or even indirect) discrimination on grounds of sexual orientation, race, disability or religion is presumptively harder to justify. A third possible reason may be that there are better resourced organizations to support litigation challenging age discrimination, and once again this may be because so many people are affected.<sup>49</sup>

However, even if an explanation can be found for the reasonably steady flow of cases coming to the ECJ in the field of age discrimination, the question nonetheless remains why there have been so few cases referred in the other fields. One possible (although somewhat unconvincing) argument could be that as far as sexual orientation and race are concerned, the kind of overt discrimination which is as easily detectable as age discrimination is less likely to be found nowadays. Overt discrimination as seen in the cases of *Feryn* and *Associa Accept* is possibly less frequent now in the employment context, although it has been demonstrated through various studies that companies frequently adopt policies of discrimination (e.g. taking account in recruitment and invitations to interview of surnames which are revealing or suggestive of race, but without overtly indicating that race was the factor at play) which are less easy to detect. Yet the absence of a reasonable flow of litigation to challenge indirect discrimination on the basis of race still seems puzzling. Another possible explanation may be that it is expensive and difficult to gather the kind of data necessary to establish a case of indirect race discrimination. A further possibility may be that perhaps the European Court of Justice is not yet understood by lawyers and litigants yet as a good forum for discrimination cases, and they instead choose to bring claims before the European Court of Human Rights (where direct actions can be brought but where the length of such actions is generally much longer and the remedial system is less effective than under the ECJ preliminary rulings procedure). Even if the employment-related focus of the Framework Employment Directive might partly account for the small number of ECJ cases concerning

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<sup>49</sup> One of the major UK age discrimination cases was brought by the organization Age Concern UK.

disability, sexual orientation, religion<sup>50</sup> and age, we would expect that there would be correspondingly more cases dealing with race in view of the much broader material scope of the Race Directive (which covers education, housing, social security and more). Further, the sex discrimination directives in the 1970s were entirely employment focused, and yet litigants chose to bring their cases much more regularly before the European Court of Justice, and found greater success there than before the European Court of Human Rights. Indeed, the ECtHR notably relied in its own later race discrimination case law on the jurisprudence of the ECJ in its early sex discrimination case law in relation to concepts such as indirect discrimination and reversal of the burden of proof.

Another possible factor explaining the uneven patterns of litigation before the ECJ in the field of anti-discrimination law may be the presence or absence of institutional litigants, NGOs or Equality bodies and commissions supporting or bringing claims in particular fields. The intended beneficiaries of anti-discrimination law are often (though certainly not always) individuals, groups or communities who are marginalized and under-resourced, and who may not have the knowledge or capacity to resort to law and litigation to defend their interests and rights. It can be difficult to tell from the information publicly available about an EU law case whether it was brought by a sole litigant, or with the help of an equality institution or an NGO, particularly since the ECJ does not permit *amicus* interventions and we are left to deduce from the reporting of the case what kind of support may have been received by the applicant.

All of these explanations, however, are speculative, and none of them (not even all of them together), provide a fully satisfactory account. It seems clear is that there is scope for a careful and rigorous study to be done into the reasons for the uneven litigation on the various grounds of discrimination under EU anti-discrimination law, which would include examining (i) who are the litigants, (ii) who is supporting them and (iii) how cases are selected, where it concerns public

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<sup>50</sup> The force of this suggestion is also weakened by the fact that quite a number of the ECHR religious discrimination cases concern claims of religious discrimination in the workplace, which means that they could have been brought to the ECJ: eg *Eweida/UK*, *Chaplin/UK*, *Siebenhaar/Germany*, *Fernandez Martinez/Spain*, *Ebrahimian/France*, *Alexandridis/Greece*, *Sindicatul Păstorul cel Bun/Romania*, *Obst/Germany*.

interest litigation.

The place to begin looking, for the purposes of such a study, is at the litigation brought before national courts and tribunals, since this is the supply line for cases coming to the CJEU. I have begun some preliminary research on what kind of litigation in these five fields of anti-discrimination law has been brought in a number of national jurisdictions, with a view to determining which factors at the national level may help to explain why cases are or are not being referred to the ECJ. This requires an investigation into (i) what number of cases on each of the grounds of discrimination were brought before domestic courts or tribunals (ii) were the provisions of the relevant EU directive argued to the domestic court (iii) was the possibility of referring the cases to the ECJ raised by or before the national court and (iv) if so, did the national court give any reason for not doing so. It may be, for example, that there is a reluctance on the part of domestic tribunals and courts to acknowledge or to deal with the EU dimension of a discrimination case, and a desire to deal with cases solely under the domestic legislation without reference to EU law even where it is relevant or applicable. It may also be the case that there is some unawareness of the existence of or the relevance of EU law on the issue both amongst lawyers and amongst judges.

The jurisdictions for which I have begun to gather data for the number of cases coming before the courts which deal with the different grounds of anti-discrimination law covered by the two Directives are France, Belgium, Netherlands, Luxembourg, Germany, Austria and the UK. While it is too early as yet to draw any strong conclusions, and the data is not comprehensive (in part since it is often difficult to get information about cases decided in lower tribunals or commissions if they are not reported or made accessible online), it seems from a preliminary analysis of the cases arising in that a few themes or trends can be identified.

A *first* is that EU anti-discrimination law has been implemented into domestic law in all states - sometimes it has been layered onto existing national equality and anti-discrimination law, and sometimes it has been adopted separately.

*Second*, there seems to be an active practice of anti-discrimination law and litigation in all of the states so far examined. In most countries, these are brought first before special bodies or tribunals,

whether commissions, equality bodies or other, which have been established for that purpose. Sometimes these bodies have the power to make references to the CJEU, sometimes not; sometimes their holdings are binding, and sometimes not. But it is clear that issues of cost and resources are very important to the possibility of appeal from these bodies, and hence the possibility of bringing the issues to a higher judicial level within the legal system.

*Third*, there are anti-discrimination cases coming before the higher courts of most states, but in significantly lower numbers than before the tribunals and commissions. Strikingly, a somewhat similar pattern of uneven distribution across the various grounds of discrimination appears evident in this domestic case law. Age discrimination is almost always at the top, race or religious discrimination (or both) are at the bottom, and sexual orientation and disability discrimination cases fall somewhere in between, depending on the jurisdiction in question.

*Fourth*, many cases are decided under the domestic implementing law without reference to the EU directives or to EU law.

*Finally*, in all Member states, there seems to be a reluctance to refer cases to the European Court of Justice, even where central points of EU law arising under the Directives are pleaded and argued. Some courts claim that only national law is relevant (there are a number of Irish cases of this kind) while others (e.g. in the UK) claim *acte claire* and assert the confidence to interpret EU law themselves without need for a reference. The findings of different domestic courts on similar issues however are quite different and varied, and there seem to be many contested points on which a ruling from the Court of Justice would be welcome to bring about greater clarity, a shared understanding of EU equality norms across states, as well as some accountability and consistency in how EU equality and anti-discrimination law is being interpreted and applied.

### ***Interim Conclusions***

To return to the question posed at the outset of this paper: is EU anti-discrimination law in decline? My provisional conclusion, at this point, is that despite the strikingly low numbers of cases referred in relation to several of the grounds in the two anti-discrimination Directives of 2000, and despite the more cautious or restrained approach of the Court of Justice in relation to some grounds in

particular, EU anti-discrimination law is not in decline but has entered a different phase. I suggest that there are various elements which may go towards explaining this.

First, as far as the low numbers of cases referred to the Court under the two Directives is concerned, it seems clear that this is not reflective of a lack of claims being brought at the national level about discrimination on the various grounds covered by the EU legislation. There is evidently considerable legal action and activism in these fields, and a large number of complaints have been brought to equality commissions and tribunals across the EU. Nevertheless, it seems also to be the case that fewer of these complaints end up in the higher courts, probably largely for reasons of cost. And in this respect it seems clear that the role of NGOs, practices of strategic public interest litigation, and support from equality bodies is crucial. And if fewer cases are making their way to the higher-level domestic courts, fewer cases still are making their way to the ECJ.

As far as the more cautious approach of the Court of Justice is concerned, there are a number of possible factors at play. In the first place, these are difficult times for the EU, which is undergoing a series of profound crises, (the economic/Euro crisis, refugee crisis, the rise of populism, the deepening and spread of Euroscepticism, culminating recently in Brexit). These crises, separately and together, pose a serious challenge to the legitimacy of the EU polity as a whole, as well as to its institutions, policies and laws. It seems likely that the Court is conscious of both the legitimacy of the EU as a whole, as well as its own judicial legitimacy more specifically, and that it may consider a prudent and cautious approach to anti-discrimination and equality cases to be wise. It is not just that there has been a backlash in Germany and elsewhere following cases like *Mangold* in which the Court took a bold step,<sup>51</sup> but also the fact that appointments to the Court are beginning for the first time to come under scrutiny. The European Court of Justice is no longer a low-profile and unnoticed promoter of EU integration. Its neighbouring court, the European Court of Human Rights, has come under sustained political fire in recent years, and the ECJ may be conscious that it could be next in line for such scrutiny and backlash.

Second, the fact that the third anti-discrimination directive which was proposed by the Commission in 2008 has not been adopted, and has generated significant controversy and member state opposition in the legislative process (along with other equality initiatives), may have led to

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<sup>51</sup> Mangold; Honeywell. Commentary



greater caution on the part of the Court, and a sensitivity to this political shift against against any further expansion of EU anti-discrimination law.

Third, it may be that the newer grounds of equality are more contested across the EU than sex and gender equality was in the first decades of European integration, perhaps especially the issue of non-discrimination on grounds of sexual orientation, which has encountered social and religious resistance. A prohibition on racial or disability discrimination is generally less contested on its face, but the task of addressing inequality in these two fields often requires pro-active measures, including reasonable accommodation in the case of disability, and the dismantling of entrenched or long-term social disadvantage in the case of race, which the Court may be reluctant to address or require. Indeed, the two anti-discrimination Directives themselves are in many respects hedged with qualifications, exceptions, justifications and exclusions, and the Court's may in part be reflecting this ambivalence in its rulings. There is also the problem of the awkward distinction between nationality and race drawn by the Directive, where EU law almost enshrines discrimination against third country nationals as part of its law. It will be very interesting, for many reasons, to see how the ECJ deals with the two headscarf cases in the pending rulings, given the wave of anti-Muslim feeling that has been evident across Europe and fuelled by the refugee crisis and recent acts of terrorism.