

PROTECTION OF DISABLED PEOPLE UNDER MALTESE AND EUROPEAN LAW

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A. EU Law

Article 13 - Legal Basis for Framework Directives on Discrimination Issues

Building on the EU's experience of dealing with sex discrimination, a consensus emerged in the mid-1990s concerning the need for the European Community to tackle discrimination on a number of additional grounds. Civil society organizations and the European Parliament were instrumental in driving this debate forward.

The result of this process was the inclusion of a new Article 13 in the EC Treaty, following the entry into force of the 1997 Amsterdam Treaty. Article 13 provides new powers to suspend the rights of a Member State which were found to be in breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. And, for the first time, the Treaty enabled the Community to combat discrimination on a wider range of grounds than ever before, such as disability, racial and ethnic origin, religion and belief, age and sexual orientation.

On the basis of this new Treaty Article the European Commission put into effect the powers set out in Article 13 and at the end of 1999 came forward with a package of proposals. This led to the unanimous adoption by the Council of two ground-breaking Directives. On 27 November 2000, *Directive 2000/78/EC*¹ 'Establishing a general framework for equal treatment in employment and occupation', was adopted. The Directive prohibits any

¹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (published in OJ L 3032 of 2 December 2000).

discrimination, be it direct or indirect, on the grounds of religion or belief, *disability*,² age or sexual orientation.³

This Directive together with the Racial Equality Directive 2000/43/EC,⁴ prohibit discrimination in employment and training. They cover, in particular, recruitment and promotion, the provision of training, pay, working conditions and practices and dismissals.

Directive 2000/78/EC

- provides the basic rights of protection and it requires employers to make reasonable adjustments to cater for the needs of a person with a disability who is qualified to do the job in question;
- provide a common level of protection against discrimination across the Union requiring changes to the existing legislative framework in all Member States;⁵
- forms part of an integral strategy to promote an improved quality of life for European citizens;
- by helping to eliminate discrimination and promote equal opportunities, the Union contributes actively to the protection of fundamental rights and freedoms and to reducing the human and financial costs of exclusion.

Scope of Directives

The Directives outlaw discrimination on grounds of racial or ethnic origin and on grounds of religion and belief, disability, age and sexual orientation, in respect of:

- access to employment and self-employment as well as to opportunities for promotion
- access to vocational guidance and training at all levels as well as work experience
- employment and working conditions, including dismissals and pay
- membership of trade unions and professional bodies and access to any benefits they provide

The abovementioned Directives outlaw the following forms of discrimination:

- *direct discrimination*, which arises where a person is treated less favourably than another is, has been or would be treated on any of the grounds covered by the Directives;

² Before the revision of the Treaty in Amsterdam, the Community had no power to tackle discrimination based on disability. However, the European Parliament had 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’ ” 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 based on the ground of disability.”

³ These Directives are supported by an action programme established by Council Decision 2000/750/EC.

⁴ Council Directive 2000/43/EC implementing the Principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000).

⁵ EU Member States were required to bring their national laws into line with the Racial Equality Directive by 19 July 2003 and with the Employment Equality Directive by 2 December 2003. They could, however, extend the deadline in respect of age and disability by up to three years, provided they informed the Commission. The new Member States were required to implement the Directives by the time they joined the Union on 1 May 2004.

- *indirect discrimination*, which arises where an apparently neutral provision, criterion or practice, whether intentionally or not, puts people of a particular racial or ethnic origin, religion or belief, disability, age or sexual orientation at a particular disadvantage compared with others. If it has this effect, the provision, criterion or practice will constitute discrimination unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
- *harassment*, which arises when unwanted conduct related to any of the grounds covered by the Directives takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- the Directives also ban instructions to discriminate and *victimisation* (or retaliation against those complaining about or giving evidence of discrimination).

B. Member State Adoption of Legislation

Although some laws prohibiting discrimination were in place before the adoption of the Directives in most countries, in none of them did they provide the protection required under the Directives. Member States have, therefore, had the task of implementing national legislation to comply with the new requirements. It has been for each MS to choose how to do this in the light of their legal and cultural traditions and the legislation already in place.

In *Malta*, legislation in force protecting disabled people consists of the following:

- Chapter 210 Persons with Disability (Employment) Act⁶
 - Legal Notice 156 of 1995 Registration and Appeal of Persons with Disability Regulations
 - Legal Notice 157 of 1995 Standard Percentage of Employment of Persons with Disability Order
 - Legal Notice 158 of 1995 Designated Employment of Persons with Disability Order
 - Legal Notice 159 of 1995 Part-Time Employment of Persons with Disability Regulations
- Chapter 343 Employment and Training Services Act⁷
- Chapter 413 Equal Opportunities (Persons with Disability) Act
- Chapter 452 Employment and Industrial Relations Act⁸
 - Legal Notice 461 of 2004 Equal Treatment in Employment Regulations⁹

Maltese Law has been brought into line with Directive 2000/78/EC in the following way:

- It prohibits discriminatory treatment for membership in employees' and employers' organization (Regulation 7 of L.N. 461)

⁶ Enacted by Act II of 1969, as amended by Acts: XIV of 1969, XXII of 1976, XI of 1977, XIII of 1985 and XXVI of 1995.

⁷ Act XXVIII of 1990, as amended by Acts XV of 1995, XVI of 1997 and II of 2005.

⁸ Act XXII of 2002, as amended by Acts IX of 2003 and III of 2004.

⁹ Act I of 2000.

- It prohibits discriminatory treatment by an employment agency (Regulation 8 of L.N. 461)
- remedies are allowed before Industrial Tribunal and under the competent court of civil jurisdiction. (Regulation 10 of L.N. 461)
- the complainant may be the person alleging to be discriminated against as well as any other person having a legitimate interest (may act on behalf or in support of complainant) in ensuring that regulations are complied with (Regulation 11 of L.N. 461)
- duty of employer or any person or organization to whom these regulations apply to disseminate information (Regulation 12 of L.N. 461)
- provides for sanctions - not exceed Lm1,000 or imprisonment of not exceeding 6 months (Regulation 14 of L.N. 461)
- discriminatory treatment includes both direct and indirect discrimination and includes harassment (Regulation 3 of L.N. 461). Victimization is dealt with under Article 28 of Chapter 452.
- burden of proof - Once someone who considers that they have not been treated equally establishes facts from which it may be presumed that discrimination has occurred, it is then for the person accused of discrimination to prove that there has been no breach of the principle of equal treatment. (Regulation 10(3) of L.N. 461)

Maltese law has gone beyond the requirements of the Directive:

- Provides for a system of registration of disabled people into a 'Register of Persons with Disability' (Regulation 5 of Chapter 210);
- Minister responsible may determine which employers are to give employment to a number of registered persons. This is done by means of a quota determined by an Order published in the Government Gazette (Regulation 15 and 16 of Chapter 210);
- Positive action extends further than at the time of actual employment. It includes (a) vocational guidance services (b) vocational training courses (c) industrial rehabilitation courses (d) disablement resettlement services. While being provided with these services, a person suffering from a disability remains under adequate medical supervision. (Regulation 3 of Chapter 210);
- Minister responsible may extend regulations under Chapter 210 to apply to part-time employment (Regulation 28).

In spite of the abovementioned legislation protecting disabled people from discrimination in employment and occupation, a number of issues still need to be addressed:

(i) Definition of 'Disability'

Under Chapter 413 disability means 'any physical or mental impairment that substantially limits one or more of the major life activities of a person'. This definition is adopted under L.N.461 of 2004 (implementing Directive 2000/78/EC and Directive 2000/43/EC). On the other hand Chapter 210 defines disability in terms of employment, that is, a person who is 'substantially handicapped in obtaining or keeping employment or in undertaking work in his own account'. Once again reference is made to both physical and mental impairment.

Although different definitions are adopted they do not seem to create any conflict. However, a single definition should be adopted.

Furthermore a close look at definitions adopted in other countries highlights the limitation that exists under our definition of 'disability'. Under the law of New South Wales (Australia) the definition of disability is very broad and includes people with learning difficulties, intellectual disability, people having a disfigurement or different formation of any part of the body, people having a physical illness or disease that makes, or has made, any part of the body or brain work differently and any organism in the body that could cause disease or illness with no symptoms such as hepatitis or HIV. Under the Disability Discrimination Act (DDA), applicable in the UK as well as in Northern Ireland, a wide definition is adopted covering people with severe disfigurements and in certain circumstances people who have had a disability in the past such as people who had severe depression, but have since recovered.

For the purpose of an anti-discrimination debate a wider definition of 'disability' might have to be considered under Maltese law. The debate would then circle more on whether social services should be afforded equally to all. This might have the consequence of placing people with a different degree of disability on an equal playing field.

(ii) *The Obligation to Employ a Disabled Person*

As explained above, employers reaching a specified quota of employees are bound to employ a person with a disability. This quota might require further scrutiny. Although this appears to be a form of positive action it might still not produce the desired results, that is, of having disabled persons integrated in society on a more widespread basis. In the UK a similar system was adopted however after carrying out a survey it was established that a small number of employers fell under this quota (the UK Disability Discrimination Act (DDA) did not apply to an employer who had less than 15 employees) thereby excluding the majority of employers (90%). Therefore on 1 October 2004 the UK DDA abolished this exemption and all employers are subject to the DDA. In Malta there might be the need to revise this quota; however proper consultation would be required with all affected parties.

(iii) *Justifying Discrimination*

Regulation 4 of L.N. 461 allows difference in treatment where the objective is legitimate and the requirement is proportionate.¹⁰ Unfortunately, due to a lack of Maltese case law this may be open to interpretation and abuse. In the UK the DDA has been amended to limit use of the existing "get out" clause that enables employers to justify some cases of direct discrimination against disabled people. Regulation 4 might also require amendments so as to have an exhaustive list of justifications.

Article 5 of Directive 2000/78 states that the employer is required to take appropriate measures, where necessary, to enable a person with a disability to have access to, participate or advance in employment, or to undergo training ... 'unless such measures would impose a

¹⁰ Article 5 of Directive 2000/78 is phrased in the following manner. The employer may take appropriate measures ... 'unless such measures would impose a disproportionate burden on the employer.'

disproportionate burden on the employer.’ Therefore the proof required under the Directive is that the measure is ‘disproportionate’ rather than ‘legitimate and proportionate’ as is required under Regulation 4 of L.N. 461.

(iv) Positive Action

The recognition of the limits of both direct and indirect discrimination had led law-makers to strike out in a new direction, namely the imposition of positive duties to promote equality, rather than just the negative requirement to refrain from discriminating. Therefore the concept of employment discrimination in Europe is expanding from direct and indirect discrimination to reasonable accommodation.

The requirement to take positive action with regard to disabled people is expressly provided for under Article 7 of Directive 2000/78/EC. This Article holds that

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

Regulation 6(1) of L.N. 461 states:

Nothing in these Regulations shall render unlawful any act done in or in connection with -

- (a) affording persons of a particular religion or religious belief, disability, age, sexual orientation or racial or ethnic origin, access to benefits relating to training which would help prepare them for a particular work or
- (b) encouraging such persons referred to in paragraph (a) to take advantage of opportunities for doing a particular work

where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to any of the grounds referred to in regulation 1(3).

The Directive goes further than L.N. 461 in that it implies the ‘maintaining or adopting of specific measures’ while L.N. 461 merely refers to encouragement to take advantage of opportunities related to a particular work. In no way does it impose an obligation on the employer or the State to increase those opportunities or make them more available to disabled people. Chapter 210 of the Laws of Malta which was enacted in 1969, and amended recently in 1995, shows that Malta has in fact been adopting measures to protect disabled persons way before the EU Directive was adopted. Therefore, the lack of incorrect implementation might not have any negative repercussions, although for clarity’s sake this section should be amended to conform with the Directive.

(v) Social Dialogue

Articles 13 and 14 of Directive 2000/78/EC regarding dialogue with social partners and appropriate non-governmental organisations have been omitted from L.N. 461. This is

particularly important in the light of Article 19 of the Directive which requires Member States to communicate the necessary information to the Commission to enable it to draw up a report for the European Parliament and the Council on the application of the Directive. If the views of the social partners are omitted from any Maltese report drawn up for this purpose the result will be a report with incomplete information being submitted to the Commission, making it impossible to address specific problems encountered by employers and employees.

(vi) Chapter 452

Part IV of Chapter 452 of the Laws of Malta provides for the ‘Protection against Discrimination related to Employment’.

Regulations 26 and 27 prohibit discrimination in the following instances:

- (a) advertising or offering of employment
- (b) terms of payment or employment conditions
- (c) work management, distribution of tasks and working conditions
- (d) employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.

L.N. 461 also refers to equal treatment with regards to selection criteria, conditions and similar matters. These provisions however should have been incorporated in the enabling Act to make matters more clear. In fact there is repetition in Chapter 452 and Legal Notice 461 as regards (a) recourse to be made to Industrial Tribunal (b) applicable sanctions. On the other hand no reference is made to the civil court in Chapter 452 as was made under the Legal Notice.

(vii) Harassment

Under the ‘Employment and Industrial Relations Act’ it seems that reference is merely being made to sexual harassment¹¹ [Regulation 29], while under the L.N. adopted under this Act, the definition is wider to include (a) any form of harassment which has the ‘purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’ and (b) harassment may also occur to people due to their disability, age, sexual orientation etc. Once again matters need to be clarified to make the definition applicable under the Legal Notice applicable under the abovementioned Act and thereby avoid any inconsistencies. Furthermore, Maltese lawmakers might have to consider introducing a new provision which makes it illegal to harass disabled people even after the employment relationship has ended. Such a provision has been introduced in the UK Disability Discrimination Act.

¹¹ ‘subjecting such person to any unwelcome act, request or conduct, including spoken words ... which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.’

(viii) *Equality Body*

The Racial Equality Directive requires a specialised body to be designated in each Member State to promote equal treatment in relation to race or ethnic origin. These bodies must provide independent assistance to victims of discrimination to pursue their complaints, conduct independent surveys, publish independent reports and make recommendations.

Directive 2000/78 however does not provide for the establishment of such a specialised body to deal with other forms of discrimination. In spite of this, there is a trend towards the establishment of single equality bodies dealing with all of the grounds of discrimination covered by the Directives. In many cases, these national bodies deal with sex discrimination alongside the other grounds covered by Article 13 EC. The Maltese government is taking up this issue, possibly following models of equality bodies set up in other Member States.

(ix) *Comprehensive Approach*

Another consideration which needs to be made when addressing equal treatment of disabled people is their physical accessibility to the work place. The field of employment is closely linked to several other areas such as for example education, transportation and access to services and goods. Therefore legislation prohibiting discrimination within the field of employment only, is not enough.

In order for the disabled person to be an active member of society in all areas and to enhance a broad non-discrimination approach, a new disability-specific directive is needed. Disabled people in Europe look with envy to the legislation in the US (the Americans with Disabilities Act) and want an equivalent European Disabilities Act and ask for disability-specific comprehensive non-discrimination legislation.

A number of countries in Europe have already adopted laws that afford greater protection to disabled people. The Maltese government has taken action in this respect and in an attempt to remedy any marginalization suffered by disabled people adopted Act I of 2000 whereby a comprehensive approach was adopted. Disabled people under the 'Equal Opportunities (Persons with Disability) Act' have been given wide protection in a number of fields. Apart from equal opportunities in Employment the Maltese government extended this protection to the field of education and accommodation and disabled persons were also given the right to access to premises as well as the right to expect that they are provided with goods, facilities and services including transport.

The UK has started discussions on a more comprehensive approach. The Government has signaled its intention to bring down any remaining barriers to equality for Britain's ten million disabled people, with the Minister responsible describing disability rights as 'the last great cause of emancipation in our time'. The DDA goes so far as to allow Government to set minimum standards so that disabled people can use public transport easily.

Talks have already started at an EU level and in 2002 it was proposed to draw up a Disability Specific Directive at a meeting of the Disability Intergroup of the European Parliament. The legal base of this *Disability Specific Directive* is Article 13 of the EC Treaty, which enables the Community to take initiatives to combat discrimination on the grounds of disability. A specific Disability Directive would complement the Commission's European Action plan on disability and would work in parallel to the Framework Directive on Equal Treatment in Employment. The 'Proposal for a Directive Implementing the Principle of Equal Treatment for Persons with Disabilities' would prohibit the discrimination disabled people experience in access to information and procedures, to buildings, telecommunication, transport modes and other public spaces and facilities and to education. Among other things the proposal also ensures that 'broadcasts, advertisements and the media do not contain insulting portrayals of disability or contain any incitement to hatred on the grounds of disability' and would ensure the respect for the dignity of disabled people in political and public life.

Although Malta is way ahead and has its equivalent of an EU Specific Disability Directive it would be wise to keep an eye on the developments of such an important piece of legislation. Apart from the possibility of having to introduce other forms of protection under Maltese law, the Maltese government might contribute to moving this proposal forward while sharing its five year experience with other European countries.

C. Commitment at EU Level

The European Union has made considerable progress in acknowledging the need to ensure the equal effective enjoyment of all human rights by people with disabilities. In its 1996 Communication on equal opportunities for disabled people,¹² the Commission made clear that 'the old medical-centred approach' was giving way to a social approach. A change in perspective has important implications. It recognizes the fact that the discrimination faced by disabled people is a socially created phenomena which is not directly related to the impairment *per se*, but rather arises from the environment which fails to accommodate people with disabilities.

This is a critical orientation of perspective. It has important implications for the way in which policy and law in relation to disability are developed and interpreted, as well as for its substantive content. It is under this perspective that Maltese law needs to be analysed and possibly be re-defined. The focus should be on the many barriers within the social environment which are faced daily by people with a disability who seek to carry out ordinary activities of everyday life.

The growing attention being given to discrimination on the ground of disability, as well as other grounds, is reflected in the work of the EU which although significant fall short of a specific Disability Directive mentioned earlier.

¹² COM(96) 406 final of 30 July 1996.

D. Fundamental Social Rights

The European Union's commitment to the principle of non-discrimination was reaffirmed by the proclamation in December 2000 of the Charter of Fundamental Rights.¹³ Article 20 of the Charter sets out the general principle of equality before the law and Article 21 deals with the principle of non-discrimination. Article 21(1) states:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

This Article goes further than Article 13 and includes seven additional grounds showing the commitment the Union has taken towards a policy of non-discrimination.

The Constitution under Article III-118 provides that 'In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or disbelief, disability, age or sexual orientation.' Therefore non-discrimination features once again among the central objectives of the EU.

The Charter has been incorporated in the Treaty establishing a Constitution for Europe and though both are not yet legally binding the Charter has already become an important reference document for the ECJ in its interpretation of Community law.¹⁴ The ECJ has consistently held that fundamental human rights, derived from the international instruments to which all the Member States are signatories, form part of the general principles of Community law, the observance of which it ensures.

E. European Employment Guidelines

At the March 2000 Lisbon European Council, the EU defined a comprehensive 10-year strategy aimed at a long-term economic growth, full employment, social cohesion and sustainable development. This strategy is underpinned, in particular, by the European Employment Strategy and the EU's Social Inclusion Process. One of the aims of the so-called 'Lisbon agenda' is to raise the employment levels of groups that are currently under-represented in the labour market; among them are people with disabilities. The importance of taking action to promote the integration of disadvantaged groups and the link with non-discrimination has been reaffirmed within the framework of the EU's European Employment Strategy, which includes a Guideline highlighting the need to integrate disadvantaged groups in the labour market including measures to combat discrimination in the workplace.¹⁵ Guideline 7 holds that:

¹³ http://europa.eu.int/comm/justice_home/unit/charte/index_en.html

¹⁴ Case C-245/01 *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk* ECR [2003] 0000; Cases T-116/01 & T-118/01 *P&O European Ferries (Vizcaya) & SA v and Diputacion Foral de Vizcaya v Commission of the European Communities* ECR [2003] 0000.

¹⁵ Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of the Member States.

“Member States will foster the integration of people facing particular difficulties on the labour market, such as early school leavers, low-skilled workers, people with disabilities, immigrants, and ethnic minorities, by developing their employability, increasing job opportunities and preventing all forms of discrimination against them”.

F. Commitment at International Level

A UN Ad Hoc Committee was set up by UN Resolution 56/168 to ‘consider proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities.’ A new UN legally binding instrument would complement the existing human rights framework. The emphasis on discrimination is fully in line with the Community rights-based approach to disability, which implies that people with disabilities should have the opportunity to enjoy the rights on an equal footing with the rest of the population. It is also in line with policy developments which have taken place on the basis of Article 13 of the EC Treaty, which enables the Community to take initiatives to combat discrimination on the grounds of disability.

The Special Rapporteur of the United Nations High Commission on Human Rights,¹⁶ in its report on Human Rights and Disability indicated that:

“In most countries, human rights violations against disabled people take the form of unconscious discrimination, including the creation and maintenance of man-made barriers preventing disabled people from enjoying full social, economic and political participation in their communities. Most governments appear to have a narrow understanding of human rights vis-à-vis disabled people and believe they need only abstain from taking measures, which have a negative impact on them. As a consequence, disabled people are neglected in the area of human rights policy and legislation”.

Therefore the marginalisation of disabled people according to this Rapporteur is still a reality. They are often deprived of education or blocked from meaningful and gainful employment. People with intellectual disability may be incarcerated in inhumane institutions and their civil and political rights be frequently abused. Therefore it is important and useful to develop a new UN legally binding instruments which makes more clear the relevance and application of the general human rights standards to persons with disabilities. The Union’s participation in the drawing up of such an instrument will only re-enforce the work already done within the Community and may turn out to be a ‘political catalyst and educational tool to enable a change in the way people with disability enjoy their rights’.¹⁷

G. Equality and Non-Discrimination

When dealing with gender equality the Constitution, under Article III-116, provides that Community institutions and Member States should do more than merely ensure the absence

¹⁶ Report on Human Rights and Disability by Leandri Despouy:
<http://www.un.org/esa/socdev/enable/dispaperdes0.htm>

¹⁷ Communication from the Commission to the Council and the European Parliament COM(2003) 16 final.

of discrimination from its employment, educational and other specified functions. They should also act positively to promote equality between men and women throughout all policy making and in carrying out all those activities to which the duty applies. The Constitution does not impose a similar requirement with regard to other grounds which often are the cause of discrimination. There is some evidence of the notion of equality in Community law prior to the Constitution such as in Articles 2 and 3(2) of the EC Treaty as well as in case law such as the Dory case where Attorney General Stix-Hackl has interpreted this as imposing an obligation on the Community actively to promote equality between men and women.

The EC Treaty also states that European laws or framework laws ‘shall establish measures to ensure the application of the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. They shall be adopted after consultation of the Economic and Social Committee.’ Finally

With a view to ensuring full equality in practice between women and men 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 to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.

However neither in the EC treaty nor in the case law has there been a move towards equality in other grounds of discrimination. A move in that direction was only made in 2004 by the Commission through the publication of a Green Paper and previously in the draft Disability Specific Directive drawn up by the European Disability Forum where the principle of equal treatment was held to ‘mean that there shall not be no direct or indirect discrimination’.¹⁸ Throughout the draft Directive it is made clear what the intention of the European Disability Forum was when drawing up the Directive. The provision for access to information and procedures, to buildings, telecommunication, transport modes, education, public spaces and facilities for disabled people go beyond simple non-discrimination, but requires positive action by Member States to ensure equal treatment of disabled people.

H. Green Paper: ‘Equality and Non-Discrimination in an Enlarged Union’

In May 2004 the EU Commission published the Green Paper *Equality and Non-Discrimination in an Enlarged Union*.¹⁹ The Green Paper sets out the European Commission’s analysis of the progress that has been made so far. It is presented as an invitation to influence EU policy and legislation on discrimination and equality. In so doing, it responds to calls from the European Parliament and others to organize a public consultation on the future development of policy in this area.

To confirm the EU commitment towards the fight against discrimination the Green Paper mentions Article 21 of the *EU Charter of Fundamental Rights*. However the Green Paper overlooks the fact that this provision only prohibits discrimination. Indeed the principle of

¹⁸ Article 2 of the draft Specific Disability Directive.

¹⁹ COM (2004) 379 final.

gender equality in the EC Treaty requires the taking of active steps towards the achievement of equality. Furthermore, the Green Paper does not discuss the other relevant provisions of Title III of the EU Charter, in particular Article 23.

The Green Paper does not put enough emphasis on the concept of equality, as distinct from that of discrimination, and on how this has been shaped by the complex interaction between binding legislation, soft law and case law. There is a clear imbalance between background information and analysis devoted to non-discrimination on the one hand and the lack of attention paid to the positive duty of the Union to promote equality in general and gender inequality in particular.²⁰ It seems to reinforce the idea that there is a hierarchy of equalities with gender equality losing ground.

Conclusion

The question to be asked at this point is whether a much stronger move towards the notion of equality is desirable at an EU and Member State level? The answer to this question goes to the heart of current European political controversy, that is, on the relative balance that is appropriate between social progress and competitiveness, and the ability to sustain substantial social spending in the context of an increasingly globalised economic system. Such a point may not be ignored and must be taken into consideration at any stage of discussion between the concerned social partners. Only then may we aspire to go beyond the mere establishment of policy to actually having that policy implemented to the benefit of those more disadvantaged and in need.

²⁰ Social Platform's response to the Green paper on Equality and Non Discrimination in an Enlarged Union, August 2004 (www.socialplatform.org)