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# Between Social Policy and Union Citizenship: the Framework Directive on Equal Treatment in Employment

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## *Abstract:*

*In December 2000, the Council adopted the Framework Directive forbidding discrimination on grounds of religion or belief, disability, age and sexual orientation in the field of employment. The Directive adopted Article 13 EC as its legal basis. However, there are strong arguments suggesting that this was not the correct choice of legal basis; in particular, the Social Chapter of the EC Treaty (Title XI) provided an alternative legal foundation, including different legislative processes (co-decision and the social dialogue). This article first examines the legal grounds requiring a different legal basis for the Directive and then explores the wider political imperatives that may explain the preference of the EU institutions for relying instead on Article 13 EC.*

## Introduction

Article 13 EC forms the legal bedrock of the new EU anti-discrimination law that has emerged since 1999. Although it extends a broad competence for the Council to take “appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”, this is qualified by the opening statement: “without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community”. The first limb of this proviso clearly aims at regulating the relationship between Article 13 EC and other potentially overlapping Treaty bases. In particular, it indicates a subsidiary role for Article 13 EC - that it should only be deployed where other Treaty provisions cannot be used.<sup>1</sup>

The first Directive adopted on the basis of Article 13 EC was the Racial Equality Directive.<sup>2</sup> As the scope of this Directive is quite wide-ranging, forbidding racial discrimination in areas such as healthcare, education and housing,<sup>3</sup> it was clear that Article 13 EC was the only appropriate legal foundation for this measure. However, the second Directive based on this article, the so-called Framework Directive,<sup>4</sup> had a much more limited scope – essentially combating discrimination in

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<sup>1</sup> Waddington, “Testing the limits of the EC Treaty Article on non-discrimination” (1999) 28 I.L.J. 133, at 135; Flynn, “The implications of Article 13 EC – after Amsterdam, will some forms of discrimination be more equal than others?” (1999) 36 C.M.L.Rev. 1127, at 1133.

<sup>2</sup> Directive (E.C.) No. 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L180/22. See further, Guild, “The EC Directive on race discrimination: surprises, possibilities and limitations” (2000) 29 I.L.J. 416.

<sup>3</sup> Article 3, *ibid.*

<sup>4</sup> Directive (E.C.) No. 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16. See further, Skidmore, “The EC Framework Directive on Equal Treatment in Employment: towards a comprehensive Community anti-discrimination policy?” (2001) 30 I.L.J. 126; Tyson, “The negotiation of the European Community Directive on Racial Discrimination” (2001) 3 *European Journal of Migration and Law* 199.

employment and vocational training based on religion or belief, disability, age or sexual orientation.<sup>5</sup> Thus, given the strong connections between anti-discrimination law and European social policy in the context of employment and occupation, there was arguably a need to determine the legal relationship between Article 13 EC and the Social Chapter of the EC Treaty. In particular, it was necessary to determine whether Article 13 EC was the appropriate legal basis for the Framework Directive, or whether, in the alternative, the Community competences for social policy, and specifically Article 137 EC, should have been used instead. Certainly, the different legislative procedures that exist between these two Treaty Articles mean that the choice of legal basis for the Framework Directive is more than a pedantic debate between legal academics. It undoubtedly had a direct impact upon the final content and strength of this measure.

The first section of this paper examines briefly the approach of the Court of Justice to determining the appropriate Treaty base for Community legislation. This is followed by a specific discussion of the choice of legal basis for the Framework Directive. The concluding section analyses the wider implications of the preference for Article 13 EC over the Social Chapter of the EC Treaty and what this may reveal about the future direction of EU anti-discrimination law.

## Treaty base dilemmas and the Court of Justice

Disputes concerning Treaty base must seem rather tedious and formalistic to the lay observer of Community law. However, such proceedings often go to the heart of the delicate balance of powers between the various institutions on the one hand, and the Union and its Member States on the other.<sup>6</sup> European social policies have proven especially susceptible to Treaty base disputes, reflecting the weaker and more fragmented powers of the Community in these fields. The Court of Justice has had to mediate disagreements on the implementation of policies in areas such as the environment, culture and health.<sup>7</sup> When called upon to resolve these disputes, it has stressed the need for an *objective* assessment of the appropriate provision. Whilst the selection of a Treaty base may be a matter of intense political controversy during the legislative process, the Court of Justice claims to disregard this background, claiming that allowing political factors to influence its decisions would be “contrary to the principle of legal certainty”.<sup>8</sup> On the contrary, it consistently maintains that “the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure”.<sup>9</sup> The content of the legislation is clearly the substantive provisions of the instrument. The more contentious aspect appears to be the determination of the aim of the legislation.

Furthermore, one should note that there are also situations where more than one Treaty base could plausibly be used. However, the Court’s response to these situations has been varied. In its decision on a programme to promote linguistic diversity, the Court of Justice referred to the need to identify the “centre of gravity” of

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<sup>5</sup> Article 3, *ibid.*

<sup>6</sup> Lenaerts, K., and Van Nuffel, P., *Constitutional law of the European Union* (1999, Sweet & Maxwell) at 89.

<sup>7</sup> See, *inter alia*, Cases C-164/97 and 165/97 *Parliament v. Council* [1999] E.C.R. I-1139; Case C-376/98 *Germany v. Parliament and Council* [2000] E.C.R. I-8419.

<sup>8</sup> paras 44-45, Case C-269/97 *Commission v. Council* [2000] E.C.R. I-2257.

<sup>9</sup> para 23, Case C-22/96 *Parliament v. Council* [1998] E.C.R. I-3231.

the legislation.<sup>10</sup> If the legislation impacts upon two different policy areas, with both aspects being “equally essential” to the measure,<sup>11</sup> then a dual Treaty base should be employed, so long as the legislative procedure is identical for both provisions. In *Titanium Dioxide*,<sup>12</sup> the Court was confronted with a measure that *prima facie* demanded a dual legal base, but the two articles were incompatible as they provided for two different legislative procedures. Interestingly, the Court indicated that in this scenario preference should be given to the Treaty base that provides the greatest role for the European Parliament.<sup>13</sup>

The difficulty with the principle in *Titanium Dioxide* is that it returns to essentially *political* motivations to justify the preference for enhancing the prerogatives of the Parliament over those of the Council, whereas the Court’s starting point is the legally objective nature of Treaty base selection. Recent judgements appear to avoid findings of a dual Treaty base, instead concentrating on the identification of the instrument’s “principal purpose”<sup>14</sup> or “main object”.<sup>15</sup> This in turn implies a more decisive resolution of the boundaries between the different Treaty provisions.

Yet, as much as the Court wishes to depoliticise decisions in this sphere, it is difficult to escape the institutional power struggles that surround such litigation.<sup>16</sup> Indeed, as demonstrated below, the Commission’s choice of legal basis for the Framework Directive is illustrative of the priority accorded to these factors; considerations that arguably provide evidence of an underlying policy shift regarding the future direction of Community anti-discrimination law.

## The legal foundations of the Framework Directive

As noted earlier, the legal basis for the Framework Directive is Article 13. Incorporated within the EC Treaty by the amendments introduced at Amsterdam, this article provides a dedicated legal basis to ‘combat’ discrimination on a number of specified grounds, thus:

“Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.”  
(Emphasis added)

Forming what may be described as a *lex specialis* in combating discrimination, Article 13 certainly appears to provide an obvious choice of legal basis for the Framework Directive. Upon closer examination, however, it becomes clear that the legislative potential of this article is limited by two key provisos within its own text (as

<sup>10</sup> Case C-42/97 *Parliament v. Council* [1999] E.C.R. I-869, 897.

<sup>11</sup> *ibid.*

<sup>12</sup> Case C-300/89 *Commission v. Council* [1991] E.C.R. I-2867.

<sup>13</sup> *ibid.*, p. 2900.

<sup>14</sup> para 60, Case C-36/98 *Spain v. Council* [2001] E.C.R. I-779.

<sup>15</sup> para 27, Case C-377/98, *Netherlands v. Parliament and Council* [2001] E.C.R. I-7079.

<sup>16</sup> O’Neill, “The choice of a legal basis: more than a number” (1994) 1 *Irish Journal of European Law* 44, at 58; Cullen and Charlesworth, “Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States” (1999) 36 *C.M.L.Rev.* 1243, at 1270.

emphasised above). Whilst both of these provisos have the general aim of subjecting the operation of Article 13 to the wider legal regime of the EC Treaty, a focus is placed, for the purposes of this paper, on the ‘without prejudice’ clause contained in the first proviso, that is, the wording “Without prejudice to the other provisions of this Treaty...”. It is contended that the existence of this clause, and the presence of a more suitable legislative alternative, should have precluded recourse to Article 13 as the legal basis for the Framework Directive.

### The ‘without prejudice’ clause - its operation

Clearly, the purpose of the ‘without prejudice’ clause in Article 13 is to prevent reliance on this article where its application would prejudice that of other legal bases within the EC Treaty. However, whilst its purpose is clear, uncertainty remains as to the particular circumstances that would trigger its operation.

Some guidance as to the interpretation of this clause can nonetheless be gained from a similarly worded provision in Article 12 EC which specifies that the operation of Article 12 is “... without prejudice to any *special* provisions contained [elsewhere in the Treaty] ...” (Emphasis added).<sup>17</sup> Interpreted by the Court of Justice as referring “*particularly* to other provisions of the Treaty in which the application of the general principle set out in ... [Article 12] is given *concrete form* in respect of *specific situations*” (emphasis added),<sup>18</sup> this clause certainly offers some interpretative value for its equivalent in Article 13.

It is important to stress, however, that such guidance cannot translate in its entirety to the operation of Article 13 because there exists a subtle, yet crucial, difference between the wording of these two clauses. In contrast to Article 12, which refers to “... *special* provisions contained [in the Treaty]...”, the ‘without prejudice’ clause in Article 13 simply refers to “... *other* provisions of [the] Treaty ...” (emphasis added), a difference in wording that arguably renders the ‘without prejudice’ clause in Article 13 susceptible to a greater range of alternative legal bases than that under Article 12.<sup>19</sup> It is argued, therefore, that the ‘without prejudice’ clause under Article 13 should be triggered, not only by those legal bases giving *concrete form* to the principle of non-discrimination (through *special* provisions),<sup>20</sup> but also by those *other* Treaty

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<sup>17</sup> The full text of Article 12 reads as follows: “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.” As such, this article both prohibits discrimination on grounds of nationality, as well as offering a dedicated legal basis for the adoption of secondary measures sharing this aim.

<sup>18</sup> See, Case C-186/87 *Ian William Cowan v. Tesor Public* [1989] E.C.R. 195 at para 14. There are two elements from this interpretation that stand out as being significant. First, the use of the words “concrete form” implies that the relevant principle must be *sufficiently apparent* in the alternative legal basis before the ‘without prejudice’ clause in Article 12 EC can be activated. Second, the reference to “specific situations” indicates that the alternative legal basis must also delineate a more *specific* area of Community activity or competence in which the relevant general principle has an application.

<sup>19</sup> Waddington suggests that there are at least two factors indicating that the reference to “other” in Article 13 EC should be interpreted differently to the word “special” in Article 12 EC. “Firstly, while the opening words in the original draft of Article 13 where modelled on Article 12, the reference to “special provisions” was later removed under the Dutch presidency. Secondly, the distinction between the words “other” and “special” in the two articles can also be found in other language versions of the Treaty”, see Waddington, L, “Testing the limits of the EC Treaty Article on Non-Discrimination” (1999) 28 I.L.J. 133, at 135.

<sup>20</sup> *ibid.* In the context of Article 12 EC, the Court of Justice gave the following examples of *special provisions*: “the provisions concerning the free-movement of workers, the rights of establishment and the freedom to provide services”, see *Cowan v. Tesor public*, above, at para. 14.

provisions that - while not explicitly referring to this principle - encompass *specific* areas of legislative activity in which it may be relevant.<sup>21</sup> Thus, in terms of the Framework Directive and its operational context, it is contended that the ‘without prejudice’ clause in Article 13 should have been triggered by an alternative and more specific legal basis within the EC Treaty, namely that provided by the social provisions of the Treaty and, in particular, Article 137(2) EC.

### **An alternative legal basis for the Framework directive – Article 137(2)**

Located within the Community’s competences for social policy, this article enables the adoption of directives to ‘support’ and ‘complement’ the activities of Member States in the fields listed within Article 137(1) EC.<sup>22</sup> These fields are as follows:

- improvement in particular of the working environment to protect workers’ health and safety;
- working conditions;
- the information and consultation of workers;
- the integration of persons excluded from the labour market...
- equality between men and women with regard to labour market opportunities and treatment at work.

Listed with a view to achieving the objectives specified in Article 136 EC (namely, the promotion of employment, an improvement in living and working conditions, proper social protection, dialogue between management and labour, lasting high employment, and the combating of exclusion) the above fields clearly encompass a wide range of labour law issues.<sup>23</sup> As a minimum, they render Article 137(2) an obvious choice of legal basis for matters pertaining to ‘work’, the ‘working environment’, and an individual’s access thereto; matters that are at the very heart of the Framework Directive.<sup>24</sup> Thus, by applying a ‘contextual analysis’ to these fields, and doing so in light of the objectives specified in Article 136, one may argue that the Framework Directive could have easily fallen within the legislative scope of Article 137(1) and, as a result, the legislative power provided by Article 137(2).<sup>25</sup> In

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<sup>21</sup> It is important to note in this respect that the objective of Article 13 is to ‘combat’ discrimination; an objective suggesting a multi-dimensional approach which is arguably wider in scope than the mere prohibition of discrimination under Article 12. Thus, apart from the greater number of grounds covered in Article 13, this objective is more likely to encompass matters that find a more ‘specific’ legal basis elsewhere in the EC Treaty.

<sup>22</sup> Whilst the words ‘support’ and ‘complement’ in Article 137(2) would arguably place a limitation on the legislative power conferred by this legal basis relative to that found in respect of transport and the regulation of the internal market (for example), it is suggested that this direction is primarily concerned with ensuring a sensitive approach to the Community principles of subsidiarity and proportionality; see Whittle, “Disability Rights after Amsterdam: the way forward.” [2000] E.H.R.L.R. 33 at 41-42. As such, it is argued that this somewhat weaker legislative power does not prevent the adoption of a binding measure to combat discrimination in the fields listed within Article 137(1).

<sup>23</sup> If the Treaty of Nice is ratified, changes will be made to the text of Article 137. It is important to note, however, that these changes are mainly of a structural nature and will not impact on the arguments made in this paper.

<sup>24</sup> One should note in this regard that the objectives listed in Article 136 are largely echoed in Recital 11 to the Framework Directive.

<sup>25</sup> Clearly, a non-discrimination measure in the context of employment can only help realise the objectives listed in Article 136. Whilst the ‘areas’ listed within Article 137(3) and the specific exclusions detailed in Article 137(6) certainly limit the legislative scope of Article 137(1), it is argued

otherwords, the legislative power in Article 137(2) should have triggered the application of the ‘without prejudice’ clause in Article 13 and, by so doing, displaced that article as the legal basis for the Framework Directive.

### **The Commission’s arguments against Article 137(2)**

Interestingly, the potential application of Article 137(2) in the context of the Framework Directive has arguably been acknowledged by the European Commission itself, albeit by negative implication. This acknowledgement can be found in the explanatory memorandum supporting the original proposal for the Directive.

It is argued by the Commission that reliance on Article 137(2) as a legal basis for the Framework Directive should be excluded because the material and personal scope of the Directive extends beyond the fields listed in Article 137(1).<sup>26</sup> This position is supported with two principal observations concerning the intended application of the Directive. The first is that the “material scope of the provisions planned covers not only salaried employment but also self-employment and the liberal professions...”.<sup>27</sup> The implication here being that those aspects of the Framework Directive that have an application to self-employment and the liberal professions are considered to be outside the legislative remit of Article 137(1), an implication hereinafter referred to as the material scope argument. The second is that the “[personal scope of the Framework Directive] is not limited to persons excluded from the labour market”.<sup>28</sup> The implication here being that (in the context of non-discrimination at least) the legislative remit of Article 137(1) is so limited, an implication hereinafter referred to as the personal scope argument.

In addition to these two principal observations, the Commission makes a further (albeit less direct) contention elsewhere in the explanatory memorandum. It does so in relation to Article 137(6) EC; a provision excluding, among others, “pay” from the general application of Article 137.<sup>29</sup> Again this contention is made by way of implication. The Commission points out in this regard that whilst the material scope of the Framework Directive expressly includes matters relating to “pay”, the exclusion in Article 137(6) does not extend (in terms of its operation) beyond matters falling within the legislative remit of Article 137 and, in particular, subsections two or three of that article. Thus, as the Commission correctly (but unnecessarily) notes, the exclusion of “pay” in Article 137(6) does not, in itself, preclude recourse to Article 13 as the legal basis for this measure.<sup>30</sup>

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below that they do not prevent recourse to Article 137(2) in the context of the Framework Directive. Similarly, whilst Article 137 (5) specifically refers to the principle of equality between men and women as regards labour market opportunities, it is suggested that this does not detract from the legislative scope of Article 137(1) as regards other grounds of discrimination. This indent, it is argued, is reflective only of the legal context from which the social policy amendments at Amsterdam originate, that is the Agreement on Social Policy. In particular one should emphasise in this respect the relative importance of gender equality under Community law (at the time of the Agreement) and the absence of an explicit legal basis for gender equality elsewhere in this instrument.

<sup>26</sup> In the section of the explanatory memorandum entitled ‘The Legal Basis’. See Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, COM (1999) 565 final at point 4, p. 7.

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> Article 137(6) states: “The provisions of [Article 137] shall not apply to *pay*, the right of association, the right to strike or the right to impose lock-outs.” (emphasis added).

<sup>30</sup> See in this respect the explanation regarding Article 3 of the Framework Directive (detailing its material scope) under point 5 on p. 10 of the explanatory memorandum. As the Commission points out, “pay” is expressly referred to in point (c) of Article 3(1) of the Framework Directive.

It is clear, however, that this otherwise superfluous observation can only be intended to add further support to the Commission's decision not to rely on Article 137(2) as the legal basis for the Framework Directive. The implication here being that the exclusion of "pay" in Article 137(6) excludes recourse to subsection two of this article as the legal basis for the Framework Directive - an implication hereinafter referred to as the 'exclusion of pay' argument.

### **A response to the Commission's arguments**

It is contended, however, that the Commission's arguments against the use of Article 137(2) are flawed and that recourse should have been made to this provision as the legal basis for the Framework Directive. This contention is supported by a response to each of the Commission's arguments (below). For ease of presentation, these arguments are examined in reverse order:

**The 'exclusion of pay' argument.** This argument, it is suggested, is based on a misunderstanding as to the purpose of Article 137(6); a misunderstanding that, if applied generally, would severely limit the practical utility of Article 137 as a whole. It is important to note in this regard that the exclusion in Article 137(6) applies not only to "pay", but also to: "...the right of association, the right to strike [and] the right to impose lock-outs". Clearly each aspect of this exclusion is concerned with specific issues of employment policy; issues that are normally regulated *directly* by collective labour law standards. Thus, when viewed in this context, the reference to pay in Article 137(6) would appear to be more concerned with preventing Article 137 - and in particular the decision making procedure in Article 137(2) (*i.e.*, qualified majority voting) - from being used to regulate pay *directly* (such as minimum wage legislation), than with the adoption of measures that merely have an incidental application to it.<sup>31</sup> It is argued, therefore, that recourse to Article 137(2), as a legal basis for the Framework Directive, should not be precluded by Article 137(6) merely because the Directive extends its principle of equal treatment to the assessment and provision of pay.<sup>32</sup>

**The 'personal scope' argument.** This argument is concerned with the legislative remit of Article 137(1) and whether that remit would encompass a non-discrimination measure that aims to protect individuals *within* the labour market as well as those that are excluded from it. The Commission is clearly of the opinion that it would not and has presumably based this interpretation on a literal reading of the fourth indent to Article 137(1) - an indent referring to "the integration of persons *excluded* from the labour market..." (emphasis added).

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<sup>31</sup> Similarly, whilst the 'areas' specified in Article 137(3) EC (acting as exceptions to the operation of Article 137(2)) will inevitably place a limitation on the broad 'fields' listed in Article 137(1), it is argued that they would not have prevented recourse to Article 137(2) as the legal basis for the Framework Directive. Thus, while the Framework Directive does have some impact on matters concerning the protection of workers where their employment contract has been terminated as well as their collective defence and representation (that is, the second and third 'areas' listed under Article 137(3)), this impact clearly remains "incidental" to the main aim of the Directive (Case C-209/97, *Commission v. Council* [1999] E.C.R. I-8067).

<sup>32</sup> A view also taken in Whittle, above n. 22, at n. 27 to that paper, and Sciarra, S, "European Social Policy and Labour Law - Challenges and Perspectives" (1995) 4(1) *Collected Courses of the Academy of European Law* 301, at 323. To hold otherwise would impose a similarly impractical limitation on the fifth indent to Article 137(1), that is, equality between men and women with regard to labour market opportunities and treatment at work. This indent clearly seeks to encompass existing Community law on matters concerning, among others, equal pay for men and women.



It is suggested, however, that such an interpretation is overly restrictive both in respect of the fourth indent itself, as well as Article 137(1) as a whole. In the context of non-discrimination (for example), such an interpretation would severely limit the practical utility of this indent as it is difficult to imagine the Community institutions adopting a measure aiming to achieve equality of *access* to the labour market only and offering no further protection to individuals once they have secured employment. Moreover, irrespective of the particular interpretation that is accorded to this indent, it is important to note that it is merely one of five under Article 137(1) - each clearly overlapping in their respective fields of application. As such, the fourth indent should not be viewed in isolation but should instead be seen as forming part of Article 137(1) as a whole. Thus, when viewed from this perspective, Article 137(1) would arguably provide extensive coverage for most aspects of the employment context and would clearly encompass issues arising *within* employment as well those concerning an individual's *access* to it - an interpretation clearly supported by the existence of the second indent under Article 137(1) which simply refers to "working conditions" generally.<sup>33</sup>

***The 'material scope' argument.*** This argument is essentially concerned with whether or not the Framework Directive's application to "self-employment" would take this measure outside the legislative remit envisaged by Article 137(1). The Commission is clearly of the opinion in this regard that it would and appears to base this opinion on a distinction drawn between "salaried employment" on the one hand, and "self-employment" on the other.<sup>34</sup> However, whilst it indicates in the explanatory memorandum that the Directive's application to "salaried employment" would fall within the legislative remit of Article 137(1), the Commission offers no explanation as to why it considers the Directive's application to self-employment would not.

Some guidance in this respect may nonetheless be gained from the legislative construction of Article 137(1) itself and in particular the reference in the first and third indents of that article to the term "workers". One may logically assume in this regard that the Commission has equated the concept of "workers" under Article 137 with that of "salaried employees"; a concept that clearly has no relevance to persons in self-employment.<sup>35</sup> Based on this assumption, it would appear that the Commission has interpreted the relationship between Article 137 and the material scope of the Framework Directive in one of two possible ways. The first is that it views those indents within Article 137(1) that do *not* refer to (and would not therefore be limited by) the concept of 'worker', as simply being too narrow in scope to justify the Framework Directive's application to self-employment. The second (and it is

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<sup>33</sup> The Commission, however, would appear to be applying an extreme form of 'content analysis' to its interpretation of Article 137(1), viewing (it is suggested, incorrectly) each indent restrictively as well as being mutually exclusive from the others.

<sup>34</sup> Whilst a distinction is drawn in the explanatory memorandum between "salaried employment" on the one hand, and "self-employment *and the liberal professions*" on the other (emphasis added), it is suggested that the Commission, in this context, is simply aiming to distinguish between the different working structures for 'employees' and those for 'self-employed' persons. It is noted in this respect that the liberal professions have traditionally come within the category of 'self-employed' and that this approach has been retained throughout the remainder of the explanatory memorandum and the text of the Framework Directive. Salaried employment, on the other hand, would appear to refer to 'employees' because, in the main, it is an employee that would receive a salary from another person or an organisation.

<sup>35</sup> Arguably, the existence of the term "workers" in Article 137 provides the only reasonable explanation for the Commission's apparent interpretation of this article and its application to self-employment.

suggested most likely) interpretation is that the Commission views Article 137(1) as being limited in its entirety to the concept of ‘worker’ and, given its apparent interpretation of that term in this context, views the legislative power in Article 137(2) as having no application *whatsoever* to “self-employment”.

On either interpretation, therefore, the Commission’s understanding as to the legislative scope of this article appears to be based on the most commonly referred to but more restrictive definition of ‘worker’ under Community law, that is, the definition applied in respect of the free-movement of ‘workers’ under Article 39 EC.<sup>36</sup> However, by relying on this definition, the Commission would appear to have dismissed, or simply ignored, the application of an alternative and arguably more appropriate definition of ‘worker’ for the purposes of Article 137.

It is important to note in this regard that the Court of Justice has clearly acknowledged, not only that there is “...no single definition of worker in Community law...”, but that this definition “... varies according to the area in which [it] is to be applied”.<sup>37</sup> Certainly, a more expansive definition of this term has been accorded to provisions beyond Article 39. In *Khalil & Others* (for example), Advocate General Jacobs demonstrated, by reference to case law, how the Court has consistently accorded a more expansive definition to this term under Article 42 EC – a provision concerned with social security matters as they affect the free movement of workers.<sup>38</sup> In particular, he noted how the concept of self-employment has regularly been included within the legislative meaning of this term in order give effect to the purpose of this article as well as any secondary legislation enacted thereunder.<sup>39</sup> It is argued, therefore, that a similarly expansive definition of ‘worker’ should be accorded to Article 137. Like Article 42, an expansive definition of this term is necessary to ensure that the purpose of this article (and any secondary legislation emanating therefrom) is not frustrated. Presumably, the objectives of Article 137 (as specified in Article 136, above), including the promotion of employment, the improvement in living and working conditions and the combating of exclusion, are all objectives intended to apply to every form of employment. If so, then one may reasonably contend that its definition of ‘worker’ must also encompass matters pertaining to self-employment if these objectives are to be fully realised.<sup>40</sup>

<sup>36</sup> A key element to this definition is that, for a certain period of time, a person performs services for and under the direction of another in return for which he/she receives remuneration. See in this respect, Case 66/85 *Lawrie Blum* [1986] E.C.R. 2121, para. 17, Case 39/86 *Lair* [1988] E.C.R. 3161, paras 31-36 and Case C-85/96 *Martinez Sala* [1998] E.C.R. I-2691, para. 32. Clearly, therefore, the majority of self-employed persons will be unable to demonstrate an employment relationship of this nature and will, as a result, fall outside the personal scope of this definition. See in this respect, Case C-15/90 *Middleburgh v. Chief Adjudication Officer* [1991] E.C.R. I-4655, [1992] 1 CMLR 353 at para 13, where the Court of Justice observed that: “... a person who has worked only in a self-employed capacity ... before becoming unemployed cannot be regarded as a “worker” within the meaning of Article [ex] 48 [now Article 39] of the Treaty and cannot therefore rely on that provision”.

<sup>37</sup> See, Case C-85/96 *Martinez Sala* [1998] E.C.R. I-2691, at para 31.

<sup>38</sup> See, Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil & Others* [2001] E.C.R. I-7413, paras 45 - 60.

<sup>39</sup> Reference is made in this regard to, Case 19/68 *De Cico v. Landesversicherungsanstalt Schwaben* [1968] E.C.R. 473, at p.480 where the Court assimilated a self employed craftsman to a wage earner; Case 23/71 *Janssen v. Mutualites Chretiennes* [1971] E.C.R. 859, paras. 6 and 8, where the Court assimilated a self employed helper on a farm to a wage earner; Case 17/76 *Brack v. Insurance Officer* [1976] E.C.R. 1429, para. 20 where the Court extended Regulation No. 1408/71 to self employed persons and members of their families (a decision prior to the 1981 amendment which expressly incorporated self-employment within the material scope of this regulation).

<sup>40</sup> This is reinforced by the Community Charter of the Fundamental Social Rights of Workers 1989. This Charter is referred to within Article 136 EC which sets out the social policy objectives to be

Further support for this interpretation can be found in the opinion of Advocate General Leger in *UK v. Council*,<sup>41</sup> an opinion centring on what was (prior to the amendments at Amsterdam) Article 118a of the EC Treaty. This article was concerned with "... encouraging improvements, especially in the working environment, as regards the health and safety of workers", and has since been subsumed within the first indent to Article 137(1).<sup>42</sup> Commenting on the term 'worker' under Article 118a, Advocate General Leger opined that its definition was wider in scope than that of 'employed person' under Article 95(2) (ex 100(a)(2)).<sup>43</sup> He noted, in particular, that it "applies more generally to *all* workers for the purposes of Community law" (emphasis added)<sup>44</sup> and that, as a concept, it could encompass matters pertaining to self-employment.<sup>45</sup>

Thus, given the objectives of Article 137 (and the case law discussed above) it is argued that the more expansive definition of 'worker' under Community law is the only appropriate definition for the purposes of this article. In other words, the Commission's material scope argument, as with its other arguments (examined above), would appear to be unfounded. As a consequence, and in light of the clear imperative in the 'without prejudice' clause to Article 13, it is argued that recourse to this article (as the legal base for the Framework Directive) should have been precluded and that reliance should have instead been placed on Article 137(2) for the purpose of this measure.

## The Framework Directive: a social policy instrument?

Having established the persuasive arguments in favour of reconsidering the use of Article 13 for the Framework Directive, it is worth considering further the implications of using Article 137 as an alternative.

The most significant legal difference between the two provisions lies in the legislative procedure applicable. Whereas Article 13 relies on unanimity in the Council and mere consultation of the Parliament,<sup>46</sup> Article 137(2) prescribes use of the co-decision legislative procedure, including qualified-majority voting in the Council. Consequently, the Parliament at least had a good reason to seek the application of Article 137(2) as this would greatly increase its influence over the final content of the Directive. Moreover, the relevant NGOs might have been expected to

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achieved by the Community under, among others, Article 137. It has also provided a source of inspiration for the Agreement on Social Policy; an agreement that was effectively incorporated into the social elements of the EC Treaty by the amendments at Amsterdam. Of particular note for the purposes of this paper is Recital 13 to the Charter. This recital specifically acknowledges the expansive definition of worker by stating that it is necessary, in terms of the social dimension of the Community, to "ensure at appropriate levels the development of the social rights of *workers* of the European Community, especially employed workers and *self employed persons*." (Emphasis added).

<sup>41</sup> Case C-84/94 *UK v. Council* [1996] E.C.R. I-5755.

<sup>42</sup> Cf. The first indent to Article 137(1), "improvement in particular of the working environment to protect workers' health and safety;"

<sup>43</sup> Presumably the term 'employed person' should be equated with 'salaried employment'.

<sup>44</sup> See n. 41 above, at para 38.

<sup>45</sup> *ibid*, at n. 17 of the Advocate General's opinion.

<sup>46</sup> If the Treaty of Nice is ratified, Article 13 will be divided into two paragraphs. The co-decision legislative procedure and qualified majority voting in the Council will be applied for the adoption of essentially non-binding measures. Hard law instruments (such as Directives) will continue to demand unanimity in the Council and mere consultation with Parliament.

advocate this option, given the tendency of unanimity voting in the Council to impose a lowest common denominator solution.<sup>47</sup>

Nonetheless, there is no evidence of any significant pressure from either the Parliament or civil society to depart from the reliance on Article 13. There appear several underlying reasons that help explain the consensus surrounding the use of Article 13. On a purely pragmatic level, there was considerable political pressure to adopt swiftly both the Racial Equality and Framework Directives.<sup>48</sup> Whilst the co-decision legislative procedure provides a much greater role for the Parliament, it is significantly more time-consuming.<sup>49</sup> Beyond this short-term imperative, two wider themes can be identified. First, a desire to reinforce a perception that the Framework Directive concerned the rights of citizens, rather than simply labour law. Second, the possibility that use of Article 137(2) could have substantially transferred legislative control to the Social Partners.

### Article 13 and Union citizenship

One of the dominant features of Article 13 is its location within the 'Principles' section of the EC Treaty. This immediately calls attention to its constitutional relevance. In particular, it is found beside Article 12, which forbids nationality discrimination – a provision that is a cornerstone of the rights of Union citizens.<sup>50</sup> Formally, the rights ascribed to Union citizenship are listed in Articles 17 to 22 EC, yet many of these rights are quite remote from the daily lives of the Union's citizens. With the exception of the right to petition the Parliament and apply to the Ombudsman,<sup>51</sup> the rights may only be invoked in the context of travel inside or outside the Union. Clearly, the extension of rights that do not depend on travel or migration is likely to be more relevant for Union citizens in general. Therefore, constructing anti-discrimination law as part of the body of citizens' rights assists greatly in strengthening the content of Union citizenship.<sup>52</sup> This process can already be seen within the Commission's "Third report on Citizenship of the Union".<sup>53</sup> The two Directives adopted under Article 13 EC are highlighted as concrete evidence of the progress being made in enhancing the quality of Union citizenship.<sup>54</sup>

Re-branding anti-discrimination law as part of the citizenship *acquis* may in turn improve the status of the Directives before the Court of Justice. To some extent, this process has already been achieved in the earlier case law of the Court regarding the former Article 119 EC (now subsumed within Article 141 EC). In *Defrenne*, the Court elevated equal pay between women and men from an element of labour law, to the status of a fundamental norm of Community law.<sup>55</sup> More recently, the Court has

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<sup>47</sup> Certainly, several of the exceptions eventually included in the Framework Directive reflect quite specific concerns of individual Member States. This is most evident in relation to the exceptions provided for policing and teaching in Northern Ireland (Article 15).

<sup>48</sup> See further, Bell, M., *Anti-discrimination law and the European Union* (2002, OUP).

<sup>49</sup> Whereas both the Racial Equality and Framework Directives were adopted within one year of being proposed, the associated amendments to the Equal Treatment Directive have taken two years to complete.

<sup>50</sup> Advocate-General Jacobs has described freedom from nationality discrimination as "a basic ingredient of Union citizenship"; para 24, Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637.

<sup>51</sup> Article 21 EC.

<sup>52</sup> Barnard, "Article 13: through the looking glass of Union citizenship" in O'Keefe, D., and Twomey, P. (eds), *Legal issues of the Amsterdam Treaty* (1999, Hart) at 379.

<sup>53</sup> COM (2001) 506.

<sup>54</sup> *ibid.*, at 23-24.

<sup>55</sup> Case C-149/77 *Defrenne v. SABENA* [1978] E.C.R. 1365, 1378.

openly identified Union citizenship as a source of new rights and protection for individuals. This process has been most evident since the decision in *Sala*, where the plaintiff was entitled to invoke the right to non-discrimination on grounds of nationality purely by virtue of her status as a Union citizen lawfully resident in another Member State.<sup>56</sup> This approach has been taken a step further in *Grzelczyk*.<sup>57</sup> The case concerned an application by a French student in his fourth year of studies in Belgium for a minimum subsistence allowance available to Belgian nationals. Notwithstanding the requirement in Directive 93/96 that students possess “sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence”,<sup>58</sup> the Court held the refusal of the subsistence allowance on the ground of his nationality to be contrary to Articles 12 and 17 of the EC Treaty. Furthermore, the Court declared “Union citizenship is destined to be the fundamental status of nationals of the Member States”.<sup>59</sup> Without doubt, the decision in *Grzelczyk* confirms the difficulty in justifying any remaining differences in treatment between EU citizens on grounds of nationality.<sup>60</sup> The association of the Racial Equality and Framework Directives with citizenship rights may, in time, lead the Court to show a similar intolerance to distinctions between citizens on any of the ‘suspect’ grounds listed in Article 13.

### Article 13 and European social policy

If the use of Article 13 for the Framework Directive indicates a reinforcement of citizenship, the decision not to rely on Article 137 conveys the opposite signal with respect to social policy. The origins of anti-discrimination law lie firmly within the framework of European social policy. Indeed, the debate on the Union’s role in this field was actively pushed forward by the former Directorate-General for Employment, Industrial Relations, and Social Affairs.<sup>61</sup> Moreover, the principle Treaty foundation for combating sex discrimination (Article 141) remains within Title XI on ‘social policy, education, vocational training and youth’. Placing Article 13 outside this section of the EC Treaty provides an indication that it is intended to go beyond employment matters. If this implies that anti-discrimination law is becoming ‘detached’ from its European social policy origins, then this supplies a further indication of the lower priority accorded to developing European social policy.

The use of Article 13 as the legal basis for the Framework Directive is not the only example of a reluctance to invoke the legislative powers conferred by Article 137 EC. More generally, there has been a policy shift away from the adoption of legally enforceable labour law instruments in favour of less binding employment policy initiatives.<sup>62</sup> Indeed, the annual employment guidelines appear to have

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<sup>56</sup> Case C-85/96 *Sala* [1998] E.C.R. I-2691.

<sup>57</sup> Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193.

<sup>58</sup> Article 1, Directive 93/96/EEC, [1993] O.J. L317/59.

<sup>59</sup> See n. 57 above, at para 31.

<sup>60</sup> See, however, paras 30-31, Case C-356/98 *Kaba v Secretary of State for the Home Department* [2000] E.C.R. I-2623.

<sup>61</sup> See, *inter alia*, Commission, “Green Paper: European Social Policy - Options for the Union” COM (93) 551, 17 November 1993, at 49; Commission, “European Social Policy - a way forward for the Union: a White Paper” COM (94) 333, 27 July 1994, at 38-39.

<sup>62</sup> Ashiagbor, “EMU and the shift in the European labour law agenda: from ‘social policy’ to ‘employment policy’” (2001) 7 E.L.J. at 311-330.

displaced momentum for establishing a body of enforceable social rights.<sup>63</sup> This also reveals an underlying shift in institutional power. Van Lancker notes the more powerful role for the Council in determining employment policy, as opposed to labour law.<sup>64</sup> In this context, the preference for Article 13 EC, even where the measure exclusively concerns equal treatment in the labour market, adds further to the impression that the social provisions in Title XI EC have become distinctly unfashionable. Fitzpatrick points out “the paradox of reaching a position whereby the powers to enact an extensive social legislative regime are finally in place at the precise moment at which the will to use them may be evaporating.”<sup>65</sup>

Another factor that may have influenced the choice of Article 13 over Article 137 is the possibility in Title XI EC for proposed legislation to be adopted via the social dialogue procedure, as opposed to the normal legislative process. In particular, Article 138(2) obliges the Commission to consult management and labour “before submitting proposals in the social policy field”. If, following this consultation, the Commission decides to proceed with a legislative proposal, it is required to consult the social partners again – this time on the ‘content of the envisaged proposal’ (Article 138(3)). At this point, management and labour may decide to initiate the process in Article 139, whereby they may reach an agreement and request the Commission to submit it to the Council for adoption as binding Community legislation. Although the social dialogue mechanism has become a prominent source of European labour law in recent years, its application to anti-discrimination law remains problematic.

Specifically, questions may be raised concerning how representative the social partners are of the individuals most affected by the forms of discrimination dealt with in the Framework Directive. Whilst the European Trade Union Confederation (ETUC) actively supported the insertion of Article 13 in the EC Treaty,<sup>66</sup> the vanguard driving this reform has been civil society NGOs – such as the Starting Line Group, the European Disability Forum, ILGA-Europe and EuroLink-Age.<sup>67</sup> The close working links constructed between these NGOs and the European Parliament, in particular, helps understand why the same groups have not generally advocated recourse to a legislative procedure that ascribes no formal role to the Parliament.<sup>68</sup>

It is interesting to note in this regard that the Court of First Instance (CFI) in *UEAPME* has already confronted the legitimacy of the social partners as legislators.<sup>69</sup> In this case, a European organisation for small and medium-sized undertakings sought to challenge the legality of the Parental Leave Directive, because of its exclusion from the negotiations leading to the relevant framework agreement between management and labour. The CFI recognised that the democratic legitimacy of the Directive

<sup>63</sup> Sciarra, “The employment title in the Amsterdam Treaty. A multi-language legal discourse” in O’Keeffe, D., and Twomey, P., (eds), *Legal issues of the Amsterdam Treaty* (1999, Hart) 170.

<sup>64</sup> Van Lancker, “Working document of the Committee on Employment and Social Affairs on the new social agenda for the medium term, part A: political context”, PE 286.207/A, 12 May 2000, at 4.

<sup>65</sup> Fitzpatrick, “The Community’s social policy: recent developments and remaining problems” in Konstadinidis, S., (ed), *A People’s Europe: turning a concept into content* (1999, Dartmouth) at 31.

<sup>66</sup> European Trade Union Confederation, *Our priorities - the fight against racism and xenophobia*, (1997, ETUC).

<sup>67</sup> See further, Bell & Waddington, “The 1996 Intergovernmental conference and the prospects of a non-discrimination Treaty article” (1996) 25 I.L.J. 320.

<sup>68</sup> For example, European Disability Forum, *Position on the Framework Directive on equal treatment in employment and occupation*, EDF 00/8 – May 2000. Available at: <http://www.edf-feph.org>

<sup>69</sup> Case T-135/96 *UEAPME v. Council* [1998] E.C.R. II-2335. For contrasting views on this judgment, see Britz & Schmidt, “The institutionalised participation of management and labour in the legislative activities of the European Community: a challenge to the principle of democracy under Community law” (2000) 6 E.L.J. 45; Bercusson, “Democratic legitimacy and European labour law” 28 I.L.J. 153.

required the negotiating partners to be sufficiently representative of the persons who would be affected by its provisions, in particular because of the lack of a formal role for the Parliament.<sup>70</sup> Specifically, it charged the Commission and the Council with validating this aspect of the process.<sup>71</sup> However, the degree of scrutiny applied does not suggest this would call into question the legality of the existing Social Partners concluding a framework agreement on combating discrimination. Whilst the CFI focused on the representativity of the employers' federations in *UEAPME*, it appears that a "general mandate" flowing from the representation of a range of employer or employee organisations will be regarded as sufficient, notwithstanding the existence of other organisations which may be more specific representatives of particular interests.<sup>72</sup>

This raises particular concerns when legislating against discrimination. As Britz and Schmidt observe, although the ETUC may be generally representative of workers, certain groups vulnerable to discrimination, such as women, remain under-represented.<sup>73</sup> The extent to which such under-representation is reflected in a weaker priority attached to their needs continues to call into question the effectiveness of the social dialogue procedures for dealing with equality issues.<sup>74</sup>

## Conclusion

Whilst it is clear that the Court of Justice views the selection of Treaty base as a matter for objective determination, the reality present in the EU institutions suggests political considerations are also important factors. This is especially true where a variety of different Treaty articles present themselves as potentially applicable, and where the 'legally correct' choice is far from obvious.

The Framework Directive demonstrates the importance of the Treaty base in establishing the character of the legislation, alongside the concern for determining the appropriate legislative process. In other fields, the struggle lies principally between the roles assigned for the Council and Parliament. However, in social policy, competition for control over the legislative process may also develop between the Union institutions on the one hand, and the social partners on the other. Clearly, the selection of a pragmatic and politically expedient Treaty article as the legal basis for the Framework Directive over what is arguably the technically correct basis for this measure indicates a policy shift in the area of Community anti-discrimination law, as well as an institutional reluctance to rely on the social provisions of the Treaty for this purpose. This may contain advantages for anti-discrimination law measures, particularly where these are then regarded as foundational rights of EU citizenship, yet, the implications for the future vitality and development of European social policy and labour law are more negative.

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<sup>70</sup> Case T-135/96 *UEAPME v. Council* [1998] E.C.R. II-2335, 2371.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*, at 2374.

<sup>73</sup> See n. 69 above, at 70.

<sup>74</sup> *ibid.* Specifically, Britz and Schmidt suggest that the Part-Time Workers Directive produced a lower level of protection than might have emerged from the normal legislative procedure.