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Published version

WHITTLE, R. (2000). Disability rights after Amsterdam: the way forward. *European human rights law review*, p. 2000.

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Disability Rights after Amsterdam: the way forward

Richard Whittle *

I. Introduction

The potential provided by the Treaty of Amsterdam¹ for the advancement of disability rights within the European Union is substantial. As an international organisation and system of law, the European Community is unique, both in the manner that the protected rights are made *accessible* to the individual and in the supervisory and enforcement mechanisms through which those rights are secured.² Together with the pervasive nature of Community law and the creativity of the European Court of Justice (Court of Justice) in developing its jurisprudence to ensure integration throughout the Union, the European Community holds great promise for the realisation of a full right to European citizenship for disabled Europeans.

Nonetheless, this potential will not be realised in the short-term, and will be severely limited in the long term, if the Community legislator does not employ the new Treaty provisions and enact secondary legislation to combat discrimination based on disability.³ In the absence of such legislation, any further advancement in disability rights at a Community level will be dependent upon the non-binding declaration attached to Article 95 EC⁴ and the further development of the Community's general principle of equality by the Court of Justice to encompass the right to non-discrimination for people with disabilities. While non-binding, the declaration attached to Article 95 EC can be described as soft law and will arguably have some legal scope in requiring the Community to "take into account the needs of persons with a disability" when drawing up measures under that article.⁵

* This article is based on a paper presented to the General Assembly of the European Disability Forum, Brussels, Belgium, on 25 April 1999. The author is particularly grateful for the comments provided by Dr. Lisa Waddington and Stuart Vernon on the final draft of this paper and the invaluable assistance provided throughout by Ms Deirdre Waters.

¹ Amending the Treaty of Rome 1957 as previously amended by the Single European Act 1986 and the Treaty on European Union 1992. Signed on 2 October 1997, the amendments introduced at Amsterdam took effect on the 1st May 1999 following ratification by the Member States. Please note that the Treaty articles referred to in this paper are based upon the new numbering system introduced by the Treaty of Amsterdam.

² See in this respect, Whittle, R. and J. Cooper (1999). "Enforcing the Rights and Freedoms of Disabled People: the Role of Transnational Law (Part II)." *Mountbatten Journal of Legal Studies* 3 (1), 3.

³ For an analysis of the Amsterdam Treaty in the context of disability discrimination see, Whittle, R. (1998). "Disability Discrimination and the Amsterdam Treaty." *E.L.Rev* 23(1), 50 (published prior to the re-numbering of the Treaty articles).

⁴ The declaration attached to Article 95 EC provides: "The conference agrees that, in drawing up measures under Article 95, the institutions of the Community shall take account of the needs of persons with a disability".

⁵ Benefits had arguably accrued from this declaration even prior to the Amsterdam Treaty and consequently, prior to the declaration taking effect. See for example, the recent Directive on radio equipment and telecommunications terminal equipment 1999/5/EC (O.J. L91/10) and in particular recitals 15 and 19. Similar initiatives have been taken in respect of other provisions of the new Treaty

As to the general principle of equality, one should note that its potential application to the development of a full right to equality under Community law has arguably been curtailed by a recent decision of the Court of Justice. In *Jacqueline Grant v. South-West Trains Ltd*,⁶ the Court of Justice was presented with an opportunity to take full advantage of the principle of equality and place a purposive interpretation upon the Community definition of sex discrimination. As such, it was in a position to interpret the prohibition of sex discrimination under Community law in a manner that would encompass protection against discrimination on grounds of sexual orientation. It did not, however, take advantage of this opportunity. Instead, by applying a “highly selective analysis of the relevant legal developments” (at both a national and international level),⁷ the Court of Justice effectively dismissed the application of the Community’s general principle of equality to the case at hand.⁸ While acknowledging the integral nature of fundamental human rights to the Community’s general principles of law, the Court of Justice stated that such rights “cannot in themselves have the effect of extending the scope of the Treaty provisions *beyond the competences of the Community*” (Emphasis added).⁹

Be that as it may, it is suggested that one should not be overly disheartened by this decision for two reasons. Firstly, one should note that the Court of Justice emphasised in *Grant* that its decision was made in the light of Community law as it stood at the time the case was heard.¹⁰ Clearly the subsequent ratification of the Amsterdam Treaty – and the inclusion of Article 13 within the EC Treaty – has since provided the Community with an undoubted *competence* to combat discrimination in the fields listed within that article. It was this legislative *competence* to which the Court of Justice made specific reference at the close of its judgement in *Grant*; a *competence* that may now arguably provide it with the necessary justification to depart from this ruling and further expand the interpretative value of the general principle of equality.¹¹ In this respect, it clearly remains open to the Court of Justice to refer to the more progressive legal developments that have and will continue to take place globally in respect of the right to equality. Secondly, it is arguable that the effect of this judgement is expressly limited to “discrimination based on sexual orientation, *such as that in issue [in Grant]*”.¹² As such, one should not interpret this judgement as imposing a

(such as those within the Employment Chapter) which lack the necessary powers to adopt binding legislation. Note also the declaration’s potential application to a judicial review action against a Community measure (based upon Article 95 EC) that has implications for, but fails to adequately consider, the needs of disabled people within its design; see in this respect Whittle, R. and J. Cooper (1999) *supra* at 24.

⁶ Case C-249/96 [1998] E.C.R. I-621.

⁷ See in this respect Bell, M. (1999). “Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT.” *European Law Journal* 5(1), 63 at 72 – 74.

⁸ By so doing, the Court of Justice applied a formula of sex discrimination that was in direct contradiction to its previous decision in Case C-13/94 *P. v. S. and Cornwall* [1996] E.C.R. I-2143; [1996] 2 C.M.L.R. 247.

⁹ *Grant*, op cit. at para 44 - 45.

¹⁰ *Grant*, op cit. at para 47 last sentence. The relevant text of the judgement reads as follows: “...Community law *as it stands at present* does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.” (Emphasis added).

¹¹ Support for this interpretation can be gained both from the judgement itself (op cit.) at paras 44 – 45 (when read in conjunction with paras 47 – 48) and from the positioning of Article 13 EC within the section of the Treaty entitled “Principles”. Note, however, the practical limitation of the Community’s general principles and the application of their interpretative value, discussed *infra* in note 17.

¹² *Grant* op cit para 47. This limitation is more than likely due to the relational aspects of homosexuality that were manifest in *Grant* and the particular social implications that would have arisen

'blanket' limitation on the general principle of equality, but should instead recognise that the Court of Justice has left open the possibility of departing from this ruling and further expanding the application of the equality principle.

If the Court of Justice were to expand the application of the general principle of equality to encompass the right to non-discrimination for people with disabilities, one would hope that a progressive stance would be adopted in the development of its jurisprudence in this respect. In this context, the Court of Justice would certainly face criticism if it did not draw from the civil rights approach to disability; an approach that has already been adopted at a national level both within¹³ and outside¹⁴ the European Union and is similarly reflected within the international arena.¹⁵ Moreover, it is suggested in this respect that the Court of Justice should employ a model of equality that promotes 'equality of opportunity' rather than the traditional notions of 'formal' or 'juridical' equality. By so doing, the Court of Justice will be better able to take account of, and make reasonable accommodations for, the material differences that may arise between individuals and achieve an optimum level of equality in a manner that is both fair and advantageous for society as a whole.¹⁶

Nonetheless, while favourable *dicta* from the Court of Justice in respect of the general principle of equality may - through their interpretative impact on the Treaty provisions or secondary legislation - provide enforceable rights to individuals, such an approach would involve a slow, incremental and, at times, disparate process.¹⁷ In the context of the non-binding declaration attached to Article 95 EC, it is clear that similar limitations exist. The potential application of this declaration to the advancement of disability rights is dependent both on the introduction of secondary legislation under Article 95 EC, and the material scope

as a direct result of a decision in favour of the applicant. See in this respect Denys, C. (1999) "Homosexuality: a non-issue in Community law?" E.L.Rev **24**, 419 at note 28 and surrounding text, and Bell, M. (1999) *supra* at 74 - 77.

¹³ See in this respect the United Kingdom's Disability Discrimination Act 1995, Sweden's Law prohibiting discrimination in working life on grounds of disability 1999, the draft Bill in the Netherlands on the Prohibition of Making an Unjustifiable Distinction on the Grounds of Handicap or Chronic Disease (1998), the Irish Employment Equality Act 1998 and Equal Status Bill (Revised) 1999, and Italian Law No.68, 12 March 1999, Rules for the Working Rights of Disabled People.

¹⁴ See, for example, the Americans with Disabilities Act 1990, Australia's Disability Discrimination Act 1992, Section 15 of the Canadian Charter of Rights and Freedoms 1982, Israel's Equal Rights for People with Disabilities Bill, 1996 (partly implemented in 1998), New Zealand's Human Rights Act 1993, and South Africa's Promotion of Equality and Prevention of Unfair Discrimination Bill 1999.

¹⁵ See, for example, the European Commission's Communication on *Equality of opportunity for people with disabilities - a new European Community disability strategy* (1996) COM 406; the General Comment No.5, E/C.12/1994/WP.13.1 December 1994 under the International Covenant on Economic, Social and Cultural Rights 1966, the Council of Europe's Recommendation No.R (92) *on a coherent policy for people with disabilities*, and the Inter-American Convention on the Elimination of All Forms of Discrimination against People with Disabilities (1999).

¹⁶ The 'equality of opportunity model' is reflected in varying degrees throughout all of the national non-discrimination measures identified in notes 13 and 14 *supra* and is clearly promoted by the international instruments identified in note 15 *supra*.

¹⁷ While the general principle of equality is broad in application, it must first be attached to a separate cause of action under Community law before it can be of relevance to the Court of Justice. In the context of the new grounds of discrimination listed within Article 13 EC, the introduction of secondary legislation under this or any other suitable Treaty article would provide such a cause of action. In this regard, one would be correct to describe Article 13 EC and its application to the general principle of equality as a 'sleeping giant'. Whether the European Commission's proposed non-discrimination package under Article 13 EC (discussed below) will awaken this giant is something that only time will tell.

of such legislation having implications for the particular needs of people with disabilities. Moreover, any advancement made in this respect will be limited to the material scope of the measures enacted under that article. In contrast, however, the adoption of secondary legislation - such as a European Directive on non-discrimination - would provide a secure, unified, and relatively immediate¹⁸ template or minimum standard of rights in this regard. Clearly, therefore, the passage of such an instrument would, in the immediate future, constitute the best way forward at a European Community level in combating discrimination on grounds such as disability.¹⁹

A tentative step in this direction has already been taken by the European Commission (the Commission) in its recently proposed non-discrimination package. This package includes two separate binding instruments, both of which take the form of a Directive and employ Article 13 EC as their legislative basis.²⁰ As proposed, one of these Directives will be specifically concerned with race (described as a 'vertical Directive') and will prohibit race discrimination in the context of employment, provision of goods and services, health, education and sport. The other will take the form of a 'horizontal Directive' and will prohibit discrimination on each of the grounds listed in Article 13 EC with the exception of gender. In contrast to the vertical Directive, however, the material scope of the horizontal Directive is limited to the context of employment and occupation.²¹ As a result, the advancement of disability rights at a Community level in the short-term will be in the form of the proposed 'horizontal Directive' and will be limited, therefore, to a right to non-discrimination in the employment context only. What remains unclear, however, is the precise content of the proposed Directive and the particular place which disability (as a ground of discrimination) will have therein.²²

II. The non-discrimination package in context

The Commission's proposed non-discrimination package provides an opportunity to fully evaluate the potential proffered by the amendments introduced at Amsterdam to the advancement of disability rights at Community level. To this end, the following discussion places a particular focus on the legislative bases provided by Articles 13 and 137 EC and their respective relationships - both actual and potential - to that package.

¹⁸ Member States are typically provided with a transition period of two years within which to implement a Directive so that they can adjust their domestic laws and policies in order to comply with its provisions.

¹⁹ That is not to ignore, however, the vital role that the Court of Justice will subsequently play in the further development of disability rights under Community law; a role that is likely to be most influential following the adoption of a secondary legislation in this regard. One need only refer to the impact of the Court's jurisprudence on the development of legal protection against sex discrimination within the European Community to illustrate this point.

²⁰ See in this respect the recent commitment made by the previous Commissioner for Employment and Social Affairs (P. Flynn) at the Vienna conference "Article 13: Anti-Discrimination: the way forward" 4 December 1998. While the Commission will also propose a Council Decision for an action programme on non-discrimination designed to complement the Directives identified above, reference to the 'non-discrimination package' throughout this paper should be understood as meaning the two proposed Directives only.

²¹ Sex is excluded from this proposal because protection against gender discrimination in the context of employment and occupation already exists at a Community level.

²² At the time of writing, the details of the proposed Directives were confidential.

(a) Article 13 EC

“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)

The basics

Article 13 EC is, in essence, an enabling provision to combat discrimination in the fields that it lists. It does not confer directly effective rights to citizens of the European Union.²³ It does, however, enable the Community Institutions to introduce secondary legislation that could, in turn, confer such rights on individuals; rights that would therefore be enforceable before national courts.

While providing a clear legislative basis for action to combat discrimination on the listed grounds, Article 13 EC is not prescriptive as to the nature or content of any forthcoming measures based upon it.²⁴ The Commission, therefore, has the option to use either binding measures, non-binding measures, or a combination of the two in proposing action under Article 13 EC.

The content of such a proposal is also within the Commission’s discretion and its assessment and formulation of the best ‘approach’ to adopt in this respect will have a critical influence on the measure’s effectiveness in combating discrimination as well as its likelihood of successful passage through the decision-making procedure. One should note, however, that the demands of ‘effectiveness’ and ‘political expediency’ (demands advanced throughout the legislative process) will rarely complement each other in the context of human rights. The potential for conflict between these demands - and consequently legislative stalemate - is particularly acute in relation to Article 13 EC because a unanimous agreement must first be reached within the Council of Ministers of the European Union (the Council) before a given proposal can be adopted under this provision.²⁵

²³ While the text of Article 13 EC is ‘sufficiently clear and precise’, the conditional nature of the facility it provides prevents it from satisfying all of the technical requirements for direct effect. An opportunity to revise the text of Article 13 EC to ensure that it provides directly effective rights to natural and legal persons may arise at the next inter-governmental conference in 2000.

²⁴ In this respect the critical wording in Article 13 EC is “...*appropriate* action to *combat* discrimination...” (Emphasis added). It is interesting to note that the initial draft of Article 13 EC employed the phrase “*prohibit* discrimination” (see, Dublin General Outline for a Draft Revision of the Treaties (CONF/2500/96 CAB). One may argue that the change to “*combat* discrimination” in the finalised version of Article 13 EC – when read in light of the words “*appropriate* action” – indicates that its application is not restricted to the prohibition of discrimination through the adoption of negative rights alone. It is possible, therefore, that the legislative basis provided by Article 13 EC may also allow for the adoption of ‘affirmative action measures’, as well as measures incorporating social and economic rights, in order to ‘combat’ *de facto* forms of discrimination.

²⁵ A significant limitation to Article 13 EC (Whittle, R. (1998) *supra* at 53), the need to establish a unanimous agreement within the Council may partly explain the format of the Commission’s proposed non-discrimination package and the placement of disability (as a ground of discrimination) within the weaker of the two Directives. Arguably, the inclusion of disability within the horizontal Directive may, due to the strength of the disability lobby within the European Union, go some way towards

The legislative scope

The Commission's approach in developing a proposed measure under Article 13 EC and the measure's vulnerability to legal challenge will, to a large extent, depend on the legislative scope or remit of application of this article and, in this respect, the following points can be made:

Firstly, the inclusion of the words "without prejudice to the other provisions of this Treaty" within Article 13 EC would arguably require the Commission to justify its preferred use of this provision if the same objective(s) could equally be achieved by employing a legislative basis found elsewhere within the Treaty. This 'justification requirement' is most likely to arise in circumstances where the general principle of non-discrimination "is given concrete form [elsewhere in the Treaty] in respect of specific situations".²⁶ One should note in this respect, that the social provisions of the Treaty, as amended at Amsterdam, and in particular Article 137 EC, clearly provide an alternative legislative basis to Article 13 EC if the material scope of the proposed non-discrimination measure is restricted to matters ostensibly relating to the concept of *worker* or the *working environment*.²⁷

Given the material scope of the proposed 'horizontal Directive', Article 137 EC arguably provides an alternative legislative basis in this regard to Article 13 EC. The potential application of Article 137 EC in this respect takes on greater significance when one considers that it assigns a more proactive involvement in the decision making process to the European Parliament (the Parliament). Consequently, it is open to the Parliament - in protecting its prerogatives - to question the validity of the Commission's use of Article 13 EC if the current proposal for a 'horizontal Directive' continues to be restricted to the context of employment and occupation alone.²⁸ More importantly however, Article 137 EC (subject to the exceptions laid down in sub-section 3) requires only a qualified majority vote in favour of the proposed measure before it can be adopted by the Council. The chances,

counteracting a negative reaction in respect of age and sexual orientation; grounds of discrimination that are currently politically sensitive at Member State level.

²⁶ This interpretation has been placed on similar wording in Article 12 EC by the Court of Justice in C-186/87 *Ian William Cowan v. Tesor public* [1989] ECR 195. The relevant text of Article 12 EC in this respect is: "...without prejudice to any special provisions contained [within the Treaty]...".

²⁷ See Whittle, R. (1998) *supra*, 55 *et seq.* where the analysis provided is equally applicable to all grounds of discrimination listed in Article 13 EC. It would appear therefore that the material scope of the proposed measure must clearly extend beyond matters relating to these concepts before Article 137 EC can reasonably be excluded as the appropriate legislative basis. Moreover, while sub section 6 of Article 137 EC provides "...this Article shall not apply to *pay*, the right of association, the right to strike or the right to impose lock-outs." (Emphasis added), it is suggested that the reference to 'pay' - in this context - is more concerned with preventing the decision making procedure in Article 137(2) EC (*i.e.*, qualified majority voting) being used to 'regulate' pay directly (*i.e.*, minimum wages *etc*) than the adoption of an equal treatment measure which merely has implications for it. As such, one may argue that Article 137(6) would not prevent the application of Article 137 EC in providing a legal basis for a non-discrimination measure merely because such a measure extended the principle of equal treatment to the assessment and provision of pay.

²⁸ Employing Article 13 EC where a more suitable Treaty article exists would run the risk of legal challenge by way of direct action for annulment under Article 230 EC. In Case C-22/96 *European Parliament v. Commission of the European Communities* (28 May 1998), the Court of Justice stated that the choice of 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 (see also, Case C-300/89 *Commission v. Council* [1987] ECR 1493, para 13)

therefore, of the horizontal Directive successfully passing through the decision making process are increased if Article 137 EC is employed as the legislative basis. In light of the above, it is suggested that the proposed horizontal Directive – in its current form – would find a more suitable legislative basis under Article 137 EC.

Secondly, the words “...*within the limits* of the powers conferred by [the Treaty] upon the Community...” (Emphasis added) would indicate that the use of Article 13 EC as a legislative basis is limited to those areas of activity that are already within the Community’s competence. Apart, therefore, from the ability to combat discrimination on the grounds that it lists, Article 13 EC does not extend that competence. Moreover, the difference in wording between this part of Article 13 EC and its equivalent in Article 12 EC (for example)²⁹ would suggest that its application is further restricted to those areas of Community competence where a *secure* Treaty basis exists. In contrast, therefore, to Article 12 EC - where the only limit on legislative action is the scope of application of the Treaty – the legislative remit of Article 13 EC is unlikely to include Community action based purely on the Treaty’s ‘objectives’ or ‘scope of application’.³⁰

Finally, the inclusion of the words “...*powers conferred* by [the Treaty]...” (Emphasis added) would arguably impose a further limitation on the legislative capability of Article 13 EC. It is suggested, in this respect, that the application of Article 13 EC is dependent upon the respective legislative *powers* of the Treaty articles that govern those areas of community activity selected to form the material scope of the proposed measure. In other words, if the Community legislator wishes to issue *binding* measures to combat discrimination under Article 13 EC, it must first select areas of Community activity (competence) where the necessary *powers* to issue such measures have been attributed to the Community by the particular Treaty articles concerned.³¹

In light of the above, it is suggested that the areas of Community competence that would provide the necessary Treaty *powers* for the adoption of a *binding* non-discrimination

²⁹ The relevant text in this regard is “Within the scope of application of this Treaty...”.

³⁰ Action beyond the existing competence of the Community to combat discrimination may theoretically find a legislative basis under Article 308 EC. Nevertheless, the decision by the German Constitutional Court in *Brunner v. European Union Treaty* [1994] 1 C.M.L.R. 57 and the subsequent reduction in Commission proposals emanating from Article 308 EC clearly demonstrate the current reluctance of the Community Institutions to employ this provision.

³¹ This interpretation of the term ‘powers’ should be contrasted with that given by M. Bell where it is equated with the term ‘competence’ (Bell M. (1999). “The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?” *Maastricht Journal of European and Comparative Law* 6(1), 5). It is suggested here, however, that such an approach, if correct, would enable the Community legislator to enact a particular type of *binding* measure (in this context a non-discrimination measure) in areas of Community activity (‘competence’) where the relevant legislative ‘powers’ provided by the Treaty do not envisage such action. The contradiction created by such an approach is particularly acute in the area of ‘Sport’ (see note 32 *infra*). While the requirement for a unanimous agreement within the Council under Article 13 EC arguably renders this particular point as to its construction and subsequent application in the legislative process somewhat academic (see Allen, R. (1998). “Article 13 and the search for equality in Europe: an overview” at the Vienna Conference “Article 13: Anti-discrimination the way forward” 4 December 1998), the value of a correct approach in this respect should not be ignored. By observing the suggested construction and application of Article 13 EC (as outlined within this paper) the Commission will ensure that a proposed measure is both more likely to comply with the principles of subsidiarity and proportionality and less likely to face legal challenge by the European Parliament. It is by following this approach that a unanimous agreement within the Council is most likely to be reached.

measure include: employment and certain social policy issues pertaining to the rights of workers, vocational training, transport, and the approximation of national measures pertaining to the functioning of the common market.³² The latter - as an area of Community competence - would encompass issues concerning, *inter alia*, access to goods and services, telecommunications, and the design of new technology.³³

It should be noted, however, that differences clearly exist as to the respective legislative *powers* of those areas of Community competence identified above and, as a consequence, the form and content of the *binding* measures that may be adopted within their respective fields of activity. The areas of employment and vocational training, for example, expressly direct Community action to 'support' and 'supplement' the activities or actions of Member States. Their respective legislative bases, therefore, provide 'limited' *powers* in this respect and should be contrasted with those pertaining to transport and the regulation of the internal market (for example).³⁴ Be that as it may, it is arguable that this direction as to the nature of any action taken is primarily concerned with ensuring a sensitive approach to the Community principles of 'subsidiarity' and 'proportionality'.³⁵ As such, this direction does not appear to prevent the adoption of a *binding* measure to combat discrimination within those areas of Community competence.³⁶ Thus, provided that the proposed measure

³² Articles 137(2) and (3), 150, 71, 94 and 95 EC respectively. It should be noted that the material scope of the proposed Race Directive includes the areas of 'health' and 'education'. However, like 'culture', these areas of Community activity, or 'competence', provide legislative 'powers' that, for the purpose of such a measure, would be limited to the introduction of "incentive measures" (see, Articles 152(4), 149, 151(5) EC respectively). As such, one may argue that their inclusion in the proposed Race Directive is founded upon legislative bases that are relatively insecure (although, see note 33 *infra*). This insecurity is further accentuated in respect of 'sport' because its inclusion within the material scope of the Race Directive can be justified only by interpreting the limited legislative *powers* found in 'education' (Article 149 EC) and 'culture' (Article 151(5) EC) in the light of the non-binding Declaration No. 29 on Sport, as introduced at Amsterdam.

³³ Additional areas of Community competence that may arguably provide the necessary Treaty *powers* for the development of a *binding* non-discrimination measure include: the right of establishment (legislative *power* in Article 44 EC), general issues relating to the right to 'European citizenship' (legislative *powers* in Articles 18, 19 and 22 EC), and the free-movement of workers (legislative *powers* in Article 40 and 42 EC). One should also note that secondary or derivative issues or areas of Community competence emanating from the main focus of these Treaty articles may also allow a right to non-discrimination at a Community level within their respective areas of activity and therefore extend the scope of any proposed measure in this regard. For example, equality of access to the provision of 'education', 'housing' and 'health care' may be justified by reliance on the Treaty articles that provide legislative *powers* in respect of the free-movement of workers. Additional legislative *powers* in this respect may arise by virtue of Treaty revision and an opportunity for amending the Treaties may present itself at the next Inter-governmental Conference in 2000.

³⁴ See note 38 *infra*.

³⁵ The principle of subsidiarity is referred to in Article 5 EC and Article 1 TEU. Further guidance on these matters can be found in the Protocol on the Application of the Principles of Subsidiarity and Proportionality (introduced at Amsterdam). For an excellent discussion of these principles see de Burca, G. (1999). "Reappraising Subsidiarity's Significance after Amsterdam", Harvard Jean Monnet Working Paper No.7/99 <http://www.law.harvard.edu/Programs/JeanMonnet/papers/99/990701.html>. For the Commission's most recent report on this area see, "Better lawmaking 1998: A shared responsibility." COM (98) 715.

³⁶ Moreover, while the Treaty article relating to vocational training specifically excludes "...any harmonisation of the laws and regulations of the Member States.", this exclusion is arguably more concerned with preventing the harmonisation of the content and organisation of the training programme rather than the adoption of rules regulating access to it. See Bell, M. (1999). "The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?" *supra*, where this analysis is extended to

complies with these principles and, in particular, the requirement to clearly demonstrate its 'added value' at Community level, the adoption of a *binding* measure in this respect is unlikely to face legal challenge.

By selecting areas of Community activity that – in conjunction with Article 13 EC - provide both the necessary *competence* and appropriate legislative *powers* to act in the proposed manner (as demonstrated above), the Commission is taking into account most issues pertinent to the principles of 'subsidiarity' and 'proportionality'.³⁷ Those issues that remain concern the type or form of the measure (and consequently the detail and substance thereof) and whether the Community, by reference to "the scale or effects" of the proposed measure (*i.e.*, its 'added value'), is better placed than the Member States to achieve the set objectives. Clearly, the use of a Directive to combat discrimination within those areas of Community competence identified above would comply with the first of these issues (*i.e.*, the correct type or form of measure).³⁸ As to the 'added value' of such a measure, the 'Community' benefits that would accrue from legislative intervention in this respect are clearly identifiable. In the context of disability based discrimination the following points can be made:

Firstly, significant gains in respect of competition within the European labour market would be achieved if the disparate level of protection currently afforded to people with disabilities throughout the European Union in matters of employment were addressed at Community level. A European measure in this respect would enable the introduction of young disabled people into the labour market and encourage the retention of the older members of the workforce as well as those acquiring a disability during their working life. This, in turn, would provide considerable benefits in respect of the increasing social burden that is being placed upon the working population. Such a measure would encourage the migration of a large number of people with disabilities from a dependency on social welfare benefits to the independence of a paid salary; a group of people who would then be able to contribute to the State system through the payment of taxes.³⁹

Secondly, the freedom of a salary would unleash a considerable consumer force that, in turn, would reinvest in the internal market. At present, however, the European market for disability friendly products (products having a *universal design*) is weak and is dominated by American distributors. Widespread investment at industry level throughout the European Union would serve to open up this market and ensure that European enterprises could offer a viable competitive alternative. Nonetheless, despite the potential profitability of such

include the Community competence of 'education' as well as 'vocational training'. In respect of 'education', however, cf. note 32 *supra*.

³⁷ In relation to the legislative scope of Article 13 EC as discussed above, the 'justification requirement', the need to find a *secure* legislative basis, and the need to select areas of activity where the necessary legislative *powers* exist, are all issues equally pertinent to the principles of subsidiarity and proportionality. This parallelism between these principles and the legislative scope of Article 13 EC is reinforced by the similarity in wording between this article and that relating to subsidiarity (Article 5 EC) in that both contain the words "... within the limits of the powers conferred ...".

³⁸ See, Whittle, R. (1998) *supra* at 57. Moreover, in the context of transport, the relevant Treaty provisions invoke a legislative basis that is less sensitive to the principles of subsidiarity and proportionality and would therefore allow the use of Community Regulations in their area of activity as well as the less restrictive legislative format found in Directives.

³⁹ Similar benefits in respect of social costs can be attributed to the retention of people in the labour market who would otherwise retire early and rely on State pensions or invalidity benefits.

investment, it is unlikely that - in the absence of market regulation - the European market will take this initiative.⁴⁰ Community intervention, therefore, demanding non-discrimination and *universal design* in the provision of goods and services would encourage European enterprises to be competitive in what is clearly a profitable market; a market addressing not only the needs of people with disabilities but those of other groups such as pregnant women, the elderly, the young and those with temporary impairments.⁴¹ Notably, it is the absence of a common level playing field throughout the European Union in this respect that renders the Community legislator better placed to act, and through such action, ensure the achievement of a *universal design* standard.

It is important to note in this context, that the term 'goods and services' (employed above) must be understood to encompass the areas of transport, physical access to the public arena, accommodation and housing, telecommunications and new technologies. Only through the provision of these key goods and services on a non-discriminatory basis, can the potential benefits of any subsequent re-investment in the internal market be fully realised. Moreover, Community wide implementation of a *universal design* standard throughout these areas would facilitate the free-movement of persons, not only in their capacity as workers, but also as providers and recipients of goods and services. By so doing, Community intervention in this manner would contribute to the attainment of a full and equal right to European citizenship for disabled Europeans.

In the context of disability based discrimination, therefore, the potential application of Article 13 EC clearly extends beyond issues that are solely concerned with employment and occupation.⁴² Consequently, the proposed 'horizontal directive', in its current form, fails to realise the potential proffered by Article 13 EC to the advancement of disability rights within the European Union.

(b) Article 137 EC

As a legislative basis, this provision enables the Council to introduce Directives in relation to the fields that it lists. These include *inter alia*:

- improvement in particular of the *working environment* to protect workers health and safety;
- *working conditions*; [and]
- the *integration of persons excluded from the labour market*....

(Emphasis added)

⁴⁰ It is clear that the existence of discrimination limits both competition and the growth of economic markets and that these markets will continue to discriminate in the absence of regulation. See in this respect, Sunstein, C. (1991). "Why Markets Don't Stop Discrimination." Soc.Phil.Pol 8, 22.

⁴¹ It is suggested that businesses, especially large multi-nationals, may in fact welcome European-level regulation in this respect as it would arguably ensure a common level playing field throughout the market and, as such, render long-term planning and investment easier.

⁴² This point is further reinforced by the observation made by Bell, M (1999). "The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?" *supra* at 16, where reference is made to the inclusion of sex as a ground of discrimination within Article 13 EC. Given that sex, in the context of employment, is already covered by Article 141 EC, its inclusion within Article 13 EC would be rendered superfluous if the application of that article were limited to the employment context only.

As previously noted, Article 137 EC provides an alternative legislative basis to Article 13 EC for the adoption of a non-discrimination measure that is limited to the context of employment and occupation alone.⁴³ Given that it requires only a qualified majority vote in favour of a proposed measure by the Council (subject to the exceptions laid down in subsection 3), Article 137 EC must surely be seen as a serious contender to Article 13 EC as regards the provision of a legislative basis for the proposed horizontal Directive. Moreover, the decision making procedure under Article 137 EC would enable both the Parliament and the social partners to have a greater influence in the development of the proposed measure; an influence that the Commission should not be seen to avoid. In this light, one may argue that the Commission should either employ Article 137 EC as the legislative basis for its proposed horizontal Directive (as opposed to Article 13 EC) or increase the material scope of the proposal to encompass additional areas of activity such as the provision of goods and services, and transport (for example). The latter would clearly take the proposal beyond the sole legislative remit of Article 137 EC and would therefore justify reliance on the broader legislative basis that can be provided by Article 13 EC (albeit limited to the extent of the legislative *powers* found in the other Treaty articles that govern the selected areas of Community *competence*).⁴⁴

As a point of detail, however, one should note that the overall construction of Article 137 EC would suggest that the legislative basis it provides is more suited to the introduction of affirmative action measures when acting in the context of equality of opportunity and employment. In contrast, the particular wording of Article 13 EC is arguably better suited to the introduction of justiciable individual rights.⁴⁵ This particular distinction between these articles and the legislative bases they provide has arguably been acknowledged by the German authorities in their recent proposal to the Commission for a Directive in the context of disability and employment.⁴⁶ The suggested legislative basis for this proposal is Article 137 EC. By requiring Member States to implement affirmative action measures to enhance the employment opportunities of people with disabilities, this proposal adopts what may be described as the ‘collective responsibility approach’ to this area of employment law. The aim of such affirmative action measures, and the purpose behind this approach, is to address - in a structural and normative manner - the ‘under-representation’ in the employment market of groups such as people with disabilities. In holding society collectively responsible, this approach - through the imposition of employment quotas or the adoption of other forms of incentive measures such as tax and other concessions for example - adopts a proactive stance in addressing this type of under-representation. In contrast, the provision of justiciable individual rights (the ‘individual rights approach’) places the responsibility for its

⁴³ See note 27 and surrounding text.

⁴⁴ This, of course, would include the *powers* provided by Article 137(2) EC if the material scope of the proposal were to encompass the employment context.

⁴⁵ Compare and contrast the wording in Articles 13 EC and 141(4) EC (gender) and their respective emphases. One may argue, in this respect, that the *primary* focus of Article 13 EC is to “...*combat discrimination...*” and it is not concerned, therefore, with the introduction of “...*specific advantages...*” (Article 141(4) EC) to compensate for the effects of past discrimination and to address the current under-representation of a protected class in the workforce.

⁴⁶ The proposal from the German authorities is entitled “Minimum standards for the vocational integration into society of people with a disability”; see “European Policy for the employment of disabled people” 24-25 February 1999, Dresden. It is interesting to note in this respect that the German proposal is, in effect, a reflection of the legal position currently in operation within the German national legal system. In the context of Germany, therefore, no further demands on the national system would result from the adoption of this proposal within the Community legal order.

success upon the ‘protected’ individual and is therefore dependent upon both the ability and willingness of the protected class to enforce these rights when confronted with prohibited forms of discrimination. As such, the ‘individual rights approach’ can be described as reactive in nature and it is this approach that is most likely to be adopted by the Commission in the development of its proposed non-discrimination package.

While measures adopting the ‘collective responsibility’ approach are, by themselves, unlikely to constitute ‘sufficiently clear’, ‘precise’, and ‘unconditional’ standards and provide ‘directly effective’ - or ‘justiciable’ - rights to individuals, a Directive employing such an approach would certainly achieve structural advances in the employment context for the normative needs of people with disabilities.⁴⁷ In light of the respective and distinct benefits of the ‘individual rights’ and ‘collective responsibility’ approaches, it is suggested that the most suitable method of tackling discrimination, at least within the employment context, would be to combine the two, *i.e.*, to combine ‘affirmative action measures’ with ‘justiciable individual rights’ (the ‘combined approach’). In the event that “affirmative action measures” are considered to be beyond the legislative scope of Article 13 EC,⁴⁸ such an approach would be dependent upon the adoption of an additional Directive (dedicated to this aim) under the legislative basis provided by Article 137 EC.⁴⁹ This “combined approach” to combating discrimination in the context of employment and occupation would not only reflect the respective philosophical focus of Articles 13 and 137 EC but also achieve a suitable compromise between the two distinct legislative approaches to disability discrimination currently operating at a national level throughout the European Union.⁵⁰

III. Critique of the non-discrimination package

As previously noted, the relevant part of the Commission’s non-discrimination package for people with disabilities is the proposal for a ‘horizontal Directive’; a proposal limited to combating discrimination solely in the context of employment and occupation. From a disability rights perspective the following points can be made in respect of that proposal:

Firstly, the grounds of discrimination in Article 13 EC are not listed in a manner that would indicate a hierarchy of status. Nevertheless, the disparity of coverage between the Commission’s proposal to combat race discrimination (extending beyond the employment context) and its proposal for a ‘horizontal Directive’ (limited to the employment context)

⁴⁷ Such a Directive would impose clear obligations upon employers and financial penalties for non-compliance in this respect. See R. Burkhauser and M. Daly (1998) “Disability and Work: The Experiences of American and German Men” FRBSF Economic Review (2), 17; an empirical study demonstrating the benefits that can be accrued within the employment context through the adoption of such measures under the ‘collective responsibility approach’.

⁴⁸ In this regard compare nn. 24 and 45 above.

⁴⁹ In this context, the adoption of a single Directive employing both Articles 13 and 137 EC as a dual legislative basis would not be permissible. According to settled case law, a measure cannot be adopted in this manner if the respective decision making procedures under the two legislative bases are ‘incompatible’, see Joined Cases C-164/97 and C-165/97, *Parliament v. Commission*, 25 February 1999. This incompatibility is clearly evident in respect of the legislative bases provided by Articles 13 and 137 EC.

⁵⁰ This “combined approach” can be found at a national level in Sweden and the Netherlands (for example) and, to a certain extent, is permitted by the Treaty in respect of sex discrimination (see, Article 141 and, in respect of affirmative action, 141 (4) EC).

clearly ascribes a second class right of equality to, *inter alia*, people with disabilities. It should be noted in this respect that there is substantial evidence demonstrating that disability discrimination extends beyond the world of work to encompass areas of activity such as those covered in the proposed Race Directive.⁵¹ Moreover, in terms of the relative improvement of life chances, people with disabilities, who constitute a sizeable population group in Europe,⁵² would arguably derive greater benefit from such coverage than the protected class under the Race Directive.⁵³

In light of this disparity, and given the clear potential of the amendments introduced at Amsterdam to the advancement of disability rights, it is suggested that no legal, moral, or commercial justifications exist for restricting the right to non-discrimination for people with disabilities solely to the context of employment and occupation. It would appear, therefore, that the decision whether or not to extend protection against disability discrimination to encompass areas beyond this context is essentially a political one.

Secondly, in going beyond the Commission's proposal for a non-discrimination package, consideration should be given to the recent initiative of the German authorities in proposing a Directive adopting the "collective responsibility" approach in the context of disability and employment. The political impetus to be gained from the official recognition by the German authorities of such an approach should not be underestimated. It is suggested, therefore, that the Commission should harness both the German initiative and the political leverage it presents and propose an additional measure that, together with the current proposal for a horizontal Directive, would adopt the 'combined approach' to combating discrimination within this area of Community competence.

Thirdly, with a particular focus on disability based discrimination, it is submitted that the ideal legislative measure at Community level to combat such discrimination would be the introduction of a specific Directive dedicated to this aim. This Directive should, in conjunction with a separate affirmative action measure, incorporate the 'combined approach' in the area of employment and occupation, and extend its protective remit to include additional areas of activity such as those highlighted earlier in this paper.⁵⁴ A specific and comprehensive Directive prohibiting discrimination based on disability would send a clear message to European society that disability is a civil rights issue and that disability discrimination is counter-productive for society as a whole. More importantly however, a

⁵¹ See, for example, T. Degener *et al. Disabled Persons' Status in the European Treaties: Invisible Citizens*, Report of the Third European Day of Disabled Persons, December 7, 1995.

⁵² 10 per cent of European citizens are disabled, see in this respect Commission of the European Communities/Economic and Social Consultative Assembly (1986) *Demographic Situation in the Community, Information Report*, CES 602/84 fin.

⁵³ Clearly, people with disabilities face the additional barrier of physical access to those areas of activity that may be regulated by the non-discrimination measure. In the context of transport for example, an effective non-discrimination measure would enable many people with disabilities to, *inter alia*, simply 'catch a bus'; an option that is not denied to the protected class under the Race Directive. Moreover, it should be noted in this respect that, as a population group, people with disabilities also face the greatest risk of poverty, see (for example) *National Anti-Poverty Strategy: Sharing in Progress* (1997) Combat Poverty Agency, Department of Social, Community and Family Affairs, Ireland; a risk that would be ameliorated by the adoption of an effective non-discrimination measure and a comprehensive 'universal design standard'.

⁵⁴ See para. ending with n. 33 above. It is suggested that the restriction on the material scope of the horizontal Directive (as currently proposed) is due to the political complications surrounding the more sensitive grounds of discrimination such as age and sexual orientation.

legislative initiative specific to disability - as opposed to a horizontal measure - would encourage people with disabilities to both own and use it effectively. Moreover, in practical terms, such a measure would provide ample opportunity to both clearly define the protected class and incorporate and clearly delineate the principle of 'reasonable accommodation' and its corollary concept of 'undue hardship'.⁵⁵ Finally, in this form, the measure would place beyond any doubt the correct usage of Article 13 EC as its legislative basis.

IV Conclusions

To conclude, therefore, the recent amendments to the EC Treaties, and in particular the inclusion of Article 13 EC, have rendered the realisation of a comprehensive and effective right to equality a realistic possibility for people with disabilities within the European Union.

As a system of international law, the European Community clearly provides the necessary mechanisms for both the promotion and the policing of a comprehensive legislative package in this regard; a package that would then be translated into national law and policy. Be that as it may, reliance in this respect should not be placed, at least in the short term, on either the *incremental* development of disability rights by the Court of Justice or the *incidental* development of such rights through the application of the non-binding declaration attached to Article 95 EC. Instead any immediate advancement to disability rights at a Community level is most likely to be in the form of secondary legislation and, in particular, a Community Directive.

The Commission's recently proposed non-discrimination package provides a clear and encouraging step in this direction. Nonetheless, the limitations associated with the proposed horizontal Directive from a disability rights perspective and the potential difficulties surrounding its appropriate legislative basis are clearly visible and have been highlighted within this paper. More significantly, however, the Commission's proposed non-discrimination package in its present form does not take full advantage of the current political and legal climate favouring the adoption of a comprehensive and effective measure that provides a full right to equality for people with disabilities. Clearly, a significant opportunity currently exists to develop a 'European approach' to disability rights by combining affirmative action measures with 'directly effective' individual rights. Disability non-governmental organisations and interest groups must therefore lobby their respective governments to ensure that the issues and discrepancies raised above are clearly acknowledged within both the public and political arena.

⁵⁵ Tempered by the limitation of 'undue hardship', the principle of 'reasonable accommodation' is arguably a prerequisite for any type of measure designed to combat both 'direct' and 'indirect' discrimination based on disability. As such, it requires an equitable (reasonable) compromise between the disadvantage imposed by the disability and the freedom of the employer, or service provider, to treat everybody in a superficially equal manner. Variations at Member State level in respect of the definition of disability or the application of this principal and its corollary concept (undue hardship) will result in a disparate level of protection throughout the Union against such discrimination; a disparity which the Community legislator should seek to avoid. In the context of the proposed horizontal Directive it should be noted that no legal or theoretical reason exists for not incorporating and clearly delineating this principle and its corollary concept within such a measure so that they apply to all grounds of discrimination covered therein. For an example in this respect see S.1 and S.43 (3) & (4) of South Africa's Promotion of Equality and Prevention of Unfair Discrimination Bill 1999.

Addendum

Immediately prior to publication of this paper, the European Commission unveiled the details of its proposed non-discrimination package. The draft texts for the proposed Directives referred to within this paper, as well as a draft Communication *on certain Community measures to combat discrimination* and a proposal for a Council Decision *establishing a Community Action Programme to combat discrimination 2001 - 2006*, can be found at: http://europa.eu.int/comm/dg05/key_en.htm

The proposed horizontal Directive is entitled: Directive *establishing a general framework for equal treatment in employment and occupation*. The Race Directive is entitled: Directive *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*.⁵⁶

⁵⁶ It is interesting to note that contrary to the indication provided by the previous Commissioner for Employment and Social Affairs at the Vienna Conference on anti-discrimination (see note 20 *supra*), the material scope of this proposal (as of draft 02/12/99) does not expressly include 'Sport'.