# CURRENT DEVELOPMENTS

## EUROPEAN UNION LAW

Edited by Joe McMahon



## I. SOCIAL POLICY

### *A. New Policy Initiatives*

The Barcelona Summit of March 2002 provided the catalyst for further coordination and synchronisation between the social and economic dimensions of the Lisbon Strategy framework. The definition of the 'European Social Model' as 'good economic performance, a high level of social protection and education and social dialogue' has become a working definition underpinning the direction of social policy in official publications.[1] The Barcelona Presidency also led to the adoption of a streamlined set of Employment Guidelines, Recommendations to the Member States and Broad Economic Policy Guidelines on the same day, heralded as an 'instrument for economic governance' by the Commission.[2] The reform of the European Employment Strategy (EES) concentrates upon the problems and weaknesses of the EES identified in the evaluation of the first 5 years of the Strategy.[3] The Commission identified four central issues for reform, focusing upon the need to set clear objectives (which include priorities and targets), the need to simplify the policy guidelines, the need to improve governance and ensure greater consistency and complementarity with other EU processes. A new development on the eve of the Spring Council (the Brussels Summit) on 20–21 March 2003 was a 'Social Summit' attended by a troika of the Heads of State/Government of the past, current and future Presidencies, the Commission and the Social Partners. One outcome

[1] Presidency Conclusions, Barcelona European Council 15 and 16 Mar 2002, para 22. Cf the definition given by Peter Hain, Government Representative on the Convention on the Future of Europe in oral evidence to the House of Lords' Select Committee on the European Union: 'good economic performance, *competitiveness*, a high level of social protection and education and social dialogue', (author's emphasis), Minutes of Evidence, 3, 3A, House of Lords' Select Committee on the European Union, *The Future of Europe: 'Social Europe'* HL Paper 79, 25 Mar 2003.

[2] The Commission has tabled fifty-seven Recommendations to the Member States. These are based upon the Joint Employment Report adopted by the Commission and the Council on 6 Mar 2003, available at: <http://www.europa.eu.int/comm/employment_social/employment_strategy/emply_en.htm>.

[3] Communications from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *Taking Stock of Five Years of the European Employment Strategy* COM (2002) 416 final; *The Future of the European Employment Strategy (EES) 'A strategy for full employment and better jobs for all'* COM (2003) 6 final. See E Best and D Bossaert (eds), *From Luxembourg to Lisbon and Beyond: Making the Employment Strategy Work* (Maastricht: EIPA, 2002).

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of this Summit was the creation of a new eight-member task force, chaired by Wim Kok.[4] The aim of the European Employment Task Force is to investigate practical steps to prompt the Member States to implement the new revised EES endorsed at the Spring Summit. The Task Force will report to the Commission in time to draft the Joint Employment Report for the annual Spring Summits.

The European Social Agenda agreed at Nice European Council in December 2000 mandated the Commission to produce a scoreboard of progress made at the EU level for each Spring Council.[5] This Scoreboard differs from other Scoreboards used in the new forms of economic governance in that 'Its objective is not to provide any ranking of Member States' performance, but rather to monitor how the agenda is transformed into policy measures and concrete action', the aim being to 'keep track of the achievements and to verify the commitment and contributions from the different actors in executing . . . [the Social Policy] Agenda'.[6] The latest Scoreboard, the third to be produced by the Commission, is a good starting point for detailing EU action, taken and proposed,[7] in the field of social policy in 2002. Of significance is the increased attention to be paid to the 'modernisation' of social protection through the open method of coordination.

Social policy *per se* was initially omitted from the agenda of the Convention on the Future of Europe. Belatedly, at the end of 2002, a Working Group on 'Social Europe' was established.[8] The Working Group considered a possible extension to the existing Article 16 EC to provide a legal base for legislation in the field of services of general economic interest. It is significant that this issue is reviewed under a 'social policy' remit since the problem of how to square the provision of public services offered by the State in competitive markets has been tackled under the free movement provisions and the competition law provisions, particularly those relating to State Aid and Article 86 EC.

[4] Members of the Task Force were announced in the Press Release of 1 Apr 2003, 'Anna Diamantopoulou announces the Members of the European Employment Task Force Under Mr Wim Kok', IP/03/469.

[5] COM (2000) 379 final. See E Szyszczak, 'The New Paradigm for Social Policy: a virtuous circle?' (2001) 38 *CMLRev* 1125; 'Social Policy in the Post-Nice Era', in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002).

[6] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *Concerning the Scoreboard on Implementing the Social Policy Agenda*, COM (2003) 57 final, 2.

[7] See also Commission's *Legislative and Work Programme 2003*, COM (2002) 590.

[8] Final Report of Working Group XI on 'Social Europe', CONV 516/03. The Group's mandate was to examine: the basic values in the social field to be included in Art 2 of the draft Constitutional Treaty, taking into account those already contained in the EU Charter of Fundamental Rights; the social objectives to be included in Article 3 of the draft Treaty; the need to define EC/EU competences in respect of social matters and the possible addition of new competences; the role of the OMC and its place in the new Constitutional Treaty; the relationship between economic and social policy coordination; the possible extension of qmv; the role of the social partners. See J Shaw, *A Strong Europe is a Social Europe*, <http//www.fedtrust.co.uk/eu_constitution>. A limitation of the late addition of this Working Group was that the first draft of Arts 1–16 of the Constitution addressing the fundamental values, objectives and competences of the Union, were drawn up before the Working Group's views could be taken into account.

### *B. New Legislation*

#### *1. The Treaty of Nice*

The entry into force of the Treaty of Nice on 1 February 2002 brought very few major changes to the social policy arena. The compromise achieved on qualified majority voting, authorises the Council to agree unanimously to any moves towards co-decision voting and qualified majority voting for Article 137(d), (f) and (g) EC in the areas for the protection of workers where their employment contract is terminated, for representation and collective defence of the interests of workers and employers, and for conditions of employment for legally resident third country nationals. This leaves Article 137(c) EC, subject to unanimity voting (social security and social protection of workers). A new indent, paragraph Article 137(k) EC, allows the Community to support and complement the activities of the Member States in the area of 'modernisation of social protection schemes'. A new sub-paragraph, Article 13(2) EC, allows the Member States to adopt incentive measures in the wider competence related to equal treatment added in the Treaty of Amsterdam. The Treaty of Nice also recognises, in Article 144 EC, the new Social Protection Committee that had already been established by a Council Decision of 29 June 2000.

#### *2. Equal Treatment*

The much awaited amendments to the Equal Treatment Directive[9] (ETD) may be eclipsed by the proposed 'recasting'[10] of the equal treatment legislation announced in the Commission's Work programme for 2003.[11] The initial impetus for the revision or amendment of the ETD started with the reaction to the ECJ ruling in *Kalanke*.[12] In the Commission's Annual Equal Opportunities Report it states that there was 'intensive and constructive co-operation between the Council of Ministers, the European Parliament and the Commission' in the negotiation of the new Directive and the Executive Summary lays claim to the fact that the successful amendment 'moved the agenda of equality firmly forward in the area of employment'.[13]

The legal base of the Directive is Article 141(3) EC. This involves the Article 251 EC procedure with the European Parliament and allows input from the ESC but does not involve the social partners. Article 138 EC provides a legal base for the use of the social partners in this area, but Article 138 EC is not an appropriate procedure for this

[9] Directive 2002/73 of the European Parliament and of the Council of 23 Sept 2002 amending Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions O.J. 2002 L269/15.

[10] The French term 'refonte' captures the process: the consolidation, with amendments, of the existing legislation in the light of case law and the new fundamental rights perspective generated by Art 13 EC.

[11] Above n 7.

[12] Case C-450/93 [1995] ECR I-3051.

[13] Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Annual Report on Equal Opportunities for Women and Men in the European Union*, 2002, COM (2003) 98 final.

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kind of amending legislation.[14] The Member States have until 5 October 2005 to implement its provisions. The Preamble to the Directive casts the principle of equality in its fundamental and human rights setting, referring to a broad range of international and Community documents. The positive duty of the Community to 'promote' equality in all its activities is reflected in the amended Article 1(1) ETD:

> Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.

One of the reasons for the amendment of the Directive is to bring the 1970s legislation up to date: to modernise it in the context of Article 13 EC. The original 1976 Directive did not define 'direct' and 'indirect' discrimination. The two new Article 13 EC Directives now give definitions of these concepts and it is important to have consistent definitions inserted into the gender equality legislation.[15] A new Article 2 of the ETD provides a definition of direct and indirect discrimination as well as extending the scope of the Directive to cover harassment, sexual harassment and 'An instruction to discriminate against persons on grounds of sex' shall also be deemed to be discrimination within the meaning of the ETD.' The inclusion of sexual harassment is highlighted as 'one of the key reforms' in the Annual Equal Opportunities Report.[16] The onus is upon the Member States and employers to take measures to prevent all forms of discrimination based upon sex, in particular sexual harassment at the workplace. The genuine occupational requirement defence is retained but the characteristic must be 'genuine and determining' and the objective must be legitimate and proportionate. The Preamble refers to *Johnston*,[17] *Sirdar*,[18] and *Kreil*.[19]

Cognisance of the progress made in relation to protecting women who are pregnant or on maternity leave is made in the Preamble which refers to the case law of the Court of Justice and Directive 92/85 recognising the need to protect a woman's biological condition during and after pregnancy.[20] Special measures are still allowed, but now a substantive maternity-related right is included in the Directive.[21] The provisions of the ETD will not prejudice parental leave arrangements under the Framework Directive on Parental Leave[22] and also where the Member States recognise distinct rights to paternity and/or adoption leave. The Preamble refers to the Council Resolution on Reconciliation of Work and Family Life.[23]

Positive action, recognised under Article 141(4) EC is mentioned in the Preamble, Recital 7, which states that the Directive does not prejudice freedom of association,

[14] For a discussion of the interaction of the various legal bases see R Whittle and M Bell, 'Between Social Policy and Union Citizenship: the Framework Directive on Equal Treatment in Employment' (2002) 27 *ELRev* 677.

[15] Directive 2000/43, OJ 2000 L180/22; Directive 2000/78, OJ 2000 L 303/16.

[16] Above 13.

[17] Case C-222/84 [1986] ECR I-4185.

[18] Case C-273/97 [1999] ECR I-7403.

[19] Case C-285/98 [2000] ECR I-69.

[20] Case C-394/96 *Brown* [1998] ECR I-418; Case 342/93 *Gillespie* [1996] ECR I-475.

[21] 'A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvements in working conditions to which she would be entitled during her absence.' (Art 1(7) ETD) (Art 1(2)).

[22] Council Directive 96/34, OJ 1996 L145/4.

[23] Resolution of the Council and of the Ministers for Employment and Social Policy meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life, OJ 2000 C 218/5.

including the right to establish unions with others and to join unions to defend ones interests. Measures within the meaning of Article 141(4) EC may include membership or the continuation of activity of organisations or unions whose main objective is the promotion, in practice, of the principle of equal treatment. Any positive action measures must be reported to the Commission every 4 years and the Commission will publish a Report making a comparative assessment in the light of Declaration 28 annexed to the Final Act of the Treaty of Amsterdam (Article 2 (3)).

A new Article 3 ETD, inserted by Article 1(3), states that there shall be no direct or indirect sex discrimination in the public or private sectors, including public bodies. Articles 4 and 5 of the original ETD are deleted and Article 6 is replaced by a new set of provisions that beef up the remedies available for victims of discrimination. This consolidates some of the Court's case law on remedies.[24] Special mention is made of the case of *Coote*.[25] A new Article, Article 8a and b, places an obligation on the Member States to introduce bodies to promote equal treatment. Such bodies may be part of agencies charged with defence of human rights and/or safeguarding individual rights. An important set of duties are placed on these bodies. Article 8b allows for a wide range of tools to be used to foster equal treatment at the national level. Including the use of the social partners and the use of collective agreements to introduce the obligations of equal treatment. Article 8c encourages a dialogue with civil society. Article 8d addresses sanctions setting out an underlying principle gleaned from the Court's case law that any sanctions must be 'effective, proportionate and dissuasive'.

While Member States may introduce or maintain more favourable equal treatment measures, they may not 'level down' and introduce a lower level of equal treatment protection which is already in place. There is an obligation imposed upon the Member States to provide information to the Commission on the transposition of the Directive, within three years of the entry into force of the Directive (ie 2008). This is to allow the Commission to draw up a Report to the European Parliament and the Council.

### *3. Insolvency*

One of the aims of this amending Directive[26] is to bring the old Insolvency Directive into line with the moves post-Maastricht and Amsterdam to develop a core of EU employment protection rights. The Directive allows the Member States to define the terms 'employee', 'employer', 'pay', 'right conferring immediate entitlement, 'right conferring prospective entitlement'. But the Directive, in line with amendment to the Transfer of Undertakings Directive (Directive 98/50, now after codification Directive 2001/23), recognises the development of a core of EU labour laws and now Member States cannot exclude from the Insolvency Directive's scope part-time employees within the meaning of Directive 97/81;[27] fixed term workers within the meaning of Article 1(2) of Directive 91/383[28] and Council Directive 1999/70 on the Framework

[24] Case C-271/91 *Marshall* [1993] ECR I-4367; Case C-180/95 *Draehmpaehl* [1997] ECR I-2195.

[25] Case C-185/97 [1998] ECR I-5199.

[26] Directive 2002/74/EC of the European Parliament and of the Council of 23 Sept 2002 amending Council Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer, OJ 2002 L270/10. The Directive uses Art 137(2) EC as the legal base. The Directive must be implemented by 8 Oct 2005.

[27] OJ 1998 L14/9.

[28] OJ 1991 L206/19.

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Agreement on Fixed Term.[29] The concept of insolvency has been broadened and brought into line with the Community concept of insolvency set out in the Insolvency Regulation on Insolvency Proceedings 1346/2000.[30] New provisions relating to transnational situations were inserted in Articles 8a and 8b. These are a codification of the case law of the Court.[31]

#### *4. Information and Consultation*

The Directive on informing and consulting employees in the European Community heralds a landmark in the development of EU social policy.[32] The purpose of the Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness. When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees. But the scope of the Directive is restricted, according to the choice made by Member States, to undertakings with at least fifty employees or establishments employing at least twenty employees. Member States are given the discretion to determine the practical arrangements for exercising the right to information and consultation at the appropriate level but the Directive sets out a number of definitions and obligations that restrict the Member States' discretion. It is possible for the Member States to delegate the practical arrangements for the implement of the Directive to the social partners.

### *C. Case Law*

The Commission has continued with its successful pursuit of infringement actions against Member States for failing to implement social policy, particularly in the area of the working environment legislation.[33] The range of Article 234 EC rulings is varied, with many references from the German courts, but also a number of references emerging from Member States not usually sending questions on Community law to the Court. The Court has ruled in one of the cases concerning the use of the equal treatment provi-

[29] OJ 1999 L175/43. [30] OJ 2000 L 60/1.

[31] Case C-117/96 *Danmarks Aktive Handelsrejsende, for Carina Mosbæk v Lonmodtagernes Garantifond* [1997] ECR I-5017; Case C-198/98 *G Everson and TJ Barras v Secretary of State for Trade and Industry and Bell Lines Ltd* [1999] ECR I-8903.

[32] Directive 2002/14 of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community, OJ 2002 L80/29. This Directive is without prejudice to the specific information and consultation procedures set out in the Collective Redundancies Directive and the Transfer of Undertakings Directive and the EWC Directive and other rights to information, consultation and participation under national law. The Information and Consultation Directive deals with a broader range of issues than the SE Employees' Involvement Directive and operates in SE's alongside that Directive.

[33] Case 65/01 *Commission v Italian Republic*, judgment of 10 Apr 2003; C-455/00 *Commission v Italian Republic*, judgment of 24 Oct 2002; Case C-383/00 *Commission v Germany*, judgment of 14 May 2002.

sion, Article 141(1) EC, to tackle the deterioration in terms and conditions of employment after CTT processes in the UK.[34] In *Lawrence* an equal pay claim was brought to counteract the payment of lower wages to women re-employed and newly employed by the successful tenderer. The Court affirms the fundamental nature of Article 141(1) EC as part of the general principle of equality. The Court states, at paragraph 17, that there is 'nothing in the wording of Article 141 (1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer'. But then, in paragraph 18 states that:[35]

> where . . . the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision.

A further equality case, *Niemi*, confirmed that pensions paid by the State in its capacity as employer fall within Article 141(1) EC and that using different ages for entitlement to pensions based upon the sex of a worker infringed Article 141 (1) EC.[36]

A number of the cases brought under the Equal Treatment Directive re-visit old ground. In *Dory* the system of compulsory military service for men in Germany was challenged using the argument that in the light of the Court's case law, there are no longer any objective reasons to justify women from being exempted from military service.[37] Dory argued that it was inconsistent with the Court's case law for women to have won the right to perform active service and yet still be exempt from compulsory military service.[38] The Court reiterated the point that measures taken by the Member States concerning the organisation of their armed forces are not excluded from the application of Community law solely because they are taken in the interests of public security or national defence. Applying the earlier rulings of *Sirdar*[39] and *Kreil*[40] the Court confirmed that the ETD was applicable to *access* to posts in the armed forces. It was for the Court to ascertain whether measures taken by national authorities in the exercise of their acknowledged discretion in fact pursued the aim of guaranteeing public security, and whether the measures were appropriate and necessary to achieve that aim (the test of proportionality).[41] But the Court ruled that Community law does not govern the Member States' *choices* of military organisation for the defence of their territory or of their essential interests. Germany's decision to ensure its defence by

[34] Case C-320/00 *AG Lawrence and others v Regent Office Care Ltd, Commercial Catering Group, Mitie Secure Services Ltd*, judgment of 17 Sept 2002.

[35] See the similar conclusion reached in Case C-256/01 *Allonby*, Advocate General Geelhoed, Opinion 2 Apr 2003. The Opinion contains reflections on the changing nature of the labour market in Europe.

[36] Case C-351/00 *Pirkko Niemi*, judgment of 12 Sept 2002. Applying Case C-7/93 *Beaune* [1994] ECR I-4471; Case C-366/99 *Griesmar* [2001] ECR I-9383.

[37] Case C-186/01 *Alexander Dory v Federal Republic of Germany*, judgment of 11 Mar 2003

[38] Pending the application Dory received his call-up papers. He applied for interim measures from the national court and the ECJ. The former granted the application but the latter declared the action inadmissible by Order of its President, Case C-186/01R *Alexander Dory v Germany* [2001] ECR I-7823.

[39] Case C-273/97 [1999] ECR I-7403.

[40] Case C-285/98 [2000] ECR I-69.

[41] For criticism of this approach see I Canor, 'Harmonisizing the European Community's Standard of Judicial Review?' (2002) 8 *EPL* 135, 146 ff.

compulsory military service is one such choice (enshrined in the Constitution) of military organisation which is immune from Community law scrutiny. The Court explicitly recognised the implications this has upon delaying the access of young men to the labour market. But the Court was not willing to extend the same disadvantages of military service to women or to rule that compulsory military service should be abolished.

There are two levels at which the Court is working in delimiting the application of Community law to the armed forces. *Dory* shows that one limit is *absolute*, when fundamental policy choices are made by the Member States. The other limit, as exemplified in *Sirdar* and *Kreil*, is *relative*. This is the discretion enjoyed by the national authorities to protect public security. The latter delimitation is subject to the rules on necessity and proportionality and may be applied by the national courts. *Dory* is important in revealing that the Court is following its earlier ruling in the tobacco advertising case, *Germany v European Parliament and Council*,[42] taking the limits of Community competence seriously.

Advocate General Ruiz-Jarabo, has taken a bold approach to the application of the Working Time Directive to the periods of time when a hospital doctor is on call. In *Jaegar*, the Advocate General points out that under Directive three conditions are established for time to be classified as 'working time': the employee must remain at his place of work; at the employer's disposal; carrying out his duties.[43] These conditions are to apply according to national laws and practice. The Advocate General finds the first two conditions met. In relation to the last condition he argues that a Member State is not entitled to interpret unilaterally the fact that a doctor who is on call at a hospital is not at an employer's disposal while he is resting, waiting to be summoned. The fact that the intensity and extent of activities carried out when on call are not the same as during normal working hours does not mean that periods spent on call constitute 'rest' time for the employee. The fact that the doctor is provided with a bed so as to rest contributes to protecting the doctor's health and ensuring that he can attend properly to patients. Thus periods of on call duty constitute in their entirety working time, within the WTD, even if the doctor is able to sleep during periods of inactivity. Such periods of inactivity cannot be classified as rest periods, especially where the worker is not guaranteed the minimum number of hours of continuous rest.

Finally, one of the most interesting cases of the last year is a reference from Spain, *Caballero*.[44] The reference concerned the interpretation of Article 1 of Council Directive 80/987 when the Spanish Wages Guarantee Fund (Fogasa) refused to pay a worker compensation which had been agreed between an employer and ex-worker under a court supervised conciliation on the ground that Caballero's dismissal was unfair. The employer had not paid the compensation and subsequently was declared insolvent. The Fogasa argued that it was not under a duty to pay the outstanding payment as its liability was limited only to where compensation had been awarded by a competent court and not, as was this case, where the compensation was the outcome of a conciliation process.

The Court's judgment is important in revealing the impact of the fundamental rights discourse in the area of social law. The Court starts its reasoning by stating that:[45]

[42] Case C-376/98 [2001] ECR I-2247.
[43] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger*, Opinion of 8 Apr 2003.
[44] Case C-442/00 *Angel Rodriguez Caballero v Fondo de Garantia Salarial (Fogasa)*, judgment of 12 Dec 2002.
[45] Para 30.

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> first, according to settled case law fundamental rights form an integral part of the general principles of law whose observance the Court ensures and, second, that the requirements flowing from the protection of human rights in the Community legal order are also binding on member states when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements. . . .

This emphasis upon the fundamental rights dimension, rather than a purely technocratic interpretation of the concept of pay within the Insolvency Directive is important in steering the Court's reasoning and on the remedy available. The fundamental right invoked by the Court here is the general principle of equality and non-discrimination. Under the Spanish rules all workers who are dismissed are entitled to the compensation but in the event of insolvency workers are treated differently in that Fogasa is only liable for claims determined by a judicial decision. The objective justification for this discrepancy in treatment put forward by the Spanish government was to avoid abuse. The Court rejected this. There were mechanisms in place to avoid abuse. In reality the conciliation processes were strictly supervised by the courts that had to approve the outcome. The Court held that once discrimination, contrary to Community law has been established, and where measures guaranteeing equal treatment are not in place 'the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages enjoyed by persons within the favoured category'.[46] There is a duty on the national courts to set aside any discriminatory provision of national law without having to request or await its prior removal by the legislature, and to apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers. This duty of 'levelling up' is drawn from the principles underpinning equal pay claims in Community law, first developed in *Defrenne II*.[47]

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## II. FREE MOVEMENT OF GOODS

### *A. Ten Years without Frontiers*

The Commission has spent time in 2003 celebrating the tenth anniversary of the establishment of the internal market. In this context the use of deadlines is misleading. The building of an internal market is more process than event. Many significant pieces of legislation entered into force at the end of 1992, but many pre-dated that moment and others again have been agreed subsequently. And the Court's interpretation of relevant provisions of the Treaty was not fossilised at the end 1992, but rather its dynamic evolution continues to exert influence over the process of market-building. The Commission is perfectly well aware of this. It admits that the Internal Market will never be 'completed'.[1] The core mission is to promote and sustain improved economic performance, not to hit crude targets. Nonetheless dissemination of propaganda possesses base appeal in all political systems and the Commission has taken the trouble to emphasise

[46] Para 42.

[47] Case 43/75 [1976] ECR 455. See Case C-184-89 *Nimz* [1991] ECR I-297, paras 18–20; Case C-408/92 *Avdel Systems* [1994] ECR I-4435, para 16.

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[1] Internal Market Scoreboard No 11, Nov 2002, available via <http://europa.eu.int/comm/internal_market/en/update/score/index.htm>.

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