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Angaben zur Veröffentlichung / Publication details:

Neuner, Jörg. 2006. "Protection against discrimination in European contract law."
European Review of Contract Law 2 (1): 35–50. <https://doi.org/10.1515/ercl.2006.003>.

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Protection Against Discrimination in European Contract Law

JÖRG NEUNER*

Abstract: Protection against discrimination in European contract law stands at the point of tension between the principle of freedom of contract and the principle of equal treatment. Both principles will be examined separately. One must distinguish between substantive and formal models of freedom, on the one hand, and conceptions of anti-discrimination based on 'defensive rights' (Abwehrrechte) and 'participation rights' (Teilhaberechte), on the other hand. The appropriate degree of protection can be better determined by employing this analysis. In so doing, it is demonstrated that protection similar to that against discrimination based on reasons of 'race' and gender is also required to address the problem of discrimination based on disabilities. Therefore, a further directive that corresponds to the Council Directives 2000/43/EC and 2004/113/EC should be enacted and provide protection for people with disabilities. The article closes by looking at the EU's competence to regulate in the field of contractual protection against discrimination.

Résumé: La protection contre la discrimination en droit européen des contrats se situe au milieu d'un conflit fondamental entre le principe de liberté contractuelle et le principe d'égalité de traitement. Dès lors, les deux principes seront d'abord présentés séparément tout en distinguant entre les concepts de liberté matérielle et formelle d'un côté et les conceptions anti-discriminatoires fondées sur des 'droits de défense' (Abwehrrechte) et des 'droits de participation' (Teilhaberechte) de l'autre côté. Sur cette base sera déterminé le niveau de protection adéquat. L'examen révélera la nécessité d'instaurer une protection contre la discrimination en raison du handicap en plus de l'interdiction de la discrimination en raison de la 'race' et du sexe. Pour l'accomplissement de cette protection, une directive européenne pour la protection des personnes handicapées devrait être prise, en correspondance avec les directives 2000/43/CE et 2004/113/CE. Finalement, la contribution éclairera les compétences normatives de l'UE en matière de non-discrimination en droit des contrats.

Kurzfassung: Der Diskriminierungsschutz im Europäischen Vertragsrecht bewegt sich im Spannungsverhältnis zwischen den Prinzipien der Vertragsfreiheit und der Gleichbehandlung. Es werden daher zunächst beide Prinzipien separat dargestellt, wobei einerseits zwischen materialen und formalen Freiheitsmodellen und andererseits zwischen abwehrrechtlichen und teilhaberechtlichen Antidiskriminierungskonzeptionen zu unterscheiden ist. Auf dieser Grundlage kann sodann das sachgerechte Schutzniveau näher bestimmt werden. Dabei zeigt sich, dass neben dem Schutz vor Diskriminierungen aus Gründen der 'Rasse' und des Geschlechts auch ein Schutz vor Benachteiligungen aufgrund von Behinderungen indiziert ist. Analog zu den Richtlinien 2000/43/EC und 2004/113/EC sollte daher noch eine weitere Richtlinie zum Schutz von Menschen mit Behinderungen erlassen werden. Der Beitrag schließt mit einem Blick auf die Regelungskompetenz der EU im Bereich des vertraglichen Diskriminierungsschutzes.

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I. Introduction

In recent years, protection against discrimination in European contract law has been intensified immensely. In particular one should note Council Directive 2000/43/EC of 29 June 2000,¹ which implements the principle of equal treatment between persons irrespective of racial or ethnic origin,² and also Council Directive 2004/113/EC of 13 December 2004, which implements the principle of equal treatment between men and women in the access to and the supply of goods and services.³ Both directives pursue the goal of hindering

1 For the history and development of the directive, see J. Niessen / I. Chopin, 'The Starting Line and the Racial Equality Directive', in J. Niessen / I. Chopin, *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden: Nijhoff, 2004) 95 et seq; Ch. Brown, 'The Race Directive: Towards Equality for All the Peoples of Europe?' (2001–2002) 21 *Yearbook of European Law* 197 et seq.

2 OJEC L 180/22 (19 July 2000): [...] Article 3 Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing. [...]

3 OJEC L 373/37 (21 December 2004): [...] Article 3 Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

3. This Directive shall not apply to the content of media and advertising nor to education.

4. This Directive shall not apply to matters of employment and occupation. This Direc-

discrimination based on certain personal attributes and proceed with the famous ‘movement from status to contract’⁴ though in the opposite status-related direction. This tendency is not new as is evidenced by developments in European consumer protection laws. However, the reservations that run counter to civil protection against discrimination are particularly massive, especially in Germany.⁵

This article attempts to outline the essential elements and the appropriate limits on protection against discrimination in European contract law. It thereby focuses on general contract law and not on specific prohibitions against discrimination, particularly those in labour law and competition law. In the following discussion, first the opposing principles of contractual freedom and equal treatment will be presented separately, so that in conclusion the appropriate level of protection can be determined.

II. The Principle of Contractual Freedom

Equal treatment of EU citizens is among the principles of proper governmental administration.⁶ In contrast, the relationship of citizens to each other is primarily shaped by the principle of freedom of contract, whereby all citizens can decide with whom and under which conditions they enter into legal transactions.

tive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts. [...]

4 H. S. Maine, *Ancient Law – Its Connection with the Early History of Society and its Relation to Modern Ideas* (5th ed, 1883) 165.

5 See eg E. Picker, ‘Anti-discrimination as a Program of Private Law?’ (2003) 4 *German Law Journal* Nr. 9, www.germanlawjournal.com; the same, ‘Antidiskriminierungsprogramme im freiheitlichen Privatrecht’, in E. Lorenz, *Karlsruher Forum 2004, Haftung wegen Diskriminierung* (2004 Karlsruhe: VVW, 2005) 7 et seq; K.-H. Ladeur, ‘The German Proposal of an “Anti-Discrimination”-Law. Anticonstitutional and Anti-Common Sense. A Response to Nicola Vennemann’ (2002) 3 *German Law Journal* Nr. 5, www.germanlawjournal.com.

6 Compare only, Case C-55/00, *Elide Gottardo v INPS* [2002] ECR I-413, para 34 (ECJ); R. Streinz, ‘GR-Charta Article 41’ in R. Streinz, *EUV / EGV* (Munich: C.H. Beck, 2003) para 5; U. Kischel, *Zur Dogmatik des Gleichheitssatzes in der Europäischen Union* (1997) *Europäische Grundrechte Zeitschrift* 3 et seq.

1. Community Law Guarantee

Freedom of contract is not explicitly guaranteed by the founding treaties of the EU, but it is counted among the unwritten fundamental rights in community law.⁷ Teleologically, freedom of contract follows from the idea of a common market, which strongly assumes the autonomy of the legal person. Protection of freedom of contract is derived systematically from the specially regulated ‘fundamental freedoms’ as well as from the universal standards and constitutional traditions common to the Member States according to Article 6 TEU. Also European secondary legislation assumes contractual freedom to be the same as an ‘a priori’ fundamental right.⁸ Thus, for example, regulations on the duty to provide information, requirements for the form of a contract, or the right to withdraw from a legal transaction only make sense given the background assumption of a principle of freedom of contract.

2. Conception of Community Law

Despite the guarantee of private autonomy in community law, there is a need to clarify what community law concretely considers freedom of contract to be. From the legal-philosophical point of view, two models compete. These two models differ fundamentally in their goals, ie whether freedom of contract serves individual or higher purposes.⁹

a) The Substantive Model of Freedom

The substantive model of freedom describes the content of the *telos* of freedom of contract and does not leave this definition to the individual subjects of private law. Hence, this concept determines which activities and conduct are within the scope of freedom and does not confine this conception of freedom to the dimension of individual self-determination. The concrete purpose of contractual freedom can thereby be defined differently and may range from universal perceptions of justice to collective interests.

7 Compare Case C-240/97, *Kingdom of Spain v European Commission* [1999] ECR I-6571, para 99 (ECJ); C.-W. Canaris, ‘Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft’, in P. Badura (ed), *Wege und Verfahren des Verfassungslebens – Festschrift für Peter Lerche zum 65. Geburtstag* (Munich: C. H. Beck, 1993) 890; K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (Berlin: de Gruyter, 2003) 240 et seq.

8 Compare also Riesenhuber, n 7 above, 555 et seq.

9 See also D. Schiek, *Differenzierte Gerechtigkeit* (Baden-Baden: Nomos, 2000) 290 et seq.

Historically considered, the idea of substantive freedom primarily conceals the danger of awarding absolute priority to values concerning the common welfare. In German National Socialism, for example, a contract was interpreted as a ‘means of design for the volkish order’ (*‘Gestaltungsmittel der völkischen Ordnung’*) and consequently, the individual people’s comrades’ (*‘Volksgenossen’*) capacity as bearers of subjective rights was denied.¹⁰ In a similar sense, the private law actor is not respected in the Marxist legal theory as an individual bearer of freedom, but rather is considered solely as a ‘species-being’ (*‘Gattungswesen’*).¹¹

Leaving aside the dangers of awarding absolute priority to collective values, the substantive concept of freedom does not entirely do justice to the role of the contractual actor as a responsible citizen. The theoretical origin of this position in terms of a material understanding of freedom is questionable. Freedom of contract does not serve the realisation of an externally founded (heteronomous) order of preference, but in contrast, the realisation of subjective perceptions.¹² This assessment is in accordance with the *lex lata*. The establishment of a common market linked to the guarantee of fundamental freedoms should secure individual possibilities for personal development and ward off governmental control of all economic and social affairs. On this note, the EU is therefore also defined as an ‘area of freedom’ in Article 2 TEU.

b) The Formal Model of Freedom

According to the concept of formal freedom, all private law persons can define freedom of contract for themselves and decide its application at will. In the words of Immanuel Kant: ‘No man can compel me to be happy after his fashion, according with his conception (...) Instead, everybody may pursue his happiness in the manner that seems best to him (...).’¹³ Thus from the per-

10 Compare M. La Torre, ‘Der Kampf wider das subjektive Recht’ (1992) 23 *Rechtstheorie* 355 et seq; R. Frassek, *Von der ‘völkischen Lebensordnung’ zum Recht. Die Umsetzung weltanschaulicher Programmatik in den schuldrechtlichen Schriften von Karl Larenz (1903–1993)* (Baden-Baden: Nomos, 1996) with ample reference.

11 Compare only K. Marx, ‘Zur Judenfrage’, in K. Marx / F. Engels, *Werke Vol 1*, (Reprint 1961) 364.

12 Compare also C.-W. Canaris, ‘Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner “Materialisierung”’ (2000) 200 *Archiv für die civilistische Praxis* 277 et seq; R. Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen* (Munich: C.H. Beck, 1995) 39 et seq.

13 *On the Old Saw: That May Be Right in Theory But It Won’t Work in Practice* (Translated by E. B. Ashton 1974) 58 (290).

spective of society one speaks also of 'negative' freedom, because the state is not allowed to determine its nature. In this context, contractual freedom means the competence personally to determine legal actions without turning to substantive aspects of justice or other criteria of correctness.

While the substantive model of freedom tends to affect persons by restricting individual self-determination, the formal counter-model tends to impede collective self-determination as well as permitting freedom at the expense of legitimate third party interests. It leaves socially unequal positions out of consideration, brings about economic hierarchies, and presses the state into a pure watchdog role. The award of priority to an absolute value of formal freedom of contract therefore also leads to undesirable results.

However, this danger can be avoided if protection from formal contractual freedom is solely understood as an 'optimisation requirement' ('Optimierungsgebot'¹⁴), which must be brought in balance with conflicting principles. Using such an interpretation, on the one hand private autonomy remains recognized as an independent value, and, on the other hand, contrasting interests are taken into account. An indication of this dualism is also found on the human rights level: next to the classic liberty rights, there exists a second generation of social rights, which is to be balanced carefully with the first. Likewise, Community law establishes not only a market structure but also a social structure.¹⁵ The establishment of a common market is not only an end in itself, but rather, according to Article 2 TEU, Article 2 EC, at the same time a means to advance social goals.¹⁶ The principle of equal pay for male and female workers according to Article 141 EC or even the freedom of movement for workers according to Article 39 EC should further be regarded as explicit social regulations. Beyond this one should emphasize the (unratified) Treaty Establishing a Constitution for Europe of 16 December 2004, which contains an entire chapter entitled 'Solidarity' (Title IV, Article II-87 to II-98).¹⁷

14 Compare R. Alexy, *Theorie der Grundrechte* (Frankfurt/M: Suhrkamp, 1986) 75 et seq with ample reference.

15 Compare E. Steindorff, *EG-Vertrag und Privatrecht* (Baden-Baden: Nomos, 1996) 42 et seq; J. Neuner, *Privatrecht und Sozialstaat* (Munich: C. H. Beck, 1999) 195 et seq.

16 Compare also Riesenhuber, n 7 above, 240.

17 See further M. Zuleeg, *Der rechtliche Zusammenhalt der Europäischen Union* (Baden-Baden: Nomos, 2004) 157 et seq.

III. The Principle of Equal Treatment

The principle of equal treatment belongs in particular to those principles that operate in conflict or competition with the principle of freedom of contract.

1. Meaning

The principle of equal treatment has different facets depending on the criterion that forms the point of reference. In its strongest form, the principle connects without differentiation to the status of a private law subject, and with this implicates a universal requirement of equal treatment. In a weaker form, the principle only includes a prohibition against distinctions based on individual characteristics. European private law anti-discrimination directives are not sweeping egalitarian imperatives, but rather merely prohibit certain distinctions from being drawn. Thus, for example, a landlord may refuse to enter a contract with a party who is interested in signing a contract, but he may not do so because of the interested party's 'race' or ethnicity.

2. Telos

Protection against discrimination under private law has two dimensions.¹⁸ One dimension concerns defensive rights in the sense of *iustitia commutativa* and the other dimension concerns participation rights in the sense of *iustitia distributiva*.¹⁹

a) The Dimension of Defensive Rights

Protection against discrimination can pursue the goal of defending interests against infringement from other citizens, eg acts of violence motivated by racism that injure people or damage property. In such cases, protection against discrimination serves primarily to protect the interest of integrity. Life, health, or property should be protected from assault. However, tort law protects these legal 'goods' comprehensively, regardless as to whether the infringement is based on racism or other reasons. Thus, bodily injury caused

¹⁸ Compare also P. Mota Pinto, 'Autonomia privada e discriminação – algumas notas', in *Estudos em Homenagem ao Conselheiro José Manuel Cardoso da Costa*, Vol II (2005) 328 et seq, 332 et seq; J. Neuner, 'Diskriminierungsschutz durch Privatrecht' (2003) *Juristenzeitung* 58.

¹⁹ For the distinction between *iustitia commutativa* and *iustitia distributiva* see Aristotle, *Nicomachean Ethics*, V 5 et seq 1130b et seq.

by a negligent driver is also unlawful and establishes the right to receive compensatory damages. Within the scope of legal protection for the interest of integrity, the aspect of non-discrimination moves to the background except as otherwise provided. This aspect then dominates only if the person is injured directly through the discriminatory nature of the action. This approach applies for example to remarks that are offensive to females or to a ban outside a restaurant that states: 'ethnic minorities are not allowed to enter the restaurant'.

b) The Dimension of Participation Rights

In contrast, the legal situation when a landlord removes the ban in front of the restaurant and simply does not serve ethnic minorities should be assessed differently. It is similar to the situation when an employer conducts himself very courteously to female applicants for a work position but regularly denies them the job. In such a scenario, it is characteristic that, in principle, the discriminator has not injured any other person's legal 'goods', but has rather failed to perform certain legal acts. Accordingly, the desired legal action is an original performance, for example showing intent to enter a contract, and not preventing harm or paying compensatory damages. Thus, the private law actor is bound to a special kind of redistribution. As a further consequence, the *telos* of the protection against discrimination provided by participation rights does not exist in the sanctioning of behaviour or convictions of the discriminator but in the social protection of a victim of discrimination from exclusion.

3. Justification

Protection against discrimination in private law can be justified in three ways: from the viewpoint of individuals, from the viewpoint of the group, and from the viewpoint of the general public.²⁰

a) Protection of the Individual

Protection against discrimination in private law serves firstly and directly the concerned citizen. He or she receives protection against the infringing third party under aspects of defensive rights, and against systematic exclusion based on certain personal characteristics under the aspects of participation rights. The example of excluding the poor from the only available private wa-

²⁰ Compare also Mota Pinto, n 18 above, 326 et seq; Neuner, n 18 above, 58 et seq.

ter well makes it immediately clear that protection guaranteed by participation rights is existentially just as necessary as the component that protects against infringement of third parties.²¹ At the same time, it becomes evident that the legal freedom of excluded third parties is not protected when the factual prerequisites of safeguarding legal freedom are absent. Altogether, protection against discrimination serves to respect human dignity when it limits the freedom of one private law actor in favour of giving another private law actor the opportunity to develop.²²

b) Protection of the Group

Discrimination can be directed not only against individual subjects of private law, but can also affect a group. For example, disabled persons tend to be placed at a disadvantage because of their health impairments in numerous areas of life, such as in labour or housing markets. In order to balance these structural impairments, it may be necessary to introduce protective measures.²³

c) Protection of the General Public

Protection against discrimination does not only serve to protect the directly affected individuals or groups but also the entire society. A society which excludes certain groups of the population endangers its own inner peace because it provokes resistance from those excluded as well as corresponding solidarity of third parties.²⁴ In addition, the democratic form of government is not without prerequisites, but as with freedom of the individual, it will only become effective if possibilities to participate in practice exist for all citizens.²⁵

21 Compare also Alexy, n 14 above, 458 et seq; P. Häberle, 'Grundrechte im Leistungsstaat' (1972) 30 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 96.

22 Compare also G. Dürig, 'Artikel 1', in T. Maunz / G. Dürig (eds), *Kommentar zum GG* (Munich: C.H. Beck, 2001) para 12; G. Dürig, 'Artikel 3', in Maunz / Dürig, this n above, para 3 et seq.

23 For more details, see B. Hepple, 'Race and Law in Fortress Europe' (2004) 67 *Modern Law Review* 8 et seq; M. Bell / L. Waddington, 'Reflecting on equalities in European equality law' (2003) 28 *European Law Review* 353 et seq; Ch. McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality', in S. Fredman, *Discrimination and Human Rights* (Oxford: Oxford University Press, 2001) 255 et seq.

24 See, in particular, L. von Stein, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage* (Reprint, Darmstadt: Wissenschaftliche Buchgesellschaft, 1972) 36 et seq.

25 See, in particular, H. Heller, 'Politische Demokratie und soziale Homogenität', in H. Heller, *Gesammelte Schriften – Vol II* (Leiden: Sijthoff, 1971) 421 et seq.

IV. The Appropriate Level of Protection

Now that the principles of contractual freedom and equal treatment have been presented in detail, the proper level of protection can be determined.²⁶

1. The Necessary Hierarchisation

The legitimate goal of prohibiting discrimination in private law exists primarily as protection against social isolation based on certain personal information. The more personal characteristics one protects, the more levelling results. Theoretically, all kind of differentiation based on personal characteristics can be prohibited, which would lead to the end of contractual freedom and to the end of the free enterprise system. Above all, economic inequality and any associated discrimination are phenomena of a free market economy and cannot be separated from the market.²⁷ This phenomenon is already noticed at the oriental bazaar, an archetype of a free market. As *Elias Canetti* describes in his travel notes 'The Voices of Marrakesh': 'There are prices for the poor and prices for the rich, of which they are for the poor naturally the highest.'²⁸ It is also valid in more sophisticated economic systems: 'The poor pay more.'²⁹ Such discrimination contrasts directly with ideals of equality, yet it seems to be the necessary price for renouncing the support structure of a planned economy.

Discrimination must certainly not be arbitrary *per se* or objectionable. As a rule, the disadvantage of some participants is accompanied by a gain in information and incentives to perform in the market. The affected persons experience a negative reaction from their fellow-beings and can draw conclusions from this: for example, to optimise their offers or to improve individual elements of performance.³⁰ Moreover, discrimination can also contribute direct-

26 For the special problems concerning indirect discrimination and affirmative action see, for instance, C. Barnard / B. Hepple, 'Substantive Equality' (2000) 59 *Cambridge Law Journal* 567 et seq, 576 et seq; L. Waddington / M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38 *Common Market Law Review* 592 et seq, 601 et seq.

27 For disadvantages based on poverty also see, A. Dummett, 'Implementing European Anti-Discrimination Law: A Critical Analysis', in Niessen / Chopin, n 1 above, 245 et seq.

28 *Die Stimmen von Marrakesch* (Munich: Hanser, 1968) 20.

29 Compare D. Caplovitz, *The poor pay more* (London: Free Press of Glencoe, 1963); A. Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen* (4th ed, Tübingen: Laupp, 1908) 18; Schiek, n 9 above, 246 et seq with ample reference.

30 Compare F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 *Ordnung von Wirtschaft und Gesellschaft* 89.

ly to a diversified market. Consider the organiser of a vacation trip who focuses on older customers, or a gym that accepts only women, or a discount for children who are celebrating their birthday.

All in all, discriminatory practices are an essential aspect of a market economy and constitute the core of private autonomy. A universal prohibition against discrimination would be incompatible with community law and would mean a change of system to a strictly materialistic and freedom-hostile egalitarian regime. Article 13 EC therefore already contains a hierarchy of dimensions of equality and does not particularly take into consideration discrimination based on poverty. Protection through the law against discrimination is only justified when the threat of a danger of considerable exclusion is present.³¹

2. The Relevant Criteria

Determining whether there is substantial exclusion depends mainly on the interplay of three factors.³²

a) Characteristics of Discrimination

Firstly, a characteristic that is commonly regarded as suitable criterion for discrimination is needed. Provided that an individual excludes other persons only because of their possession of a certain attribute, this discrimination normally has to be accepted as permissible. For example, when one denies his products or services to university professors, he is excluding himself rather than others. A characteristic of discrimination does not become a problem of exclusion for the community until a considerable number of private law subjects regard it as a criterion leading to exclusion. A common standard can be methodically determined mainly in two ways: firstly by examining history in so far as certain personal characteristics have been especially susceptible to discrimination; secondly by examining international agreements supporting anti-discrimination that prove a consensus about the need to regulate certain

31 Critical of the requirement of hierarchisation Ch. Brown, 'The Race Directive: Towards Equality for All the Peoples of Europe?' (2001–2005) 21 *Yearbook of European Law* 223; S. Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 157 et seq; S. Baer, "‘Ende der Privatautonomie’ oder grundrechtlich fundierte Rechtsetzung?" (2002) *Zeitschrift für Rechtspolitik* 294.

32 Compare J. Neuner, n 18 above, 62 et seq; consenting K. Riesenhuber / J.-U. Franck, 'Verbot der Geschlechtsdiskriminierung im Europäischen Vertragsrecht' (2004) *Juristenzeitung* 537 et seq; K. Larenz / M. Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (9th ed, Munich: C.H. Beck, 2004) § 34 para 38 et seq.

reasons for discrimination.³³ Accordingly, several types of personal information such as 'race', religion or sexual orientation are commonly found as relevant standards.

b) The Victim's Need for Protection

Next to the objective danger of exclusion that characteristics of discrimination pose, the victim's need for protection should be taken into consideration. Different criteria are of importance for this. In particular, it depends on whether the aspects of discrimination are unalterable (for example, 'race', gender or disability),³⁴ whether the possibilities to evade discrimination are absent owing to market structure (ie a monopoly), and how severely the discriminated person depends on the performance (ie is the good vitally important or only a luxury good?).

c) The Discriminator's Interest in Differentiating

Thirdly and finally, the decision maker's interest in making a differentiation should be taken into consideration. Here one must distinguish between unalterable and alterable personal information because the latter is protected in principle by respect for the idea of self-determination and is therefore potentially justifiable as an ethical or moral guide to action. Unlike the state or government, an individual citizen is not obliged to observe neutrality with regard to religion or any other ideology. Essentially, the individual citizen can freely prosper in all areas of life, join societies, and through his market power also pursue goals that are external to the market. However, in regard to unalterable features such as 'race' or gender, self-determined, preferential decisions are normally precluded. There is therefore no ethical reason worthy of recognition that such characteristics should be generally used as criteria for discrimination. Only in the private sphere this differentiation is legitimate and not able to be renounced, as demonstrated by the example of the choice of one's spouse or partner.

3. The Need for Legislative Regulation

If one reviews the relevant criteria, protection against discrimination in European contract law appears to be indicated in some cases.³⁵ This protection concerns the unalterable criteria of 'race' and gender as well as disabilities.

³³ Critical Bell / Waddington, n 23 above, 363.

³⁴ See also D. Schiek, 'A New Framework on Equal Treatment of Persons in EC Law' (2002) 8 *European Law Journal* 309 et seq.

³⁵ Waddington / Bell, n 26 above, 610, emphasize, that 'the equality hierarchy created by

a) 'Race'

The necessity of protection against racially based discrimination is evident. Both the history of anti-Semitism and numerous actual events such as denial of entry to restaurants or bars prove clearly and strongly the need for legislative intervention. In addition, the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) consensually underpins this requirement and, among other things, guarantees in Article 5 (f) 'the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.' The only controversial issue remaining is whether providing protection against racially based discrimination must be so absolute that it would, for example, supersede the need for an individualised showing of culpability.

b) Gender

Just as there is a convention for 'race', there is also a UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Here, the Member States are obliged 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise' (Article 2 [e]). These measures apply especially to the areas of economic and social life (Article 13), notably to the conclusion of contracts (Article 15[2]). The Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services therefore answers in larger parts only international obligations and guaranteed human rights minimum standards.³⁶ It may be objected to the requirement of a comprehensive directive fighting gender discrimination that there is no need for legal action,³⁷ but there is considerable discrimination at least in the field of providing financial credit as well as in the field of insurance premiums when pregnancy is involved. On the one hand, one could have considered limiting the directive to these aspects. On the other hand, the directive provides various factual restrictions and does not exclude varying treatment according to Article 4(5) if it is justified by legitimate ends. According to this, not only are special parking spaces, gyms, or shelters for women included, but also according to the sixteenth re-

the Union is not the result of a particular design for EU anti-discrimination law; it is very much the product of political pragmatism'.

36 Compare also, the first recital in the preamble et seq; also see Neuner, n 18 above, 59 et seq, with ample reference.

37 Compare F. Stork, 'Das Gesetz zum Schutz vor Diskriminierungen im Zivilrecht – Umsetzung der Richtlinien 2000/43/EG und 2004/113/EG in das deutsche Privatrecht' (2005) *Zeitschrift für europarechtliche Studien* 58 et seq, with ample reference.

cital in the preamble, even membership in private clubs which are accessible only to the members of a certain gender. In view of this relativisation, a disproportionate interference with contractual freedom should not in general be feared.³⁸

c) Disabilities

In contrast to gender discrimination, the legal need for protection of people with disabilities appears to be even stronger, as for example when one considers their permanent disadvantage in the area of tenancy law and also in the field of laws on travelling.³⁹ Significantly, a comprehensive convention of the UN 'on the rights and dignity of persons with disabilities' is presently being prepared.⁴⁰ Furthermore, Article II-86 of the European Charter of Fundamental Rights provides that the EU 'recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. The ethical, comparative, and systematic interpretation of legal reasons consequently strongly supports the protection of people with disabilities in European contract law by means of guaranteeing a special directive.⁴¹

d) Other Reasons for Discrimination

With respect to other reasons for discrimination, mainly because of alterable personal attributes such as religion or ideology, protection according to private law can be necessary as well. However, this is to be designed in a significantly weaker form and should be left to the Member States.

Furthermore, the prohibition against discrimination based on nationality according to Article 12 EC proves to be a special case. This has indeed proved to be a principle in human rights law, but it is primarily associated with the market and should secure the prerequisites of a community market. Thus in contrast to Article 13 EC, Article 12 EC has a direct effect between the subjects of private law (horizontal direct effect).

38 Compare also, K. Riesenhuber / J.-U. Franck, 'Das Verbot der Geschlechtsdiskriminierung beim Zugang zu Gütern und Dienstleistungen' (2005) *Europäisches Wirtschafts- und Steuerrecht* 251.

39 Also see, Communication from the Commission to the European Parliament and the Council 24.1.2003, COM (2003) 7 et seq.

40 See in addition Communication from the Commission to the European Parliament and the Council 24.1.2003, COM (2003) 4 et seq; for the current status of the convention see www.un.org/esa/socdev/enable/rights/adhocom.htm

41 Compare also R. Whittle, 'Disability Rights after Amsterdam – The Way Forward' (2000) *European Human Rights Law Review* 33 et seq.

V. Competence of Regulation

In conclusion, it is essential to discuss the extent to which the EU possesses the authority to legislate anti-discriminatory measures in general contract law. This is controversial⁴² in so far as Article 13 EC allows anti-discriminatory measures ‘within the limits of the powers conferred by it [the Treaty; J.N.] upon the Community’. Concentrating only on the wording of this restriction, Article 13 EC can seem to be a redundant repetition of already existing competences and authorities. The historical development of Article 13 EC thereby shows that the legislator did not make any regulations that are mostly empty of meaning, but rather that the legislator wished to strengthen and expand the options for action that the community has. Article 13 EC was legislated against the background of forceful claims for a directive concerning anti-discrimination.⁴³ The intention behind the expansion of competence is also revealed in the wording of the article, which says that anti-discriminatory measures can be met ‘without prejudice to the other provisions of this Treaty’. When one reads this expansion in connection with the reference to ‘powers conferred’, it becomes clear that Article 13 EC does not contain any original assignment of competences,⁴⁴ but does expand accessory competences.⁴⁵

In this case, Article 137(1) (j) EC is of central importance. According to Article 137(1) (j) EC, ‘the combating of social exclusion’ falls in the competences of the community. This is precisely the major aim of regulations in private law that uphold principles of anti-discrimination. Article 13 EC is therefore teleologically and systematically connected to Article 137(1) (j) EC, namely ‘without prejudice to the other provisions’ of Article 137(2) EC which provides restrictions of competence in the Article’s original area of application. In

42 See in addition, M. Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002) 121 et seq; M. Mahlmann, ‘Gerechtigkeitsfragen im Gemeinschaftsrecht’, in U. Rust, *Die Gleichbehandlungsrichtlinien der EU und ihre Umsetzung in Deutschland* (Rehburg-Loccum: Evangelische Akademie, 2003) 51 et seq.

43 See Bell, n 42 above, 73.

44 But arguing that way E. Guild, ‘The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations’ (2000) 29 *Industrial Law Journal* 416, 423; E. Eichenhofer, ‘Diskriminierungsschutz und Privatautonomie’ (2004) *Deutsche Verwaltungsblätter* 1080.

45 Compare also A. Epiney, ‘Artikel 13’, in C. Calliess / M. Ruffert, *Kommentar zu EU-Vertrag und EG-Vertrag* (2nd ed, Neuwied: Luchterhand, 2002) para 4; A. Epiney / M. Freiermuth, *Das Recht der Gleichstellung von Mann und Frau in der EU* (Baden-Baden: Nomos, 2003) 45.

conclusion, it is consequently determined that the community has the responsibility to enact directives concerning anti-discrimination in contract law that are in accordance with criteria named in Article 13 EC. Considerable limitations of this authority result from the principles of subsidiarity and proportionality according to Article 5(2), (3) EC. It must also be considered that the principle of limitation of powers to specific areas can be easily undermined through the general clause of assigning authority according to Article 13, 137(1) (j) EC. With regard to this possibility, the EU should restrict itself to enacting directives that protect against discrimination based on characteristics of 'race', gender and disabilities only.