Amongst such sources should be listed, no doubt *inter alia*, the constitutional provisions of the Member States, international instruments, and non-binding instruments of EU law (so-called 'soft' law). The part they play is discussed more fully in chapters 2 and 7.

The grounds on which EU law forbids discrimination

The picture which emerges from a consideration of the numerous sources of EU equality and non-discrimination law is a complex one. There are a number of instruments to which a court must have regard in deciding an issue within this area, and the European judicature, in seeking to resolve ambiguities and unclear matters, must have recourse to many different instruments. Nevertheless, in the current state of the law, there is only a limited list of grounds on which EU law actually contains an outright prohibition on discrimination. These are nationality, sex, part-time and temporary employment, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.

(i) Nationality

A number of provisions of EU law forbid discrimination against persons on the ground of their possessing the nationality of one of the Member States. The most important are Article 12 of the TEC, prohibiting such discrimination in general terms and authorizing the Council to adopt rules designed for this purpose, and Articles 39–55, providing for the free movement of workers, the right of establishment, and the freedom to provide services within the Community. A substantial body of secondary law has also been enacted to support these rights. However, for reasons already set out, discrimination on the ground of nationality is not dealt with extensively in the present work.

(ii) Sex

That the improvement of the quality of life for the peoples of the Communities is an ideal underlying the EU is clear from the Preamble to the TEC[97] and from the aspirations of the founders of the Communities discussed above. However, at the time the original TEC was being drafted, there were two radically opposed conceptions of the relationship between social policy and the establishment and functioning of the proposed Common Market. The French view was that the harmonization of the 'social costs' of production was necessary in order to make

[97] See in particular Recital 3: 'Affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples.'

sure that businesses competed on a fair and equal basis once the barriers to the free movement of persons and capital were removed. At the time of the negotiations, there were important differences in the scope and content of the social legislation in force in the States concerned. France, in particular, had on her statute book a number of rules which protected workers and were consequently expensive for employers. For example, legislation of 1957 mandated equal pay for men and women. Workers in France also had longer paid holidays than workers in the other States, normally a minimum of twenty-four days. They were, in addition, entitled to overtime pay after fewer hours of work at basic rates than elsewhere. All this meant that the French feared that the indirect costs of production of goods in France would make French goods uncompetitive in the proposed Common Market and would damage French industry. They therefore sought to persuade the other negotiating States that social costs should be equalized throughout the Community. Germany, however, took a very different line, arguing that the harmonization of indirect or social costs would inevitably follow from the setting up of a Common Market. The Germans were also strongly committed to a minimum level of government interference in the area of wages and prices.

A compromise was ultimately reached and the two differing viewpoints were both reflected in the Treaty's social policy provisions.[98] In particular, the French delegation succeeded in persuading the others to accept two specific provisions, which would protect French industry from the kind of 'social dumping' of which it was afraid. These are what are today Article 141, on equal pay for men and women,[99] and Article 142, which provides that the Member States will 'endeavour to maintain the existing equivalence between paid holiday schemes'.

Despite this somewhat unedifying origin, there emerged a principle which both the Union and the ECJ were to regard as of fundamental importance, namely, the equal treatment of men and women. Social policy generally came to play an increasingly prominent role in practice because it provided a useful mechanism by which to emphasize the human face of the Community, against a background of criticism that it was exclusively economic, capitalist, and uncaring. Social policy legislation was also made more necessary as a result of economic recession and mass unemployment. So, by 1972, the communiqué issued by the Paris Summit Meeting stated that the Heads of State or Government attached 'as much importance to vigorous action in the social field as to the achievement of monetary

[98] That the debate between the two positions is not yet over has been shown in more recent times by the altercations between those who would seek to de-regulate employment and their opponents who advocate harmonized social policy legislation as the only route to real future progress in Europe. A more recent example of the practical issues involved can be seen in the decision of Hoover, a US company, to close its factory in Dijon and transfer production to Scotland, where the burden of social protection provisions was perceived to be less than that in France: see Editorial Comment, 'Are European Values Being Hoovered Away?' (1993) 30 CMLRev 445.

[99] See Forman, 'The Equal Pay Principle under Community Law' (1982) 1 LIEI 17. Note that despite its legislative history, the equal pay article makes no suggestion (and neither has the subsequent case law of the ECJ) that it protects only women and not men.

and economic union'. A 'Social Action Programme' followed in 1973,[100] which was approved by the Council in January 1974.[101] The Social Action Programme had three main aims: the attainment of full and better employment; the improvement of living and working conditions; and the increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings. Among other things its objectives included the bringing about of a 'situation in which equality between men and women obtains in the labour market throughout the Community, through the improvement of economic and psychological conditions, and of the social and educational infrastructure'.

Gradually, equality of opportunity as between the sexes took its place at the forefront of EU social policy.[102] In addition to the enactment of a series of directives on the subject, five 'Action Programmes' have been mounted covering the periods 1982–5, 1986–90, 1991–5, 1996–2000, and 2001–2005.[103] These have sought to enforce the equality legislation on a practical level in numerous ways, a matter of the utmost importance if the kinds of structural disadvantages faced by women which have been discussed earlier in this chapter are to be dismantled.[104] An 'Advisory Committee on Equal Opportunities for Women and Men' was established in 1982 to help the Commission to formulate and implement policy on the advancement of women's employment and equal opportunities, and to arrange for the exchange of information between interested bodies in this field.[105] In addition, the Amsterdam Treaty gave a strong new emphasis to equality of opportunity irrespective of sex.

Quite why sex equality has been accorded this sort of priority by the Community is open to speculation. On an economic level, it is clearly important to prevent competitive distortions in a now quite highly integrated market. On the political level, perhaps it has been selected because it provides a relatively innocuous, even high-sounding, platform by means of which the Community can demonstrate its commitment to social progress. Barnard has also suggested that the promotion of the concept of equality by the ECJ has served, in times of uncertainty

[100] 24 October 1973, COM (73) 1600. [101] OJ [1974] C13/1.

[102] For an account of the processes at work to achieve this end, see Harlow, 'A Community of Interests? Making the Most of European Law' (1992) 55 MLR 331.

[103] See Action Programme 1982–5, OJ [1982] C186/3; Equal Opportunities for Women Medium-term Community Programme 1986–90, Bull EC Supplement 3/86 and Bull EC 6–1986, point 2.1.116; Third Medium-term Community Action Programme COM (90) 449 final; Fourth Equality Action Programme 1996–2000, OJ [1995] L335/37; Council Decision of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001–2005), Decision 2001/51, OJ [2001] L17/22.

[104] However, the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions on Equality Between Women and Men (19 February 2004, COM (2004) 115 final) exposes some dispiriting statistics, in particular that the average gender pay gap in the EU remains at 16% and has hardly changed in recent years; similarly, sex segregation in the labour market has also remained more or less constant, at around 25% for occupational segregation and 18% for sectoral segregation.

[105] Commission Decision 82/43/EEC of 9 December 1981, OJ [1982] L20.

about the future of the EU, to legitimize the Union and to strengthen political integration.[106]

The part played by the European Parliament in the process will provide an interesting study for the historians of future generations. The Parliament, which has a higher proportion of women members than have the national parliaments,[107] has since 1984 possessed an influential Standing Committee on Women's Rights and has on several occasions provided the impetus for Community action in this field.[108] To some extent, it may be that to accede to demands made by the Parliament in the sphere of equal rights between the sexes has provided the Community's executive with a useful way out of heeding its advice in other fields.[109]

The ECJ has also made clear the importance which it attaches to the principle of sex equality. In its seminal decision in *Defrenne v Sabena*,[110] it held:

> The question of the direct effect[111] of Article 119 must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty. Article 119 pursues a double aim. First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty. This aim is accentuated by the insertion of Article 119 into the body of a Chapter devoted to social policy whose preliminary provision, Article 117, marks 'the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.' This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community. Furthermore, this explains why the Treaty has provided for the complete implementation of this principle by the end of the first stage of the transitional period.[112]

[106] Barnard, op cit, n 12.

[107] See Valance, 'Do Women Make a Difference? The Impact of Women MEPS on Community Equality Policy' in Buckley and Anderson (eds), *Women, Equality and Europe*, (Macmillan, London, 1988) and CREW Reports (1990), Vol 10, No 5, 11. After the 1994 elections, women represented 25.7% of the membership of the European Parliament. By 1996, this percentage had increased to 27.6. This is to be compared with the average percentage of women in the national parliaments of the Member States, which stood at 15 in 1996, notwithstanding the accessions of Sweden and Finland which both have an exceptionally high number of women in parliament: see *Equal Opportunities for Women and Men in the European Union: Annual Report 1996* (Commission, Luxembourg, 1997). The percentage of women MEPS rose to 30% in both the 2000 and the 2004 elections.

[108] See, eg, its Resolution of 11 February 1981 on the Situation of Women in the EC (Bull EC 2-1981, point 2.3.7), which prompted the production of the first 'Action Programme'.

[109] See O'Donovan and Szyszczak, Equality and Sex Discrimination Law (Blackwell, Oxford, 1988), in particular ch 7.

[110] Case 43/75 [1976] ECR 455, the so-called Second Defrenne case, noted in [1976] Journal of Business Law 296. See also Wyatt, 'Article 119 EEC: Direct Applicability' (1975–6) 1 ELRev 418, and Crisham, 'Annotation on Case 43/75' (1977) 14 CMLRev 108.

[111] The meaning of 'direct effect' is discussed in ch 2.

[112] [1976] ECR 455, at 471–2. For discussion of the similar rationales for EU race discrimination law, see McInerney, 'Bases for Action against Race Discrimination in EU Law' (2002) 27 ELRev 72.

This passage explains two vital elements of the ECJ's reasoning in relation to the principle of equal pay for men and women. First, it sees equal pay as part, but only part, of the social objectives of the Community. This has enabled it in later cases to develop an allied general principle of equality as between the sexes. It has also undoubtedly contributed to the Court's purposive reading of the secondary legislation on sex discrimination. France's 'foot-in-the-door' negotiating stance when the original TEC was being drafted therefore paid off in a way which could hardly have been anticipated in 1957. Secondly, because Article 141 is an important element in the development of Community social policy, it is not to be read narrowly or restrictively;[113] its meaning and effects must be understood in the light of its purposes, and this can lead to very much more extensive constructions of its terms, and those of the implementing directives, than would normally be expected.

It might be thought that the definition of 'sex' was a straightforward biological matter and that the only question marks which would be encountered in enforcing the principle of sex equality would concern its scope, rather than the ground itself. However, the ECJ has made it clear that the principle of non-discrimination on the ground of sex extends in two important ways beyond the obvious case of a comparable man and woman receiving different treatment. In arriving at these decisions, it has concentrated on 'gender' as well as 'sex', in other words, the social, psychological, and cultural constructs which accompany a person's membership of one or other sex, in addition to the biological difference of sex.

First, the principle of sex discrimination has been interpreted by the ECJ as providing automatic protection against discrimination based upon pregnancy.[114] In *Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus*,[115] the Court held that the Equal Treatment Directive forbade an employer to refuse to employ a pregnant woman, who was otherwise suitable for the job which she had been offered. The fact of her pregnancy was the most important reason for her non-employment and, since this is a condition which can apply only to members of the female sex, this meant that the employer's action necessarily constituted direct discrimination on the ground of sex.[116] In *Handels-OG Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Aldi Marked K/S)*,[117] the Court added that this principle holds good throughout the relevant period of maternity leave.[118] It is clear from *Dekker*, and also from the ECJ's subsequent decision in *Webb v EMO (Air Cargo) Ltd*,[119] that there is no need to resort to comparison with the treatment

[113] See, eg, the comment of Darmon AG in Joined Cases C-399, 409 and 425/92, C-34, 50 and 78/93 *Stadt Lengerich v Helmig* [1994] ECR I-5727, at 5731. See also Case C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253, in which the ECJ held that Art 141 applies to employment relationships in the public service. [114] This matter is discussed in further detail in ch 5.

[115] Case 177/88 [1990] ECR I-3941, noted by Ascher-Vonk in (1991) 20 ILJ 152.

[116] The meaning of 'direct' discrimination is discussed in ch 3.

[117] Case 179/88 [1990] ECR I-3979; both *Dekker* and *Aldi* are noted by Nielsen in (1992) 29 CMLRev 160. See also More, 'Reflections on Pregnancy Discrimination under EC Law' [1992] JSWFL 48. [118] See also discussion in ch 5 of the Pregnancy Directive.

[119] Case C-32/93 [1994] ECR I-3567.

afforded, or which would be afforded, to a member of the opposite sex where the detrimental treatment complained of can be shown to be referable to pregnancy; thus, it is incorrect to draw comparisons between the treatment received by a pregnant woman and that which would, for example, be received by a male comparator suffering from some temporary medical ailment.[120] Treatment based upon pregnancy is *ipso facto* treatment based on sex.

Secondly, the principle of sex equality has been held to apply to discrimination based upon gender reassignment. In *P v S and Cornwall County Council*,[121] the ECJ held that the Equal Treatment Directive prohibited the dismissal of an employee[122] where the true reason for the dismissal had been found by the referring court to be the employee's proposal to undergo gender reassignment.[123] The Court explained that the Directive:

> ... is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Moreover, ... the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure ...
>
> Accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.
>
> Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.
>
> To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.[124]

[120] But for discussion of the extent to which the ECJ has compromised this principle in its subsequent decisions, see ch 5.

[121] Case C-13/94 [1996] ECR I-2143. See Campbell and Lardy, 'Discrimination Against Transsexuals in Employment' (1996) 21 ELR 412, and Flynn's comments in (1997) 34 CMLRev 367.

[122] In *Goodwin and I v UK* (2002) EHRR 447, the European Court of Human Rights held that the UK's failure to accord legal recognition (specifically, through an amended birth certificate) to the reassigned gender of a post-operative transgender person violated the right to private life pursuant to Art 8 of the ECHR; furthermore, the State's refusal to recognize that reassigned gender for the purpose of marriage violated the right to marry under Art 12. The UK responded by enacting the Gender Recognition Act 2004, which permits an amended birth certificate to be issued to a transsexual person who registers pursuant to the Act. Since, as discussed above, the ECHR operates as a secondary source of EU law, *Goodwin* is likely to induce the ECJ to take an increasingly broad view of the protection granted by EU law to transsexuals.

[123] This conclusion was of particular significance in the UK where the Sex Discrimination Act 1975 had not been interpreted hitherto as extending to this situation on the basis that the treatment received by the applicant would have been no different whether the gender reassignment had been male to female or *vice versa*. See *White v British Sugar Corporation* [1977] IRLR 121. However, subsequently in *Chessington World of Adventures Ltd v Reed* [1997] IRLR 556, the Employment Appeal Tribunal held that the Sex Discrimination Act could be construed so as to cover unfavourable treatment on the ground of a declared intention to undergo gender reassignment. The Act was subsequently formally amended so as to preclude discrimination against transsexuals by the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999 No 1102.

[124] [1996] ECR I-2143, at 2165. Tridimas has commented: 'The case provides a prime example of the way the Court views the principle of equality as a general principle of Community law transcending

Tesauro AG added:

> I regard as obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or *vice versa*, but denies that protection to those who are also *discriminated against*, again by reason of sex, merely because they fall outside the traditional man/woman classification.[125]

The spirit of this decision was followed in *KB v National Health Service Pensions Agency*.[126] A female nurse employed by the National Health Service complained that the restriction of survivors' benefits in her pension scheme to widows and widowers infringed her right to equal pay pursuant to Article 141.[127] She was living in a stable relationship with R, a female-to-male transsexual, and UK law did not at the relevant time permit marriages other than between two people of the opposite biological sex; neither did it recognize the possibility of a legal change of sex.[128] The ECJ held that a decision to restrict benefits to married couples, excluding all unmarried couples, did not *per se* amount to sex discrimination since it applied to both sexes. However, the situation in question did involve an 'inequality of treatment' which, although it did not directly undermine the enjoyment of a right protected by Community law, affected one of the conditions for the grant of that right; in other words, the inequality did not relate to the award of the widower's pension but to a necessary precondition for the grant of such a pension, namely, the capacity to marry. The Court noted that the UK law prohibiting marriage between transsexuals and preventing the alteration of birth certificates had recently been held by the European Court of Human Rights to constitute a breach of Articles 8 and 12 of the ECHR.[129] This led it to conclude:

> Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as KB and R from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141.[130]

However, the Court went on to hold that it is for the Member States to determine the conditions under which they give legal recognition to gender reassignments; it

the provisions of Community legislation. In effect, the Court applied a general principle of unwritten human rights law, according to which discrimination on arbitrary criteria is prohibited, rather than the provisions of the Equal Treatment Directive, a literal interpretation of which does not support the Court's finding' (Tridimas, *The General Principles of EC Law* (Oxford University Press, Oxford, 1999), at 70). For further discussion of the general principle of equality, see ch 7 of the present work.

[125] Ibid, at 2153. See Barnard, '*P v S*: Kite Flying or a New Constitutional Approach?' in Dashwood and O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, London, 1997). In *Chief Constable of West Yorkshire Police v A (No 2)* [2004] 2 WLR 1209, the House of Lords held that it followed from *P v S and Cornwall County Council* that, for the purpose of identifying unlawful discrimination, a transsexual person must be regarded as having the sexual identity of the gender to which he or she has been reassigned.

[126] Case C-117/01 [2004] 1 CMLR 28.

[127] The applicability of Art 141 to pension schemes, and in particular to survivors' benefits, is discussed in ch 4.

[128] But see now the Gender Recognition Act 2004.

[129] *Goodwin v UK* (2002) 35 EHRR 447, as to which see ch 7.

[130] [2004] 1 CMLR 28, at [34].

was therefore for the national court in *KB* to determine whether KB could rely on Article 141 in order to gain recognition of her right to nominate R as the beneficiary of her survivor's pension.

The broad interpretation of the concept of 'sex' for the purposes of the Directive given by the ECJ in *P v S and Cornwall County Council*, combined with the Court's references to the fundamental right to equality and to dignity and freedom, lent force to the view that the Directive might also extend to discrimination on the ground of homosexuality.[131] Thus, for example, in *R v Secretary of State for Defence, ex parte Perkins*,[132] Lightman J commented in the High Court:

> After the decision in the *Cornwall* case, it is scarcely possible to limit the application of the Directive to gender discrimination, as was held in the *Smith* case,[133] and there must be a real prospect that the European Court will take the further courageous step to extend protection to those of homosexual orientation, if a courageous step is necessary to do so. I doubt, however, whether any courage is necessary, for all that may be required is working out and applying in a constructive manner the implications of the Advocate General's Opinion and the judgment in the *Cornwall* case.[134]

Furthermore, in *Grant v South-West Trains Ltd*,[135] which concerned travel concessions granted by an employer in respect of the common law opposite-sex spouse of an employee but refused to a lesbian employee who was living with a female partner, Elmer AG submitted that discrimination on the ground of sexual orientation was indeed forbidden by EU law. Although the *Cornwall* case technically concerned the Equal Treatment Directive, he argued that it had equal significance for Article 141, 'which sets out the basic principle prohibiting discrimination based on sex'. In order to give full effect to that principle, he reasoned that Article 141 must be construed so as to preclude forms of discrimination against employees based on gender, and he continued:

> The provision must, in order to be effective, be understood as prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent or other dependent. The provision must therefore also be regarded as precluding an employer from, for instance, denying a household allowance to an employee for sons under 18 living at home when such an allowance in otherwise equivalent circumstances was given for daughters living at home.[136]

[131] Support could also be derived for the application of the Equal Treatment Directive to discrimination on account of homosexuality from the fact that Art 2(1) (even after its amendment) refers to discrimination on 'grounds' (plural) 'of sex'. In *R v Ministry of Defence, ex parte Smith* [1996] IRLR 100 (noted by Skidmore in 'Homosexuals Have Human Rights Too' (1996) 25 ILJ 63) and *Smith v Gardner Merchant Ltd* [1996] ICR 790, UK courts held that UK sex equality legislation did not protect homosexuals against discrimination on grounds of sexual orientation. For further discussion, see Wintermute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 60 MLR 334, and Waaldijk and Clapham (eds), *Homosexuality: A European Community Issue* (Martinus Nijhoff, Dordrecht, 1993).

[132] [1997] IRLR 297. The *Perkins* case challenged the Ministry of Defence's policy of dismissing all members of the armed services who had a homosexual orientation. The request for a preliminary ruling in this case was, however, withdrawn after the ECJ's decision in Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621, discussed below.

[133] Op cit, n 131.

[134] [1997] IRLR 297, at 303.

[135] Op cit, n 132.

[136] Ibid, at 627.

His conclusion was that:

> [A] provision in an employer's pay regulations under which the employee is granted travel concessions for a cohabitee of the opposite sex to the employee but refused such concessions for a cohabitee of the same sex as the employee constitutes discrimination on the basis of gender which falls within the scope of [the Treaty] Article ...[137]

Despite these robust assertions, in its decision in *Grant* the ECJ nonetheless ultimately rejected the view that the equal treatment principle contained in Article 141 extended to discrimination on the ground of homosexuality.[138] It did however note expressly that the Treaty of Amsterdam had inserted what is now Article 13 into the TEC, and that this would enable future legislative action to outlaw discrimination on the ground of sexual orientation. As seen above, such action was taken shortly after *Grant* in the form of the Framework Directive.

The Equal Treatment Directive also refers, in Article 2(1), to discrimination in relation to marital or family status. The ECJ has never ruled specifically on the meaning of the phrase 'marital status'. However, it would appear to embrace any type of marital status, so that it seems to protect alike those who are married, those who have never been married, and those who were once married but whose marriage has ended because of death, divorce, or nullity.[139] The meaning of discrimination on the basis of 'family status' is less obvious, but it is perhaps designed to cover discrimination on the basis of a person's position within a family, for example, as a parent, a child, or a grandparent. It remains unclear whether discrimination on the grounds of marital and family status are prohibited *per se*, or whether they are prohibited only where they also constitute some form of sex discrimination, whether direct or indirect. The latter construction is probably the more likely—the main object of the Directive is to prohibit sex discrimination—and the phrase 'by reference in particular to marital or family status' suggests that these are merely examples of situations in which sex discrimination can occur.

(iii) Part-time and temporary employment

Two other grounds on which discrimination is today prohibited by EU law have also developed out of the law on sex discrimination. As will be seen in chapter 3, the concept of indirect discrimination enables the ECJ to treat as unlawful practices which, though apparently neutral, have a disadvantageous effect upon a protected class of persons. Thus, since the vast majority of part-time workers throughout the

[137] Op cit, n 132 at 629–30.

[138] For criticism of this decision, see Terrett, 'A Bridge too Far? Non-Discrimination and Homosexuality in European Community Law' (1998) 4 EPL 487; Bamforth, 'Sexual Orientation Discrimination after *Grant v South-West Trains*' (2000) 63 MLR 694; and the comment of McInnes in (1999) 36 CMLRev 1043. See also Joined Cases C-122 & 129/99P *D and Sweden v Council* [2001] ECR I-4319.

[139] Cf the British Sex Discrimination Act 1975, s 3, which forbids discrimination on the basis of marital status only as far as married persons are concerned. The Civil Partnership Bill, if enacted, will extend protection against discrimination to same-sex couples who have registered a civil partnership.

EU are female, practices which produce a negative impact for part-time workers have consistently been treated by the ECJ as contrary to the principle of sex equality. The same is true for practices which produce an adverse impact for workers employed on fixed-term contracts of employment. Today, however, it is not always necessary to resort to the concept of indirect discrimination in these situations since, as will be discussed in chapter 5, discrimination on the grounds of both part-time and temporary working is independently rendered unlawful by the Directive on Part-Time Work[140] and the Directive on Fixed Term Work.[141] This independent regulation has the consequence that male part-time and temporary workers also have legal protection against discrimination.

(iv) Racial or ethnic origin

The Race Directive prohibits discrimination on the grounds of 'racial or ethnic origin'.[142] Its background was mounting international concern at the prevalence of racism, in particular because of the resurgence of Far Right activities and racist violence in parts of Europe.[143] 1997 was proclaimed the European Year against Racism,[144] and the same year witnessed the creation of the European Monitoring Centre on Racism and Xenophobia.[145] The European Council meeting in Tampere in October 1999 invited the Commission to come forward as soon as possible with proposals to implement Article 13 in the field of race, an invitation which was accepted with alacrity.[146] The Commission was particularly concerned about discrimination in parts of Central and Eastern Europe, especially as regards the Roma and persons with learning disabilities; it was therefore keen to send out a signal about the importance of respect for fundamental rights to the countries of Central and Eastern Europe which were at that time seeking accession to the EU. In addition, it wished to ensure that the new Article 13 legislation formed part of the *acquis communautaire* to which those countries would be required to accede.[147] There is, nevertheless, undoubtedly also an economic basis for the Race Directive[148] (as indeed for its sister instrument, the Framework Directive).[149] Fredman has argued that discrimination helped to establish the Common Market by creating a pool of cheap labour, and it was only with the acceptance of a 'convergence

[140] Directive 97/81, OJ [1998] L14/9. [141] Directive 99/70, OJ [1999] L175/43.

[142] Op cit, n 88. See, in particular, Arts 1 and 2 of this Directive.

[143] See Gearty, 'The Internal and External "Other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe' in Alston (ed), with Bustelo and Heenan, *The EU and Human Rights* (Oxford University Press, Oxford, 1999). See also Brown, 'The Race Directive: Towards Equality for *All* the Peoples of Europe' (2002) 21 YEL 195. [144] OJ [1999] C237/1.

[145] See Regulation 1035/97, OJ [1997] L151/1.

[146] See also the account of the remarkable haste with which the Race Directive was ultimately adopted, given by the Select Committee on the European Union in 'The EU Framework Directive on Discrimination', HL Session 2000–01, 4th Report, HL Paper 13, para 7.

[147] See Select Committee on the European Union, 'EU Proposals to Combat Discrimination', HL Session 1999–2000, 9th Report, HL Paper 68, para 36. [148] See, eg, Recital 9 of its Preamble.

[149] See Recital 11 of the Preamble to the Framework Directive.

between economic goals, and goals of justice and fairness that a generalised power to legislate in the discrimination field was enacted'.[150]

It is to be noted that the Directive contains no definition of the elusive expression 'racial or ethnic origin',[151] although a few textual clues about its intended meaning can be garnered from the lengthy Preamble. In particular, Recital 6 provides:

> The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

Thus, the Directive appears to be predicated on the basis that the human race itself, although a single generic entity, consists of different racial groups. The concept of racism is on several occasions[152] linked in the Preamble with 'xenophobia', defined in the *Shorter Oxford English Dictionary* as a 'morbid dread or dislike of foreigners'; this might perhaps indicate that the Directive is primarily targeted at discrimination against racial groups (whatever they may be) whose origin is outside the EU.

The notion of ethnicity is arguably even more elusive than that of race. However, it may perhaps be hazarded that more cases will turn on the meaning of ethnic origins than of racial origins because, whilst 'racial' suggests physiological but generally unprovable distinctions between people, 'ethnic' primarily connotes sociological or cultural distinctions (albeit sometimes transient ones) with which the judiciary is likely to feel more comfortable. Thus, for example, the *Shorter Oxford English Dictionary* definition suggests that 'ethnic' indicates the distinctive characteristics of different racial groups or peoples. Recital 8 of the Preamble refers to 'ethnic minorities', suggesting perhaps that it is minorities within a State's population who are uppermost in the mind of the legislature. Recital 10 refers to a Commission Communication on 'racism, xenophobia and anti-Semitism', the only hint given by the instrument that religion or religious heritage may play a part in defining ethnicity.

Recital 14 highlights the very important practical point that women from racial minorities frequently encounter discrimination on the grounds both of their race and of their sex:

> In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

A further deduction to be made from this statement would seem to be that the relevant substantive provisions of EU law on racial and sexual equality should, as far as possible, be interpreted and applied consistently with one another.

[150] Fredman, 'Equality: A New Generation?' (2001) 30 ILJ 145, at 149.

[151] Attempts to provide a scientific explanation for the attribution of race are, mercifully, generally discarded today. Thus, as Fredman has observed, race today is really 'a social construct, reflecting ideological attempts to legitimate domination, and heavily based on social and historical context... Racism is... not about objective characteristics, but about relationships of domination and subordination...' (Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, Oxford, 2001).

[152] Recitals 7, 10, and 11.

On a more negative note, Recital 13 explains that the Directive applies to the nationals of third countries but 'does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation'.[153] It is immediately evident that this limitation will lead to some idiosyncratic distinctions; thus, for example, a white Zimbabwean whose antecedents were of European origin might be unable to complain of unlawful discrimination occurring in a Member State of the EU in circumstances where a black compatriot, of African descent, could do so. It is noteworthy that the primary British legislation outlawing race discrimination refers to 'colour, race, nationality or ethnic or national origins'.[154] 'Colour' has not been included in the Directive, though it seems probable that it will play an indirect role in establishing ethnicity; this is in many ways a strange omission, since much racial discrimination is in reality grounded upon the visible element of the colour of the victim's skin.[155]

It is therefore clear that much discretion has been left in the hands of the ECJ as regards the definition of 'racial or ethnic origin'. As will be seen in chapter 2, the ECJ's position is crucial, since any definition it formulates will create binding law in all the Member States. Even if it opts to delegate a measure of discretion over the meaning of 'racial or ethnic' in different national contexts to the courts of the Member States, the outer limits of any such discretion will be patrolled by the ECJ. Although experience in the field of sex discrimination suggests that confidence can be placed in the ECJ to articulate sensible and workable principles in this area, the disadvantage of the present arrangements is that the law will remain uncertain until such time as it does so. This is undesirable for applicants and respondents alike.

British case law on racial discrimination is probably the most advanced of all the Member States of the EU. It is therefore likely to provide at least guidance to the ECJ in formulating its definition of 'racial or ethnic origin'. In practice, most of the litigation has concerned the meaning of 'ethnic', perhaps because the inclusion of 'colour' in the Race Relations Act definition has made it less necessary to concentrate on the meaning of 'race'. The leading decision is that of the House of Lords in *Mandla v Dowell Lee*.[156] A Sikh boy had been refused admission into a school because he refused to cut off his hair and remove his turban. Since Sikhs cannot be identified by reference to colour, race, nationality, or national origin, it was necessary to prove that they formed an ethnic group if they were to be protected by the Act. Lord Fraser set out two essential, and five other relevant, characteristics of an ethnic group; in practice, his test is routinely applied today by British courts and tribunals hearing discrimination cases. The *essential*

[153] This exception is discussed in more detail in ch 6.

[154] Race Relations Act 1976, s 3(1). Cf the new legislation introduced to implement the Race Directive; the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003 No 1626, refer only to racial, ethnic, or national origin.

[155] See discussion by Brennan in 'The Race Directive: Recycling Racial Inequality' (2002–3) 5 CYELS 311.

[156] [1983] AC 548.

characteristics are:

- a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive;
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

The *relevant* characteristics are:

- either a common sense of geographical origin, or descent from a small number of common ancestors;
- a common language, not necessarily peculiar to a group;[157]
- a common literature peculiar to the group;
- a common religion different from that of neighbouring groups or from the general community surrounding it;
- being a minority, or being an oppressed or dominant group within a larger community.

Lord Fraser added that a group which included enough of these characteristics would be capable of including converts, such as people who marry into it. The House of Lords concluded that Sikhs did constitute an ethnic group. They were originally a religious community but are now no longer purely religious in character. However, they are a distinctive and self-conscious community, with a history going back to the fifteenth century. They have a written language, which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than Hindus, and they were at one time politically supreme in the Punjab.

Applying Lord Fraser's test, Rastafarians were held not to constitute an ethnic group in *Crown Suppliers v Dawkins*,[158] since sixty years does not amount to a long shared or group history. Similarly, Muslims are not regarded by British courts as forming an ethnic group since they include people of many different nationalities and colours, who speak many different languages.[159] On the other hand, in *CRE v Dutton*,[160] members of the 'traveller' community (formerly known as 'gypsies') were found to be an ethnic group because they do have a long shared history and a common geographical origin (coming from Northern India via Persia in medieval times); they also have some customs of their own, especially as regards cooking, washing, dressing, and furnishings. They have a language or dialect of their own and, although without a common religion or literature, they have a repertoire of folk tales and music passed down the generations.[161]

[157] A common language, on its own, is insufficient to establish a racial group under British law: *Gwynedd County Council v Jones* [1986] ICR 833.

[158] [1993] ICR 517.

[159] This assumption underlies the decision of the Employment Appeal Tribunal in *J H Walker Ltd v Hussain* [1996] IRLR 11. Cf the discussion below on discrimination on the ground of religion or belief.

[160] [1989] QB 783.

[161] In *Seide v Gillette Industries* Ltd [1980] IRLR 427, the Employment Appeal Tribunal held that Jewish people could be said to share a common ethnicity.

(v) Religion or belief

The grounds of religion or belief, disability, age, and sexual orientation are all contained in the Framework Directive. As was the case with the Race Directive, the Commission made it clear at the time of proposing the instrument that an important part of its motivation was that this anti-discrimination legislation should form part of the *acquis communautaire* before the accession of the new Member States. The grouping of the four, seemingly somewhat disparate, grounds together was also part of the Commission's strategy; it believed that the Member States were more enthusiastic about some of the grounds than about others, and it wanted to exploit the political momentum to ensure that it achieved legislation on all the bases mandated by Article 13.[162] Nevertheless, this approach involves the risk of false consistency, in other words, that the attempt to shoe-horn four different grounds into a single legislative instrument will produce a model which is not wholly appropriate to one or more of them.

As in the case of racial or ethnic origin contrary to the Race Directive, the Framework Directive makes no attempt to define 'religion or belief', so that similar problems of uncertainty occur here, as indeed also in relation to disability, age, and sexual orientation. In using the bare but alternative expression 'religion or belief', the Directive presumably means to encapsulate both religious beliefs (however 'religion' is to be defined) and other philosophical beliefs on major issues such as life, death, and morality akin to, but not amounting to, religion; thus, a belief in a divine being or deity would appear to be unnecessary. So, for example, it seems likely that the intention is to cover Buddhism. What remains to be clarified by the ECJ is whether other typical facets of religious practice, such as some form of communal or individual worship, will be required; if they are, this might rule out belief systems such as humanism, pacifism, atheism, and vegetarianism. In addition, the Court will have to draw the difficult line between religion or belief on the one hand and political opinion on the other, a problem of heightened importance in a world in which religious fundamentalism often marches hand in hand with political ideology.

Further guidance will be available from the ECHR, Article 9 of which provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

As already noted, the law flowing from the ECHR operates as a source of EU law and, therefore, the meaning attached by the European Court of Human Rights to the concept of religion is relevant to its interpretation by the ECJ. It is thus relevant to note that, although it has not decided many cases directly on the point, the European Court of Human Rights has taken an essentially broad view of Article 9,

[162] See Select Committee on the European Union, op cit, n 147, para 40.

not confining it to the major world religions[163] but extending it also to fringe religions[164] and to non-religious beliefs, including atheism and agnosticism.[165] Before its demise,[166] the European Commission on Human Rights also recognized as 'religions' some movements which might be referred to popularly as 'cults'.[167]

UK law did not, before the enactment of the Framework Directive, define religion or belief for the purpose of anti-discrimination law; this was because no statute applying to mainland Britain prohibited religious discrimination *per se*[168] and, although the Fair Employment and Treatment (Northern Ireland) Order 1998[169] prohibits discrimination on the ground of 'religious belief or political opinion',[170] in the practical context of Northern Ireland it is clear that the Catholic and Protestant religions are those which were uppermost in the mind of the legislature.[171] The only former purpose for which UK law had to define religion was for the law of charities, since one of the permitted objects of a charity is the advancement of religion.[172] The UK courts, understandably, have never sought to arbitrate between different religions, nor to decide on the veracity of their respective claims.[173] However, for charitable status, a religion requires that its adherents believe in a god[174] and, furthermore, that they engage in some form of worship.[175]

In the UK, the prohibition on religious discrimination is implemented by the Employment Equality (Religion or Belief) Regulations 2003.[176] These define 'religion or belief' as 'any religion, religious belief, or similar philosophical belief'.[177] The Department of Trade and Industry Explanatory Notes which preceded the

[163] Although of course the major world religions are included. See, eg, *Cha'are Shalom Ve Tsedek v France*, App No 00027417/95, Reports of Judgments and Decisions 2000-VII, which implicitly regards Orthodox Judaism as covered by Art 9.

[164] For example, the Jehovah's Witnesses: *Hoffmann v Austria* (1994) 17 EHRR 293 and *Thlimmenos v Greece* (2001) 31 EHRR 411; and the Pentecostal Church: *Larissis v Greece* (1999) 27 EHRR 329.

[165] *Kokkinakis v Greece* (1994) 17 EHRR 397.

[166] Protocol 11 to the ECHR, which came into force on 1 November 1998, replaced the Commission and the old Court with a new full-time Court of Human Rights.

[167] For example, Druidism (*Chappell v UK* (1987) 53 DR 241), Scientology (*X and Church of Scientology v Sweden* (1979) 16 DR 68), the Divine Light Zentrum (*Omkarananda and the Divine Light Zentrum v Switzerland* (1981) 25 DR 105), Pacificism (*Arrowsmith v UK* (1978) 19 DR 5), Veganism (*H v UK* (1993) 16 EHRR CD 44), and the Krisna consciousness movement (*Iskcon v UK* (1994) 76A DR 90).

[168] However, as noted in the preceding section, religion plays a part in determining ethnicity within the provisions of the Race Relations Act 1976.

[169] SI 1998 No 3162 (NI 21).

[170] For the purposes of the Order, references to a person's religious belief or political opinion include references to '(a) his supposed religious belief or political opinion; and (b) the absence or supposed absence of any, or any particular, religious belief or political opinion': reg 2(3).

[171] See, eg, reg 4 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

[172] See generally Picarda, *The Law and Practice Relating to Charities*, 2nd edn (Butterworths, London, Dublin, and Edinburgh, 1995).

[173] *Neville Estates Ltd v Madden* [1962] Ch 832.

[174] *Bowman v Secular Society* [1917] AC 406.

[175] See the Decision of the Charity Commissioners of 17 November 1999 to the effect that the Church of Scientology did not attract charitable status since, although members of the Church believed in a god, they did not engage in veneration of their god. See also *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697.

[176] SI 2003 No 1660.

[177] Ibid, reg 2.

enactment of the Regulations add that the courts and tribunals will probably wish to consider factors such as whether the potential 'religion or belief' involves collective worship, a clear belief system, and a profound belief affecting a person's way of life or view of the world. The ACAS Guide counsels employers to be aware that the Regulations 'extend beyond the more well known religions and faiths to include beliefs such as Paganism and Hinduism . . . and those without religious or similar beliefs'.[178]

(vi) Disability

As with the other grounds specified in the Framework Directive, no definition is provided of the term 'disability'; the suggestion of the House of Lords Select Committee on the EU that some non-exhaustive examples might be given was not taken up.[179] The result is especially unsatisfactory in relation to such an extremely vague and open-ended term as disability.

Once again, some guidance might be obtained from the UK's domestic legislation, in this case the Disability Discrimination Act 1995. Section 1(1) defines disability for the purposes of the Act as 'a physical or mental impairment which has a substantial and long-term adverse effect on [the] . . . ability to carry out normal day-to-day activities'. Schedule 1 supplements this provision by defining such things as the types of mental illness covered, the meaning of 'long-term', the relevance of medical treatment, and the correct approach to progressive conditions; in doing so, it well illustrates the difficulties inherent in this area and thus the current lacuna in EU law. However, the UK's domestic legislation, focusing as it does on impairment, adopts a highly 'medical' view of disability; there is a competing and wider model of disability which sees it as a social construct, in other words, a result of the person's disadvantaged position in society. As one writer has put it, '[w]hilst the medical model sees disability as a functional impairment, the social model sees disability as a particular relationship between the impaired individual and society';[180] she goes on to argue that EU law takes an increasingly social view and that the UK's domestic law may therefore fall short of its demands.[181]

(vii) Age

Age is similarly left undefined by the Framework Directive. The only conclusion which can be drawn from this, in the absence of explanatory case law from the

[178] ACAS, *A guide for employers and employees: Religion or belief and the workplace*, 2004, www.acas.org.uk.

[179] See Select Committee on the European Union, op cit, n 147, para 69.

[180] Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' (2003) 32 ILJ 253.

[181] See also Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective' (2002) 27 ELRev 303.

ECJ, is that the Directive is intended to protect all age groups and not merely older people,[182] despite the demographic trend towards an increasingly elderly population in Europe.[183] However, as will be seen in chapter 6, the Directive contains a widely drafted exception where age discrimination can be justified by reference to a legitimate aim; this might well exonerate national legislation restricting the application of the principle in specific instances to older people.[184]

(viii) Sexual orientation

In common with the other prohibited categories, 'sexual orientation' remains to be defined by the ECJ. Its most obvious intended application is to homosexuals; this conclusion is reinforced by the ECJ's reluctance to interpret 'sex' for the purposes of Article 141 so as to include discrimination against homosexuals,[185] and the clear hints in its jurisprudence that this is a matter for legislative, not judicial, decision-making. However, the prohibition in the Directive also extends to discrimination against heterosexual, and bisexual people.[186] It is to be hoped that sexual orientation for this purpose includes those who merely incline towards homosexual, heterosexual or bisexual attraction without actively indulging in such sexual activity, since otherwise the practical application of the provision will be severely undermined; similarly, it will enhance the effectiveness of the Directive if the proscription is held to extend to discrimination on the ground of a person's behaviour (for example, his or her manner of dressing), as well as on the ground of his or her underlying sexual preference.[187]

It is not yet clear whether the Court will be prepared to apply the legislation, in addition, to those with minority sexual preferences such as, for example, sado-masochism. This is not the view taken by UK law, which limits 'sexual orientation' to:

> [A]n orientation towards—
> (a) persons of the same sex,
> (b) persons of the opposite sex, or
> (c) persons of the same sex and of the opposite sex.[188]

[182] But it is to be noted that Recital 6 of the Preamble to the Framework Directive refers expressly to the integration of 'elderly' people, and Recital 8 speaks of supporting 'older workers'.

[183] Cf the American law on age discrimination; the Age Discrimination in Employment Act 1977 protects only workers who are aged 40 and over.

[184] For support for such an argument, see Rubenstein, 'US court upholds older worker preferences' (2004) 129 EOR 18.

[185] See discussion above.

[186] There is, however, a body of opinion which questions whether sexual identity can be separated into rigid categories; see Oliver, 'Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements' (2004) 33 ILJ 1, and the literature cited therein.

[187] See further discussion in ch 3.

[188] The Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003 No 1661), reg 2(1).

2

Essential characteristics of EU law

The nature and effects of EU Law

Because of the power,[1] and indeed sometimes the duty,[2] of national courts of the Member States of the EU to seek preliminary rulings from the ECJ[3] in cases pending before them, it has been for the ECJ on numerous occasions to define the nature and effects of EU law. The ECJ's jurisdiction in the preliminary rulings procedure extends to explaining the meaning and effects of particular pieces of EU law, but the Court does not have the power to apply its rulings to the facts of the given case; that remains the role of the referring national court. In defining the characteristics of EU law, the ECJ has clearly been strongly influenced by the federalist ideal underlying the conception of the Communities. It has been able to distil certain specific and vital qualities of EU law, which differentiate it clearly both from the national laws of the Member States and also from traditional international law.[4] In practice, as events have turned out, there has probably been no other field of substantive law in which these principles developed by the ECJ have proved to be more important than sex discrimination. There is every reason to suppose that such principles will come to have similar significance in relation to the new fields of equality law too.

[1] The main power to seek a preliminary ruling is given by Art 234 (formerly Art 177). Art 234(2) confers discretion on national courts and tribunals to request a preliminary ruling where a question of EC law has to be decided before that court or tribunal can arrive at a judgment. Exceptionally, however, lower courts have no discretion to seek preliminary rulings in relation to questions arising under Title IV of the Treaty on 'Visa, Asylum, Immigration and other policies related to the free movement of persons'. (It should be noted that, pursuant to Protocols annexed to the TEU and TEC, Title IV does not apply to the UK, Ireland, or Denmark, unless they decide to opt in.) The ECJ does not, however, have jurisdiction to give preliminary rulings on Council measures connected with the removal of controls on the movement of persons across internal borders 'relating to the maintenance of law and order and the safeguarding of internal security': Art 68(2). TEU Art 35 gives additional jurisdiction to the ECJ to give preliminary rulings on matters governed by Title VI of that Treaty ('Police and Judicial Cooperation in Criminal Matters'), provided that the national State concerned has accepted the Court's jurisdiction in this respect. For further discussion of the preliminary rulings procedure, see Arnull, Dashwood, Ross, and Wyatt, *Wyatt & Dashwood's European Union Law*, 4th edn (Sweet & Maxwell, London, 2000), ch 11.

[2] In the case of courts and tribunals against whose decisions there is no judicial remedy under national law; see Art 234(3) and Art 68(1).

[3] Art 225 provides that this jurisdiction remains exclusive to the ECJ, notwithstanding the creation of the CFI. However, Art 225(3) permits the Statute of the Court of Justice to confer jurisdiction on the CFI to give preliminary rulings in specific areas.

[4] Cf Hartley, 'The Constitutional Foundations of the European Union' (2001) 117 LQR 225.