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# The gays' and lesbians' rights in an enlarged European Union

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# Legislation in fifteen EU Member States against sexual orientation discrimination in employment: the implementation of Directive 2000/78/EC <sup>1</sup>

Kees WAALDIJK

## 1. Introduction

The Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter: the Directive) requires explicit and specific legislation to outlaw sexual orientation discrimination. It does not demand a full harmonisation of national anti-discrimination law. However, the adoption of the Directive meant that all Member States either had to amend existing laws

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<sup>1</sup> This paper is based on the report of the European Group of Experts on Combating Sexual Orientation Discrimination ([www.emmeijers.nl/experts](http://www.emmeijers.nl/experts)), and especially on two of its Chapters, written by the author: Chapters 19 ("Comparative analysis") and 20 ("Conclusions"), which in turn were based on the fifteen national Chapters written by the members of the group, and on Chapter 2, on European law, written by Matteo BONINI-BARALDI, the group's assistant-coordinator. To him, to the group's researcher Alan LITTLER, and to the members of the group I want to express my gratitude for their valuable contributions to this big project. I am equally grateful to Riekje Boumlak and Wout Morra who assisted in coordinating the project. The Group of Experts was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 ([http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/prog\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/prog_en.htm)). The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted to the European Commission in November 2004, aimed to represent the law as it was at the end of April 2004, although some later developments in 2004 were taken into account. The full text of the report (including English versions of all twenty Chapters and French versions of most Chapters, plus summaries in English and French of all Chapters) can be found via [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts).

and/or to introduce new ones. To assess whether the Member States are honouring their duties under the Directive, the European Commission in 2002 has set up a group of independent legal experts. In November 2004 this group presented its report *Combating sexual orientation discrimination in employment*<sup>2</sup>. This paper summarises the findings of that report.

Before the Directive was adopted in 2000, eight of the then fifteen Member States did already have some legislation against sexual orientation discrimination in employment, but AUS, BEL<sup>3</sup>, DEU<sup>4</sup>, GRC, ITA, PRT and the UK did not.

The then fifteen Member States had until 2 December 2003 to implement the Directive (either by pre-existing legislation or by new legislation)<sup>5</sup>. Only in BEL, FRA, ITA, PRT, SWE, and the UK the legislation to implement the Directive had been more or less completed before that date. In DNK, FIN, NLD and ESP implementation measures came into force early in 2004, and in AUS and IRL during the Summer of 2004 (as did supplementary legislation in PRT). By August 2004 a proposal to implement the Directive was waiting to be debated in the Parliament of LUX. In DEU and GRC final Government proposals to implement the Directive still had to be published.

This contribution gives an overview of the implementation situation with respect to the requirements of the Directive in the fifteen old Member States<sup>6</sup>. The main basis for this comparative overview is the national legislation that has been enacted or

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<sup>2</sup> K WAALDIJK & M BONINI-BARALDI (ed.), *Combating sexual orientation discrimination in employment legislation in fifteen EU Member States*. Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Leiden, Universiteit Leiden 2004, published on the website of the Commission of the European Communities, see [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts). The Chapters of that report referred to here, are the following (with the abbreviations used for the names of the Member States): 2. European law, by M BONINI-BARALDI, 3. Austria – AUS, by H GRAUPNER, 4. Belgium – BEL, by O DE SCHUTTER, 5. Denmark – DNK by S BAATRUP, 6. Finland – FIN by R HILTUNEN, 7. France – FRA by D BORRILLO, 8. Germany – DEU by S BAER, 9. Greece – GRC by M PEPONAS, 10. Ireland – IRL by M BELL, 11. Italy – ITA by St FABENI, 12. Luxembourg – LUX by A WEYEMBERGH, 13. Netherlands – NLD by K WAALDIJK, 14. Portugal – PRT by M FREITAS, 15. Spain – ESP by R RUBIO-MARIN, 16. Sweden – SWE by H YTTERBERG, 17. United Kingdom – UK by R WINTEMUTE, 18. Comparative overview by M BONINI-BARALDI, 19. Comparative analysis by K WAALDIJK, 20. Conclusions by K WAALDIJK. The report also contains an appendix with a thematic study by Alan LITTLER “Discriminatory partner benefits”.

<sup>3</sup> Except for a Collective Agreement of 1999 made binding by Royal Decree, see O DE SCHUTTER, “Belgium”, Chapter 4 in the report mentioned in note 2, para 4.1.5.

<sup>4</sup> Except for regional legislation in some German Länder, see S BAER, “Germany”, Chapter 8 in the report mentioned in note 2, para 8.1.5.

<sup>5</sup> The ten countries that joined the European Union on 1 May 2004, had to implement the Directive before that day. This Chapter does not discuss the implementation in these ten new Member States.

<sup>6</sup> For an analysis of the Directive’s requirements see M BELL, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, M BONINI-BARALDI, “European law”, Chapter 2 in the report mentioned in note 2, and K WAALDIJK, “Comparative analysis”, Chapter 19 in the same report.

proposed in most of these Member States, and that has been described and analysed in much more detail in the chapters of the report *Combating sexual orientation discrimination in employment*

First the general situation in which this implementation is or has been taking place is sketched

## 2. Social and legal background

The European Community's requirement, contained in the Directive, to prohibit sexual orientation discrimination in employment, did not arrive in a vacuum. In each of the then fifteen Member States there were already all kinds of laws – and social attitudes – about sexual orientation, about discrimination, and about employment. With respect to all three topics the Member States have many things in common, while simultaneously showing a great diversity.

### A. Public opinion surveys

As regards sexual orientation, considerable changes have taken place over the last decades in all Member States. Nevertheless, both socially and legally there are still great differences between them. The *European Values Study* gives us some idea of how the populations of the different EU countries think about homosexuality.

Table 1 Data from the 1999/2000 European Values Study Survey <sup>7</sup>

The countries are listed here in the same order as in Table 2 (see below)

	Percentage of the sample that answered that they would not like to have homosexuals as neighbours <sup>8</sup>	Mean answer to question whether homosexuality can always be justified, never, or something in between (10 = always, 0 = never) <sup>9</sup>
SWE	6	7.7
DNK	8	6.6
ESP	16	5.5
NLD	6	7.8
LUX	19	5.9
UK (Great Britain)	24	4.9
UK (Northern Ireland)	35	4.0
FRA	16	5.3
ITA	29	4.8
BEL	18	5.2
IRL	27	4.4
PRT	25	3.2
FIN	21	4.9
AUS	25	5.4
GRC	42	3.4
DEU	13	5.7

<sup>7</sup> L. HALMAN, *The European Values Study A Third Wave Source book of the 1999/2000 European Values Study Surveys*, Tilburg, WORC, Tilburg University, 2001, full text available at [www.europeanvalues.nl](http://www.europeanvalues.nl). This study is based on surveys carried out in 1999 and 2000 among the population of thirty-two European countries. Per question there were some 900 to 2,000 valid answers.

<sup>8</sup> *Ibid.*, p. 42

<sup>9</sup> *Ibid.*, p. 223

These figures suggest a great variation in the degree of social acceptance of homosexual orientation. However, it should be remembered that over the last decades almost all European countries have seen a considerable increase in the level of tolerance and social acceptance of homosexual preference, homosexual conduct, and homosexual relationships. It seems reasonable to expect that this trend will continue, also in those countries where the values of a large part of the population are not yet very positive towards lesbian, gay and bisexual persons. Seen from that perspective, the social developments around homosexuality are fairly similar in the fifteen Member States. This is further evident from the fact that in each of these countries a socially and politically active lesbian & gay movement has been establishing itself. Organisations from these movements have often been quite influential in accelerating social – and legal – change. Simultaneously, the numbers of women and men deciding to come out as lesbian, gay or bisexual (to their family, friends, colleagues, employer, etc.) have also been rising noticeably throughout the European Union, although in many places it still is a difficult and sometimes risky step for the individual. Also the availability of information about homosexuality, in books, films, television, internet, etc. has been growing considerably.

These and various related social developments have led many citizens (of any sexual orientation, and obviously including politicians, judges, etc.) to conclude that discrimination because of sexual orientation should be combated just as much as discrimination on other grounds (see Table 2 below). And that again has contributed to series of political decisions *to abolish* forms of sexual orientation discrimination that could be found *in legislation* (mainly in criminal law and in family law)<sup>10</sup>, and *to combat* sexual orientation discrimination in employment and other areas of society, often *through legislation* (see below). It seems probable that both this decrease in legal discrimination and this increase in legal protection against social discrimination, in turn are reinforcing the social developments just mentioned. One could specifically expect a further rise in the number of women and men who feel free to come out as lesbian, gay or bisexual.

Data from the 57<sup>th</sup> *Eurobarometer*, carried out in Spring 2002, give some indication of attitudes of European citizens about discrimination on several grounds<sup>11</sup>.

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<sup>10</sup> Section I.H. below contains a table showing the years when the fifteen Member States have taken major legislative steps to decriminalise homosexual sexual acts, and to recognise same-sex partners.

<sup>11</sup> See A. MARSH & M. SAHIN-DIKMEN, *Discrimination in Europe (Report A & Report B)*, Policy Studies Institute, London, 2002. (*Report B* is available at [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/publi/pubs\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/publi/pubs_en.htm); the results per country given in the tables in this chapter are part of annexes to *Report A*).

Table 2. Data on attitudes towards discrimination from the 2002 Eurobarometer <sup>12</sup>

The countries are listed here according to the results of the first question. For the first two columns a score of 100 means that all persons in the sample think that discrimination on the particular ground(s) is "wrong" in all circumstances. For the last two columns a score of 100 means that all persons in the sample think that "in general people consider it wrong" to discriminate on the particular ground(s). The scores are the combined results of questions relating to four domains of discrimination: seeking work or training, promotion at work, seeking accommodation or housing, and public services such as restaurants, banks and so on <sup>13</sup>.

	<i>Opposition to discrimination on grounds of sexual orientation</i> <sup>14</sup>	<i>Opposition to discrimination on all grounds</i> <sup>15</sup>	<i>Perceived opposition of others to discrimination on grounds of sexual orientation</i> <sup>16</sup>	<i>Perceived opposition of others to discrimination on all grounds</i> <sup>17</sup>
SWE	92	86	75	73
DNK	91	87	75	72
ESP	90	89	72	72
NLD	90	84	77	72
LUX	89	88	75	75
UK	88	87	76	76
FRA	87	85	73	72
ITA	86	85	65	67
BEL	85	81	74	70
IRL	84	82	76	75
PRT	83	85	72	75
FIN	82	83	68	70
AUS	78	78	64	65
GRC	77	82	64	69
DEU (east)	71	71	65	65
DEU (west)	69	68	60	61

Data of the same Eurobarometer also indicate that actual sexual orientation discrimination is indeed taking place in all Member States (see Table 3 below).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, Report B, p. 27.

<sup>14</sup> *Ibid.*, Chart 78 of Report A.

<sup>15</sup> *Ibid.*, Chart 79 of Report A. "All grounds" includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

<sup>16</sup> *Ibid.*, Chart 78 of Report A.

<sup>17</sup> *Ibid.*, Chart 79 of Report A. "All grounds" includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

*Table 3 Data on extent of perceived sexual orientation discrimination from the 2002 Eurobarometer*<sup>18</sup>

The countries are listed here in the same order as in Table 2 above. The scores in the first two columns are the combined results of questions relating to seven domains of discrimination at work, while looking for a job, in primary school, in secondary school, at university, in obtaining housing, and in accessing public and commercial services<sup>19</sup>

	<i>Percentage of respondents that reported having experienced discrimination or harassment on grounds of sexual orientation</i> <sup>20</sup>	<i>Percentage of respondents that reported having witnessed discrimination or harassment on grounds of sexual orientation</i> <sup>21</sup>	<i>Percentage of respondents that answered that they think 'a homosexual (a gay or lesbian person)' with the same skills or qualification would have less chance than anyone else of getting a job, training or promotion</i> <sup>22</sup>
SWE	< 0.5	10	43
DNK	< 0.5	4	26
ESP	< 0.5	3	45
NLD	> 1.0 and < 1.5	11	24
LUX	> 0.5 and < 1.0	8	37
UK	> 0.5 and < 1.0	6	28
FRA	> 0.5 and < 1.0	6	33
ITA	< 0.5	3	39
BEL	> 0.5 and < 1.0	5	26
IRL	< 0.5	2	22
PRT	< 0.5	3	44
FIN	< 0.5	9	56
AUS	< 0.5	5	34
GRC	> 0.5 and < 1.0	4	54
DEU (east)	> 0.5 and < 1.0	5	32
DEU (west)	> 0.5 and < 1.0	6	39

<sup>18</sup> See note 11

<sup>19</sup> *Ibid*, Report B, p. 10 and 17

<sup>20</sup> *Ibid*, Chart 7 of Report A. In Report B (p. 14) A. MARSH & M. SAHIN-DIKMEN write: "In all countries except Netherlands, less than 1 per cent of respondents reported discrimination on grounds of sexual orientation. The differences between countries are too small to allow a meaningful comparison, but it is interesting to note that Netherlands ( ) has the highest number of respondents who reported discrimination because of sexual orientation. It is possible that this higher rate of discrimination is more of a reflection of a cultural openness about the issue than it is an indication of comparatively higher actual incidence rates." One might add to that, that the higher rate of coming out among gay men and lesbian women in the Netherlands than in several other countries, may also make them more likely to be confronted with discrimination because of their orientation.

<sup>21</sup> *Ibid*, Chart 39 of Report A. See also Report B, p. 17-21

<sup>22</sup> *Ibid*, Chart 71 of Report A. See also Report B, p. 25

The fact that on average less than 1% of the respondents in all countries experienced sexual orientation discrimination (i.e. 81 persons among a total of around 16,000 respondents)<sup>23</sup>, should be read in combination with the assumption that only around 5% of adults identify as gay or lesbian, and that a lesser percentage come out as such. It is noteworthy that the percentage of respondents reporting having experienced discrimination on grounds of race or ethnicity (3%), religion or beliefs (2%), physical disability (2%), learning difficulties or mental illness (2%), or age (5%) are only a little higher<sup>24</sup>. It should also be noted that these figures do not necessarily give an accurate picture of the full extent of actual discrimination taking place.

The mutually reinforcing social and legal developments indicated above are not only occurring in the Member States, but also at the European level. The inclusion of sexual orientation in Article 13 of the EC Treaty in 1999 and in the Directive in 2000 can be seen as a product of this. For eight of the then fifteen Member States this Directive has meant that additions had to be made to already existing legislation prohibiting sexual orientation discrimination in employment (DNK, ESP, FIN, FRA, IRL, LUX, NLD, SWE), for the then seven other Member States the Directive has meant that for the first time sexual orientation discrimination in employment needed to be made the object of national legislation (BEL, AUS, DEU, GRC, ITA, PRT, UK).

Given these rather different social and legal starting points with respect to sexual orientation, it will come as no surprise that existing and proposed laws in the Member States also vary considerably. In part, that variation can also be attributed to the differences in traditions and structures that characterise the existing laws of the Member States on employment in general and on anti-discrimination with respect to other grounds than sexual orientation. For example, in employment and/or anti-discrimination law the legal relevance of constitutions, collective labour agreements, or judicial law-making varies from country to country.

### ***B. Constitutional protection against discrimination***

In theory, all citizens of the European Union enjoy some constitutional protection against sexual orientation discrimination in employment, at least in *public* employment. However, this is only spelled out in one national constitution, that of Portugal. In the other Member States constitutional protection can either be derived from more general words in the national constitution, or from the European Convention on Human Rights.

The law of the European Union, so far, does not provide any real constitutional protection in this matter: Article 13 of the EC Treaty lacks direct effect, and it remains to be seen what the legal status of the non-discrimination provision of Article 21(1) of the EU Charter of fundamental rights will be. Nevertheless, the explicit inclusion of sexual orientation in both Article 13 of the EC Treaty and Article 21 of the EU

<sup>23</sup> *Ibid.*, Report B, p. 13.

<sup>24</sup> *Ibid.*, Chart 1 of Report A.

Charter, helps to strengthen the idea that sexual orientation discrimination should be considered as unconstitutional. This has been made even more evident by the inclusion of these two provisions into the agreed text for the European Constitution<sup>25</sup>, and by the insertion in that text of a new article, on the aim of combating discrimination in EU policies<sup>26</sup>.

In Portugal a constitutional amendment adding "sexual orientation" to the prohibition of discrimination in Article 13 of the Portuguese Constitution came into force on 31 July 2004<sup>27</sup>.

As far as the other national constitutions are concerned<sup>28</sup>, the words "sexual orientation" so far can only be found in one of the constitutional instruments of Sweden. However, (together with DNK, LUX and the UK) Sweden is one of the few countries without a general constitutional prohibition of discrimination. The Swedish provision (which is not legally binding) merely obliges Parliament, Government and other public bodies to take action against discrimination on several grounds, including sexual orientation<sup>29</sup>. An instruction to combat discrimination in general, can also be found in some other constitutions (ITA, PRT, ESP)<sup>30</sup>.

<sup>25</sup> See M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.1. In the Treaty establishing a Constitution for Europe of 29 October 2004 ([www.europa.eu.int/constitution/constitution\\_en.htm](http://www.europa.eu.int/constitution/constitution_en.htm)) the provisions are numbered and phrased as follows:

Article II-81(I) (former II-21, based on Article 21 EU Charter) "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

Article III-124 (former III-8, based on Article 13 EC) "(1) Without prejudice to the other provisions of the Constitution and within the limits of the powers assigned by it to the Union, a European law or framework law of the Council may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council shall act unanimously after obtaining the consent of the European Parliament. (2) By way of derogation from paragraph 1, European laws or framework laws may establish basic principles for Union incentive measures and define such measures, to support action taken by Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, excluding any harmonisation of their laws and regulations".

<sup>26</sup> Article III-118 (former III-3) "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

<sup>27</sup> Constitutional Law 1/2004. On Madeira and the Azores this amendment came into force on 10 August 2004. See M. FREITAS, "Portugal", Chapter 14 in the report mentioned in note 2, para. 14.1.

<sup>28</sup> Sexual orientation is mentioned explicitly in anti-discrimination provisions in the regional constitutions of a few Länder in DEU.

<sup>29</sup> H. Ytterberg, "Sweden", Chapter 16 in the report mentioned in note 2, para. 16.1.1.

<sup>30</sup> See the first paragraphs of the relevant national chapters in the report mentioned in note 2.

In the eleven Member States that do have a constitutional prohibition of discrimination on many grounds (AUS, BEL, FIN, FRA, DEU, GRC, IRL, ITA, NLD, PRT, ESP), that prohibition is (most probably) at least binding on the legislature<sup>31</sup>, and on public employers. In some countries it is not yet clear whether it is covered (DEU, FRA, GRC and IRL). But in six countries there is enough authority (in case law, in the doctrine, or in the *travaux préparatoires*) to consider sexual orientation implicitly covered as a prohibited ground for discrimination (AUS, BEL, FIN, ITA, NLD, ESP)<sup>32</sup>.

Especially for the nine countries where national constitutional protection against sexual orientation discrimination is unclear or absent, it is relevant to see if this is made good by any direct applicability of the European Convention on Human Rights. By the end of 2003, the Convention had indeed become directly applicable in all of the then fifteen Member States of the EU<sup>33</sup>. Although in the courts of some of them the Convention does not take precedence over parliamentary legislation (DEU, IRL, UK and possibly ITA)<sup>34</sup>.

The European Convention on Human Rights binds its State Parties, and therefore all legislatures, and all public employers. This has been recognised in the case law of the European Court of Human Rights, most clearly in the cases where it ruled that the ban of the United Kingdom on gays and lesbians in the armed forces violated Article 8 of the Convention (respect for private life)<sup>35</sup>. Article 14 of the Convention prohibits discrimination on many grounds with respect to the enjoyment of the other rights and freedoms it guarantees. Sexual orientation discrimination in employment will almost always fall within the ambit of one of these other rights, especially the right to respect for private life. This is so because the European Court of Human Rights considers at least three of the main aspects of sexual orientation as (very intimate) aspects of private life: sexual conduct<sup>36</sup>, sexual preference<sup>37</sup>, and relationships<sup>38</sup>. Whether the

<sup>31</sup> In NLD with the restriction that parliamentary acts cannot be declared unconstitutional by the Dutch courts (K. WAALDIJK, "Netherlands", Chapter 13 in the report mentioned in note 2, para 13.1.1).

<sup>32</sup> See the first paragraphs of the relevant chapters in the report mentioned in note 2.

<sup>33</sup> The last of the fifteen old Member States to make the Convention directly applicable, was IRL (in 2003), see M. BELL, "Ireland", Chapter 10 in the report mentioned in note 2, para 10.1.1.

<sup>34</sup> See the first paragraphs of the relevant chapters in the report mentioned in note 2.

<sup>35</sup> ECHR, 27 September 1999, *Lustig-Prean and Beckett v UK*, appl 31417/96, *Smith and Grady v UK*, appl 32377/96, 22 October 2002, *Beck, Copp and Bazeley v UK*, appl 48535-48537/99.

<sup>36</sup> ECHR, 22 October 1981, *Dudgeon v UK*, appl 7525/76, 26 October 1988, *Norris v Ireland*, appl 10581/83, 22 April 1993, *Modinos v Cyprus*, appl 15070/89, 31 July 2000, *A D T v UK*, appl 35765/97, 9 January 2003, *S L v Austria*, appl 45330/99, *L & V v Austria*, appl 39392/98 and 39829/98, 10 February 2004, *B B v UK*, appl 53760/00.

<sup>37</sup> ECHR, 27 September 1999, *Lustig-Prean and Beckett v UK*, appl 31417/96, *Smith and Grady v UK*, appl 32377/96, 21 December 1999, *Salgueiro da Silva Mouta v Portugal*, appl 33290/96, 26 February 2002, appl 36515/97, *Fretté v France*, 22 October 2002, *Beck, Copp and Bazeley v UK*, appl 48535-48537/99.

<sup>38</sup> ECHR, 24 July 2003, *Karner v Austria*, appl 40016/98.

Court will also consider *coming out* as an aspect of private life, remains to be seen, but this could also be considered as falling in the ambit of the freedom of expression (Article 10)<sup>39</sup>. Some cases of discrimination will fall within the ambit of the right to property (Article 1 of the First Protocol to the Convention). So far the European Court of Human Rights has five times found unlawful sexual orientation discrimination<sup>40</sup>. In the only cases of alleged employment discrimination on that ground, the Court has chosen to reach its conclusion directly on the basis of Article 8<sup>41</sup>.

Whether there also exists some constitutional protection against sexual orientation discrimination in private employment, is less certain in most countries. The European Convention on Human Rights here only plays a role with respect to court decisions and legislation on private employment: these decisions and that legislation need to be non-discriminatory.

Invoking a generally worded provision in a national constitution or in the European Convention on Human Rights is not easy, for an ordinary victim of employment discrimination (and for his ordinary lawyer). Therefore more specific legislation is necessary (see para. 3. C. below), especially in private employment where constitutional protection is very limited. But there is also another reason why whatever constitutional protection may exist, is not enough: the principles and concepts of equality used in constitutional law are often vague and capable of different applications, and allowing for rather more justifications than are acceptable under the Directive (see below).

### C. General principles and concepts of equality

Long before the Directive was adopted, the existence of a general principle of non-discrimination was recognised by the Court of Justice of the EC. In the application of this principle the Court often uses a similarly situated test, but sometimes also simply investigates whether a decision depends on a certain (discriminatory) reason<sup>42</sup>. Both elements can be found in the Directive's definition of direct discrimination<sup>43</sup>.

Even earlier, the European Court of Human Rights had had a chance to elaborate on the prohibition of discrimination contained in Article 14 of the European Convention on Human Rights. The Court considers a distinction to be discriminatory if it lacks an objective and reasonable justification. With respect to grounds as "suspect" as sexual orientation it has specified that such a justification requires particularly serious

<sup>39</sup> See European Commission of Human Rights, 3 May 1988, *Morriensens v. Belgium*, appl. 11389/85.

<sup>40</sup> In the cases of *Salgueiro, S.L., L. & V., Karner*, and *B.B.* (see the previous notes).

<sup>41</sup> In the cases of *Lustig-Prean and Beckett*, *Smith and Grady*, and *Beck, Copp and Bazeley* (see the previous notes).

<sup>42</sup> See M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.2.

<sup>43</sup> See K. WAALDIJK, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.2.3.

reasons, and that the distinction must be shown to be proportionate in relation to the legitimate aim sought, and necessary for achieving that aim <sup>44</sup>

Most national constitutional provisions on equality have been given more or less similar interpretations, or other interpretations consisting of tests that are only the starting point of any discussion about the question whether a particular distinction is justified. It can therefore be said that the Directive, and the implementing legislation inspired by it, also operate so as to give more legal certainty to those who would otherwise have to rely on a very generally worded constitutional, or even unwritten, principle of non-discrimination.

#### *D. Provisions on sexual orientation discrimination in employment*

Since the 1980s, gradually legislative and other steps have been taken by the Member States and the Institutions of the EC to *explicitly* combat sexual orientation discrimination in employment. The following listing, which is not exhaustive <sup>45</sup>, demonstrates both the increasing speed of this process, and the accelerating role that the Institutions of the EC seem to have played in it <sup>46</sup>. There appears to be some correlation between the timing of the legal data in this listing and the data on values and attitudes given in Tables 1 and 2 above.

1984	European Parliament	Resolution on sexual discrimination at the workplace
1985	FRA	Penal Code (using "mœurs" to cover sexual orientation)
1986	FRA	Labour Code (also using the term "mœurs")
1987	-	-
1988	-	-
1989	-	-
1990	-	-
1991	Commission EC	Recommendation on the protection of the dignity of women and men at work, including Code of practice on measures to combat sexual harassment
1992	NLD	Penal Code
1993	IRL	Unfair Dismissals Act 1977
1994	NLD	General Equal Treatment Act
1995	ESP	Penal Code
	FIN	Penal Code
1996	DNK	Act on Discrimination
1997	LUX	Penal Code
1998	Council EC	Staff Regulations of officials of the EC (Article 1a, among others) and Conditions of Employment of other servants of the EC (Article 83, among others)

<sup>44</sup> ECHR, 24 July 2003, *Karner v Austria*, appl 40016/98 (see previous paragraph, and further M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2, para 2.1.2)

<sup>45</sup> For national legislation the years of entry into force are given, full citations can be found in the paragraphs 1.5 and 2.1 of each national chapter of the report mentioned in note 2.

<sup>46</sup> See M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2.

	Court of Justice EC	<i>Grant v. South West Trains Ltd.</i> (considering a disadvantage based on the sex of an employee's partner to be sexual orientation discrimination, but leaving it to the Member States and the Council to legislate against it)
	IRL	Employment Equality Act 1998
1999	Member States EU	Article 13 EC (inserted into the EC Treaty on 1 May 1999 by the Treaty of Amsterdam of 2 February 1997)
	BEL	Collective agreement (made binding by Royal Decree)
	SWE	Sexual Orientation Discrimination Act
2000	Council EC	Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
2001	FIN	Employment Contracts Act
	FRA	Inclusion of the words " <i>orientation sexuelle</i> " in the provisions of Penal Code and Labour Code
	FRA	Amendment of Law 83-634 governing the rights and obligations of civil servants
	DEU	Industrial Relations Act
2002	SWE	Equal Treatment of Students at Universities Act
2003	BEL	Law of 25 February 2003 on combating discrimination
	SWE	Discrimination Prohibition Act
	SWE	Amendment of Sexual Orientation Discrimination Act
	SWE	Amendment of Equal Treatment of Students at Universities Act
	ITA	Legislative Decree implementing the Directive
	UK	Employment Equality (Sexual Orientation) Regulations 2003
	UK	Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003
	PRT	Labour Law Code
	Council EC	Implementation deadline of Directive 2000/78/EC (2 December)
2004	ESP	Act 62/2003 (also amending the Workers' Statute, and Act 45/1999 concerning the relocation of workers in the framework of a trans-national contractual work relation)
	FIN	Equality Act 26/2004 (also amending Employment Contracts Act)
	FIN	Act on Holders of Municipal Office as amended by Equality Act
	UK	Equal Opportunities Ordinance, 2004 (Gibraltar)
	NLD	Amendment of the General Equal Treatment Act
	DNK	Amendment of the Act on Discrimination
	Council EC	Staff Regulations of officials of the EC (Article 1d, among others) and the Conditions of Employment of other servants of the EC (Article 124, among others)
	AUS	Equal Treatment Act Federal Act on the Equal Treatment Commission and the Equal Treatment Agency Federal Equal Treatment Act
	PRT	Law 35/2004 containing supplementary provisions to Labour Law Code

IRL	Equality Act 2004, amending the Employment Equality Act 1998
IRL	Pensions Act 1990, as amended by Social Welfare Act 2004 (not yet in force)

The adoption of a pending legislative proposal to (further) implement the Directive is to be expected in 2005 in Luxembourg. Government proposals to implement the Directive were to be expected in Germany and Greece by late 2004.<sup>47</sup>

It should be noted that several Member States also prohibit employment discrimination on one or more related grounds, such as civil status (NLD, BEL, PRT), family status (IRL), family situation (FRA, LUX, PRT), family relations (FIN), and *mœurs* (FRA and LUX, the term may be translated as “morals, manners, customs, ways”).

### *E. Case law precedents on sexual orientation discrimination in employment*

Even before there was explicit legislation banning such discrimination, some national courts, and also the main European courts, have had to rule on cases of sexual orientation discrimination in employment. Sometimes they accepted the claim, sometimes they rejected it.

Among the “important case law” signalled in the national chapters of the report of the European Group of Experts on Combating Sexual Orientation Discrimination, less than ten cases can be counted in which the claimant was successful. For most Member States a complete lack of reported case law was indicated: AUS, BEL, DNK, GRC, ITA, LUX, PRT and SWE.<sup>48</sup>

The first decision by a superior court finding that there had indeed been unlawful sexual orientation discrimination came in 1982, when in the Netherlands the highest court for public employment cases found that a man had been unlawfully dismissed from his job in the armed forces on the sole fact of his homosexual orientation.<sup>49</sup> More recently the European Court of Human Rights in 1999 ruled against the British ban on the employment of homosexuals in the armed forces.<sup>50</sup> And in 2002 the German Federal Administrative Court ruled that the military is not allowed to differentiate on the basis of sexual orientation.<sup>51</sup>

<sup>47</sup> In GRC, in May 2004, the opposition in Parliament has introduced a bill to implement the Directive. It is very unlikely that this opposition bill will become law. When the current opposition was still in government, before the elections of March 2004, the then Government had introduced an implementation bill, but that bill “died” because of the elections (see Chapter 9).

<sup>48</sup> K. WAALDIJK, “Comparative analysis”, Chapter 19 in the report mentioned in note 2, para 19 I 6.

<sup>49</sup> K. WAALDIJK, “Netherlands”, Chapters 13 in the report mentioned in note 2, para 13 I 6.

<sup>50</sup> ECHR, 27 September 1999, *Lustig-Prean and Beckett v UK*, appl 31417/96, *Smith and Grady v UK*, appl 32377/96.

<sup>51</sup> S. BAER, “Germany”, Chapter 8 in the report mentioned in note 2, para 8 I 6.

From the Dutch case it may be concluded that such discrimination was already unlawful (at least in the armed forces, and *a fortiori* in other sectors of public employment) in 1982, i.e. ten years before the first explicit anti-discrimination legislation. Similarly, the German case of 2002 indicates that such discrimination in public employment is also already unlawful in Germany, even before the first explicit anti-discrimination legislation that should be expected in 2005 or 2006. But the 1999 judgements of the European Court of Human Rights allow for a wider conclusion, certainly since the Court subsequently ruled that "sexual orientation"<sup>52</sup> and three of its main aspects (preference<sup>53</sup>, conduct<sup>54</sup> and relationships<sup>55</sup>) are indeed covered by the prohibition of discrimination in Article 14 of the European Convention. Now it can be maintained that since 1999 sexual orientation discrimination with respect to *military and other public employment* is unlawful in all State Parties to the European Convention on Human Rights, and therefore throughout the European Union.

With respect to *private employment*, the little case law there is, seems less helpful. The European Court of Human Rights cannot pronounce on discrimination by private employers, because the European Convention only binds the State Parties. The Court of Justice of the EC so far has had only one case on sexual orientation discrimination in private employment, *Grant v. South West Trains Ltd.*, and it decided to leave it to the Member States and the Council to legislate on it<sup>56</sup>.

The lack of case law does not mean that there are no cases. Especially in countries where anti-discrimination legislation is already in force, cases can be settled before going to court<sup>57</sup>. The fact that many cases do not make it to court, can also be learned from figures about the specialised bodies set up in three countries to deal with cases of sexual orientation discrimination:

- In Ireland in four years since 2000 the *Equality Tribunal* received fifteen complaints about sexual orientation discrimination in employment, and in two years since 2001 the *Equality Authority* has been working on a total of seventeen cases of such discrimination<sup>58</sup>.
- In Sweden in five years since 1999 the *Ombudsman against Discrimination on grounds of Sexual Orientation* has had to deal with over sixty employment related complaints<sup>59</sup>.

<sup>52</sup> ECHR, 21 December 1999, *Salgueiro da Silva Mouta v Portugal*, appl. 33290/96.

<sup>53</sup> *Ibid.*

<sup>54</sup> ECHR, 9 January 2003, *S.L. v Austria*, appl. 45330/99; *L. & V. v Austria*, appl. 39392/98 and 39829/98; 10 February 2004, *B.B. v UK*, appl. 53760/00.

<sup>55</sup> ECHR, 24 July 2003, *Karner v Austria*, appl. 40016/98.

<sup>56</sup> ECJ, 17 February 1998, Case C-249/96, *Grant v. South West Trains*, ECR, p. I-621; see M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.6.

<sup>57</sup> K. WAALDIJK, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.1.6.

<sup>58</sup> M. BELL, "Ireland", Chapter 10 in the report mentioned in note 2, para. 10.1.6.

<sup>59</sup> H. YTTERBERG, "Sweden", Chapter 16 in the report mentioned in note 2, para. 16.1.6.

- And in the Netherlands in nine years since 1995 the *Equal Treatment Commission* has given twenty-nine opinions about alleged sexual orientation discrimination in employment. In addition to that, the staff of this Commission answers questions about sexual orientation discrimination by telephone: eighteen times in the year 2002 <sup>60</sup>.

Finally, it should be pointed out that in several countries there have been many cases about the denial to gay or lesbian employees of certain spousal benefits because of their not being married to their partner. The second sexual orientation case to come to the Court of Justice of the EC, *D. and Sweden v. Council* <sup>61</sup>, also falls in this category. The Court chose to treat the distinction between (same-sex) registered partnership and (different-sex) marriage as one involving civil status, and rejected the claim of the Swedish employee of the Council of the EU for a household allowance for his registered partner <sup>62</sup>.

#### ***F. Provisions on discrimination in employment that do not cover sexual orientation***

For several decades already, employment discrimination on grounds of race and sex has been the object of more international and European rules than discrimination on grounds of sexual orientation. Hence, it is not surprising that most Member States have older and wider national rules on employment discrimination on these other grounds. However, it should be borne in mind that (apart from specific topics such as social security, pregnancy and enforcement bodies) the actual level of protection required by the Directive with respect to sexual orientation discrimination in employment, is hardly lower than the levels of protection required by the Race Directive and the various directives on the equal treatment of men and women <sup>63</sup>.

Also, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it is mostly undesirable to choose different contents and/or different words for rules with respect to different grounds. Whether different grounds of discrimination are to be tackled in (the same articles in) the same laws, is a matter of national judgement. But the question whether any differences between the rules on sexual orientation and rules on other grounds are unacceptable in light of the relevant directives and/or needlessly confusing for all concerned, surely is a topic of attention for the Commission of the EC. Therefore,

<sup>60</sup> K. WAALDIJK, "Netherlands", Chapter 13 in the report mentioned in note 2, para. 13.1.6.

<sup>61</sup> ECJ, 31 May 2001, *D. and Sweden v. Council*, Cases C-122/99 P and C-125/99 P, *ECR*, p. I-4319.

<sup>62</sup> For a discussion whether a similar case involving a private or public employer in a Member State would or could be decided differently, see K. WAALDIJK, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.3.3.

<sup>63</sup> M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2, para. 2.1.7.

at a later stage, it would make sense to carry out detailed comparisons between the national rules on the different discrimination grounds in the field of employment.

### G. Provisions on sexual orientation discrimination in other fields than employment

Most Member States have not only prohibited sexual orientation discrimination in the field of employment, but also in other fields. These fields clearly fall outside the scope of the Directive. However, for several reasons it is important to note the existence of such anti-discrimination provisions in other fields:

- Firstly, the borderline between employment and other fields is not always clear cut. This is particularly true for the areas of vocational training, vocational guidance, self-employment and benefits provided for by organisations of workers, employers, or professionals (all covered by Article 3(1) of the Directive). Each of these areas overlaps with that of goods and services. Therefore it is fortunate that the provision of goods and services is subject to a prohibition of sexual orientation discrimination in most Member States: BEL, DNK, FIN, FRA, IRL, LUX, NLD, ESP and SWE <sup>64</sup>.
- Secondly, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it can be helpful if the anti-discrimination norm is a *general* norm, and not just one applicable in certain carefully delineated areas.
- Thirdly, the perception of what areas (employment, goods and services, partnership, incitement) are central to the problem of sexual orientation discrimination varies from country to country.

A chronological (not complete) list of measures signalled in the report *Combating sexual orientation discrimination in employment* indicates the increasing prevalence of national explicit prohibitions of sexual orientation discrimination beyond the field of employment <sup>65</sup>:

1985	FRA	Penal Code (provision of goods and services)
1986	NLD	Act on Benefits for Victims of Persecution 1940-1945
1987	DNK	Penal Code (incitement to hatred)
	DNK	Act on Race Discrimination (amended so as to also cover sexual orientation)
	SWE	Penal Code (provision of goods and services)
1988	NLD	Data Registration Act
	SWE	Homosexual Cohabitees Act
1989	DNK	Registered Partnership Act
1990	-	-
1991	-	-

<sup>64</sup> See para. 1.6 of the relevant chapters in the report mentioned in note 2.

<sup>65</sup> For national legislation the years of entry into force are given; full citations can be found in the paragraphs 1.8 of each national chapter of the report mentioned in note 2.

1992	NLD	Penal Code (discrimination by a business, by a professional or by a public official; incitement to hatred by anyone)
1993	AUS	Code of conduct for police officers
1994	NLD	General Equal Treatment Act (provision of goods and services)
	ESP	Law on Urban Housing
	SWE	Penal Code (sexual orientation aggravating motive for crimes)
1995	FIN	Penal Code (provision of services)
	ESP	Penal Code (provision of services; incitement to hatred)
	SWE	Registered Partnership Act
1996	-	-
1997	BEL	Immigration circular
	LUX	Penal Code (provision of goods and services; incitement to hatred)
	NLD	Royal Decree on the training of medical doctors
1998	NLD	Civil Code (registered partnership)
	UK	Northern Ireland Act 1998 (duty to promote equality)
1999	UK	Greater London Authority Act (duty to promote equality)
	FRA	Civil Code (registered partnership: <i>Pacs</i> ; and recognition of same-sex <i>concubinage</i> )
2000	AUS	Data Protection Act
	BEL	Law on statutory cohabitation
	IRL	Equal Status Act 2000 (provision of goods and services)
2001	DEU	Law on Ending Discrimination Against Same-Sex Unions: Life Partnerships
	NLD	Civil Code (civil marriage)
	PRT	Law on <i>de facto</i> couples
2002	SWE	Equal Treatment of Students at Universities Act
	SWE	Penal Code (sexual orientation aggravating motive for crimes)
	FRA	Law 2002-73 (rental housing)
	ESP	Law on Political Parties
	FIN	Registered Partnership Act
2003	SWE	Instrument of Government
	SWE	Discrimination Prohibition Act (provision of goods and services)
	SWE	Penal Code (incitement to hatred)
	SWE	Cohabitation Act
	FRA	Penal Code (sexual orientation aggravating motive for crimes)
	BEL	Law of 25 February on combating discrimination (provision of goods and services)
2004	BEL	Civil Code (civil marriage)
	FRA	Penal Code (sexual orientation aggravating motive for more crimes)
	LUX	Partnership Act
	PRT	Constitution

### H. Other aspects of the legal background

Although the Directive does not require any legislation outside the field of employment discrimination, it seems appropriate to include a table briefly indicating the legal situation of homosexuality in each Member State in two of the most relevant other areas of law: criminal law and family law (see Table 4 below). Developments in these areas are bound to have an impact on the adoption, interpretation and application of anti-discrimination legislation with respect to sexual orientation. Occasionally, the effects of criminal law or family law can also be felt in the field of employment.

*Table 4. Decriminalisation of homosexuality and legislative recognition of same-sex partners<sup>a</sup>*

The countries are listed here in the same order as in Table 2 (see above).

	<i>Decriminalisation of sexual acts between adult men (and adult women)</i>	<i>Equalisation of age limits in sex offences law</i>	<i>First legislative recognition of not-registered same-sex cohabitation</i>	<i>Introduction of a form of registered partnership</i>	<i>Joint or second-parent adoption by same-sex partner(s) allowed</i>	<i>Opening up of civil marriage to same-sex couples</i>
SWE	1944	1978	1988	1995	2003	in preparation
DNK	1930	1976	1986 <sup>b</sup>	1989	1999	—
ESP	1822 <sup>c</sup>	1822	1994 <sup>d</sup>	in preparation <sup>e</sup>	— <sup>f</sup>	in preparation
NLD	1811	1971	1979 <sup>g</sup>	1998	2001	2001
LUX	1792	1992	—	2004 <sup>h</sup>	—	—
UK	1967, 1980, 1982 <sup>i</sup>	2001	2000 <sup>j</sup>	2006 <sup>k</sup>	2005 <sup>l</sup>	—
FRA	1791	1982	1993	1999	—	—
ITA	1889 <sup>m</sup>	1889	—	—	—	—
BEL	1792	1985	1996	2000 <sup>n</sup>	in preparation	2003 <sup>o</sup>
IRL	1993	— <sup>p</sup>	1995 <sup>q</sup>	—	in preparation	—
PRT	1945	in preparation <sup>r</sup>	2001	—	—	—
FIN	1971	1998	—	2002	—	—
AUS	1971	2002	1998 <sup>s</sup>	—	—	—
GRC	1950	— <sup>t</sup>	—	—	—	—
DEU	1968, 1969 <sup>u</sup>	1989, 1994	2001	2001	2005	—

<sup>a</sup> Years given are the years in which national legislation came into force. This table is a shortened, and updated, version of an appendix to K. WAALDIJK, "Taking same-sex partnerships seriously: European experiences as British perspectives", *International Family Law*, 2003, p. 84-95, full text available at [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk). See also K. WAALDIJK (ed.), *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries*, Documents de travail, no. 125, Paris, Institut National des Etudes Démographiques, 2005 (full text available at [http://www.same-sex.med.fr/intro\\_pub.htm](http://www.same-sex.med.fr/intro_pub.htm)).

<sup>b</sup> Surviving same sex partner pays the same inheritance tax as surviving married spouse (Law of 4 June 1986, no 339, repealed by Law on Registered Partnership of 7 June 1989, no 372)

<sup>c</sup> Although the formal age limits for heterosexual and homosexual acts were equalised at the time of decriminalisation of homosexual acts in 1822, in practice homosexual acts with minors continued to be penalised until 1988 under a general provision against "serious scandal and indecency" (see H. GRAUPNER, *Sexualität, Jugendschutz und Menschenrechte*, Teil 2, Frankfurt, P. Lang, 1997, p. 665-666)

<sup>d</sup> Law on Urban Housing of 24 November 1994

<sup>e</sup> Partnership legislation has so far been enacted in most autonomous regions: Catalonia (1998), Aragon (1999), Navarra (2000), Valencia (2001), Balearic Islands (2002), Asturia (2002), Madrid (2002), Andalucía (2002), Canary Islands (2003), Extremadura (2003) and the Basque Country (2003). See R. RUBIO-MARIN, "Spain", Chapter 15 in the report mentioned in note 2, para 15.3.3. Not all of these legislative schemes involve a form of registered partnership: some only provide for the recognition of *de facto* cohabitation.

<sup>f</sup> Only in Navarra (2000), the Basque Country (2003) and Aragon (2004). The provisions on joint adoption by unmarried different-sex and same-sex couples in Navarra have been suspended pending a challenge to the constitutional power of the Navarra legislature (as opposed to the national legislature) to enact them (see N. PÉREZ CANOVAS, "Spain: The Heterosexual State Refuses to Disappear", in R. WINTEMUTE & M. ANDENAES (ed.), *Legal Recognition of Same-Sex Partnerships*, Oxford, Hart Publishing, 2001, p. 503).

<sup>g</sup> Unregistered cohabitation (both for same-sex and different-sex couples) was first recognised in Dutch legislation in a Law of 21 June 1979 (amending Article 7A:1623h of the Civil Code, with respect to rent law), followed by a Law of 17 December 1980 on inheritance tax due by the surviving partner from a "joint household". Since then many more laws have been amended so as to recognise cohabitation for a multitude of purposes, including social security, tax, citizenship, and parental authority.

<sup>h</sup> Law of 9 July 2004 ("relating to the legal effects of certain partnerships"), published in *Memorial A*, no 143, 6 August 2004, entry into force on 1 November 2004.

<sup>i</sup> Decriminalisation of most sexual activities between two men over 21 took place in England and Wales in 1967, in Scotland in 1980 and in Northern Ireland in 1982 (see H. GRAUPNER, *op cit*, p. 711, 727, 739).

<sup>j</sup> In 1997 the government introduced a "concession outside the Immigration Rules" allowing unmarried long-term cohabiting partners who could not marry each other (for example because they are of the same sex), to apply for leave to enter/remain in the United Kingdom, in 2000 this concession was incorporated into the Immigration Rules (para 295A-295O). The first piece of parliamentary legislation recognising same-sex partners was enacted in 2000 by the Scottish Parliament: Adults with Incapacity (Scotland) Act 2000 (Section 87(2)). In 1999 and 2004 some older legislation has been interpreted so as to also cover same-sex cohabitants. See the judgements of the House of Lords of 28 October 1999, *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 707, and of 21 June 2004, *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>k</sup> In November 2004 the United Kingdom enacted the Civil Partnership Act, which is expected to enter into force around the beginning of the year 2006.

<sup>l</sup> The Adoption and Children Act 2002 will allow for joint and second-parent adoption by same-sex partners when it comes into force in September 2005 (expected date).

<sup>m</sup> In several parts of Italy sex between men was decriminalised (and in some parts then re-criminalised) before the general decriminalisation of 1889. See H. GRAUPNER, *op cit*, p. 505, and F. LEROY-FORGEOT, *Histoire juridique de l'homosexualité en Europe*, Paris, PUF, 1997, p. 66.

<sup>n</sup> It may be argued that the "*cohabitation légale*" introduced in 2000 by the Law on statutory cohabitation is either a form of registered partnership or a form of not-registered cohabitation.

<sup>o</sup> The Belgian law opening up marriage to persons of the same sex of 13 February 2003 (*Moniteur Belge*, 28 February 2003, Ed. 3, p. 9880) entered into force on 1 June 2003.

<sup>p</sup> The age limit for any sexual act between men is higher (seventeen) than for an oral or non-penetrative sexual act between a man and a woman, vaginal intercourse of a woman with a boy, or any sexual act between women (all fifteen). However, the age limit for anal sex between a man and a woman, and for vaginal intercourse of a man with a girl is also set at seventeen. See H. GRAUPNER, *op cit*, 1997, p. 481 and 487.

<sup>q</sup> Domestic Violence Act, 1995, and Powers of Attorney Act, 1995 (see L. FLYNN, "From Individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform", in R. WINTEMUTE & M. ANDENAES (ed.), *op cit*, p. 596).

<sup>1</sup> Between 1945 and 1995 the age limits were equal. See H. GRAUPNER, *op cit*, p. 597-598. In 2004 a bill was introduced in Parliament to equalise the ages again.

<sup>2</sup> Several partner-related aspects of criminal law, including the right to refuse testimony against your partner in a criminal court (see H. GRAUPNER, "The first will be the last: Legal Recognition of Same-Sex Partnerships in Austria", in R. WINTEMUTE & M. ANDENAES (ed.), *op cit*, p. 557-559).

<sup>3</sup> In the case of "seduction", the age limit for sex between men is higher (seventeen) than for lesbian or heterosexual sex (fifteen). See H. GRAUPNER, *op cit*, p. 466.

<sup>4</sup> In the former German Democratic Republic (East Germany), homosexual acts between men were decriminalised in 1968, and the age limits were equalised in 1989. In the Federal Republic of Germany (West Germany before the unification), the dates were 1969 and 1994. See H. GRAUPNER, *op cit*, p. 407-410.

### 3. Legal instruments used to implement the Directive

In all Member States legislation to implement the Directive is required at national level. In the UK separate (national) implementing legislation has been adopted for Great Britain (that is Scotland, England and Wales), for Northern Ireland and for Gibraltar.<sup>66</sup> In some countries, implementation of the Directive can be accomplished (on the basis of delegation) by governmental decree (GRC, ITA, UK); in the other countries primary parliamentary legislation is required.

In addition to national legislation, some regional legislation is required in Austria (primarily with respect to public employees and agricultural workers), Belgium (with respect to public employment and vocational guidance and vocational training) and Germany (with respect to public employment).<sup>67</sup>

According to the case law of the Court of Justice of the EC, the provisions of a directive must be implemented with "the specificity, precision and clarity necessary to satisfy the requirements of legal certainty"<sup>68</sup>. This means that all elements of the Framework Directive must be explicitly implemented, if not already explicitly covered in existing law. The Court of Justice has also ruled that provisions in a Constitution cannot be considered as an appropriate means of implementation.<sup>69</sup>

By August 2004 the Framework Directive of 27 November 2000 had been more or less fully implemented in twelve Member States. In the chronological order of their implementing legislation, these are: FRA, BEL, SWE, ITA, UK, PRT, ESP, FIN, NLD, DNK, AUS and IRL. In the latter six countries implementation was completed after the Directive's implementation deadline of 2 December 2003. The most important instruments used are the following:

<sup>66</sup> See R. WINTEMUTE, "United Kingdom", Chapter 17 in the report mentioned in note 2, para. 17.1.3, 17.1.5 and 17.2.1.

<sup>67</sup> See H. GRAUPNER, "Austria", Chapter 3 in the report mentioned in note 2, para. 3.1.3, O. DE SCHUTTER, "Belgium", Chapter 4 in the report mentioned in note 2, para. 4.1.3; and S. BAER, "Germany", Chapter 8 in the report mentioned in note 2, para. 8.1.3, respectively.

<sup>68</sup> See case law cited by M. BONINI-BARALDI, "European law", Chapter 2 in the report mentioned in note 2, para. 2.2.1.

<sup>69</sup> *Ibid.*

- FRA Penal Code (Articles 225-1, 225-2 and 432-7), as amended in 1985, 2001 and 2002, Labour Code (Articles L122-35, L122-45, L122-46, L122-47, L122-49, L122-52 and L122-54), as amended in 1986, 1992, 2001 and 2002, Law 83-634 of 13 July 1983 governing the rights and obligations of civil servants (Article 6 and *6quinquies*), as amended in 2001 and 2002 <sup>70</sup>
- BEL Federal Law of 25 February 2003 on combating discrimination, in force since 27 March 2003,  
Flemish Decree of 8 May 2002 on proportionate participation in the labour market, in force in the Flemish Region/Community since 29 June 2003,  
Ordinance of 26 June 2003 on the mixed management of the labour market in the region of Brussels-Capital, in force since 9 August 2003,  
Decree of 19 May 2004 on the implementation of the principle of equal treatment, in force in the French-speaking Community since 17 June 2004,  
Decree of 27 May 2004 on equal treatment in employment and professional training, in force in the Walloon Region since 3 July 2004,  
Decree of 17 May 2004 on guaranteeing equal treatment in the labour market, in force in the German-speaking Community since 13 August 2004 <sup>71</sup>
- SWE Penal Code (Article 9(4) of Chapter 16, on unlawful discrimination), as amended in 1987,  
Sexual Orientation Discrimination Act of 1999, as amended per 1 July 2003,  
Discrimination Prohibition Act of 2003, in force since 1 July 2003,  
Equal Treatment of Students at Universities Act of 2001, as amended per 1 July 2003 <sup>72</sup>
- ITA Legislative Decree 216 of 9 July 2003, in force since 28 August 2003,  
Workers' Statute (Article 15), as amended per 28 August 2003 by Legislative Decree of 9 July 2003,  
Legislative Decree 276 of 10 September 2003 (Article 10, with respect to job agencies), in force since 24 October 2003 <sup>73</sup>
- UK Employment Equality (Sexual Orientation) Regulations 2003, in force since 1 December 2003,  
Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, in force since 2 December 2003,  
Equal Opportunities Ordinance, 2004 (Gibraltar), in force since 11 March 2004 <sup>74</sup>

<sup>70</sup> In both Codes, the Directive has been implemented first by law 2001-1066 of 16 November 2001 on combating discrimination, and then by Law 2002-73 of 17 January 2002 on moral harassment, Law 2001-1066 also introduced a prohibition of sexual orientation discrimination into Law 83-634, into which Law 2002-73 introduced a prohibition of moral harassment See D BORRILLO, "France", Chapter 7 in the report mentioned in note 2, para 7 1 5 and 7 2 1

<sup>71</sup> See O DE SCHUTTER, "Belgium", Chapter 4 in the report mentioned in note 2, para 4 2 1

<sup>72</sup> See H YTTTERBERG, "Sweden", Chapter 16 in the report mentioned in note 2, para 16 1 5 and 16 2 1

<sup>73</sup> See S FABENI, "Italy", Chapter 11 in the report mentioned in note 2, para 11 2 1

<sup>74</sup> See R WINTENMUE, "United Kingdom", Chapter 17 in the report mentioned in note 2, para 17 1 5

- PRT Labour Law Code (Article 22-24), in force since 1 December 2003;  
Law 35/2004 containing supplementary provisions to the Labour Law Code, in force since 29 August 2004 <sup>75</sup>.
- ESP Penal Code (Article 314), as amended in 1995;  
Act 62/2003 on fiscal, administrative and social measures, in force since 1 January 2004;  
Workers' Statute (Articles 4, 16 and 17), as amended per 1 January 2004 by Act 62/2003;  
Act 45/1999 (Article 3) concerning the relocation of workers in the framework of a trans-national contractual work relation, as amended per 1 January 2004 by Act 62/2003 <sup>76</sup>.
- FIN Penal Code (Article 3 of Chapter 47), as amended in 1995;  
Employment Contracts Act of 2001 (Article 2 of Chapter 2), as amended per 1 February 2004;  
Equality Act 21/2004, in force since 1 February 2004;  
Act on Holders of Municipal Office (Article 12), as amended per 1 February 2004;  
Act on Civil Servants (Article 11), as amended per 1 February 2004;  
Seamen's Act (Article 15), as amended per 1 February 2004 <sup>77</sup>.
- NLD Penal Code (Articles 90*quater* and 429*quater*), as amended in 1992;  
General Equal Treatment Act of 1994, as amended per 1 April 2004 by the Implementation Act of 21 February 2004 <sup>78</sup>.
- DNK Act on Discrimination of 1996, as amended per 8 April 2004 by Act 253 of 7 April 2004 <sup>79</sup>.
- AUS Equal Treatment Act (covering private employment), in force since 1 July 2004;  
Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (also covering private employment), in force (under this name) since 1 July 2004;  
Federal Equal Treatment Act (covering public employment), proposed in November 2003, in force since 1 July 2004;  
as far as the required implementation at regional level is concerned, legislation has only been adopted or proposed in five of the nine states of AUS <sup>80</sup>.
- IRL Unfair Dismissal Act 1977 (Article 6(2)(e)), as amended in 1993;  
Employment Equality Act 1998, in force since 1999, as amended per 18 July 2004 by the Equality Act 2004;  
Pensions Act 1990, as amended by the Social Welfare Act 2004 (not yet in force) <sup>81</sup>.

<sup>75</sup> See M. FREITAS, "Portugal", Chapter 14 in the report mentioned in note 2, para. 14.2.1.

<sup>76</sup> See R. RUBIO-MARIN, "Spain", Chapter 15 in the report mentioned in note 2, para. 15.1.5 and 15.2.1.

<sup>77</sup> See R. HILTUNEN, "Finland", Chapter 6 in the report mentioned in note 2, para. 6.1.5 and 6.2.1.

<sup>78</sup> See K. WAALDDIK, "Netherlands", Chapter 13 in the report mentioned in note 2, para. 13.2.1.

<sup>79</sup> See S. BAATRUP, "Denmark", Chapter 5 in the report mentioned in note 2, para. 5.2.1.

<sup>80</sup> Regional implementation draft bills have been adopted or proposed in four of the nine Austrian states (Vienna, Upper Austria, Lower Austria, Styria and Carinthia). See H. GRAUPNER, "Austria", Chapter 3 in the report mentioned in note 2, para. 3.2.1 (plus his addendum before para. 3.1).

<sup>81</sup> See M. BELL, "Ireland", Chapter 10 in the report mentioned in note 2, para. 10.1.5 and 10.2.1.

In one country (Luxembourg) the Directive is already partly implemented by pre-existing legislation explicitly prohibiting sexual orientation discrimination in employment, while legislation to complete the implementation has been presented:

LUX Penal Code (Article 454 and following), as amended in 1997;

Bill to implement the Directive, submitted to Parliament on 10 November 2003 (which would not become law before 2005) <sup>82</sup>.

In the two remaining countries (DEU and GRC) the Directive has not yet been implemented at all.

In Germany a government proposal to implement the Directive at national level was to be published late in 2004 <sup>83</sup>. At regional level there is no implementation activity yet; the Länder are waiting for the federal Government to act first <sup>84</sup>.

In Greece first a proposal for a presidential decree to implement the Directive was presented in July 2003. This proposal was abandoned when a bill proposing to implement the Directive by Act of Parliament was published in November 2003 and presented to Parliament in January 2004. This bill did not live long, because Parliament was dissolved for the elections of March 2004. In May 2004 the opposition re-introduced the old government implementation bill, but this opposition bill has little chance of being adopted <sup>85</sup>. Late in 2004 the Government presented a new implementation bill.

The conclusion must be that up to August 2004 only twelve Member States had more or less fully implemented the Directive. Of these twelve, six did so after the implementation deadline of 2 December 2003 had expired (ESP, FIN, NLD, DNK, AUS and IRL). The proposal for such legislation still has to be adopted in LUX, and final proposals for implementation still have to be published in DEU and GRC.

#### 4. The quality of the implementation of the Directive

This paragraph brings together the main conclusions about the implementation (with respect to sexual orientation) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation at national level in the then fifteen EU Member States by April 2004 (or shortly thereafter). These conclusions are based on the more detailed comparative analysis in Chapter 19 of that group's report <sup>86</sup>, and on the fifteen national chapters written by the members of the European Group of Experts on Combating Sexual Orientation Discrimination. In

<sup>82</sup> See A. WEYEMBERGH, "Luxembourg", Chapter 12 in the report mentioned in note 2, para. 12.1.5. On 4 July 2002 a Bill (no. 4979) was proposed to combat moral harassment (see A. WEYEMBERGH, para. 12.2.5).

<sup>83</sup> See S. BAER, "Germany", Chapter 8 in the report mentioned in note 2, para. 8.2.1.

<sup>84</sup> Certain forms of sexual orientation discrimination in *public* employment had already been prohibited in four of the German Länder (Hamburg, Lower Saxony, Saarland and Saxony-Anhalt).

<sup>85</sup> See M. PEPONAS, "Greece", Chapter 9 in the report mentioned in note 2, para. 9.2.1.

<sup>86</sup> K. WAALDIJK, "Comparative analysis", Chapter 19 in the report mentioned in note 2.

those chapters more detailed information and criticism, and more arguments, nuances and good practices can be found.

It is also important to note that these conclusions only provide a tentative analysis of the implementation of the Directive. Firstly, the Group of Experts had been asked by the Commission of the EC to cover only the fifteen "old" Member States, not the ten countries that would join the EU in May 2004. Secondly, final implementation texts are not yet available in most regional states of Austria, not on national and regional level in Germany, and not in Greece. Thirdly, in Luxembourg the proposal for implementing legislation is still being discussed and possibly amended in Parliament. Finally, the Court of Justice of the EC has not had a chance to specify the meaning of many words and phrases in the Directive, and it also remains to be seen how national courts will interpret the various implementing laws and regulations.

The following conclusions have been formulated quite strictly, because EC law demands a strict implementation wherever the Directive contains clear and specific requirements. Wherever its wording is vague or leaves scope for national variations, I have accepted more room for different interpretations of the Directive. Many of the implementation shortcomings highlighted here can, and indeed should, be solved by national courts giving an interpretation to the national legislation that is in conformity with the Directive. To remove other shortcomings, further legislation will be required, and perhaps judgements of the Court of Justice.

Because of the absence of implementing legislation, the legal situation in Germany and Greece is not covered in the remainder of this contribution, which therefore only deals with *thirteen Member States*. Regional legislation is not covered in these conclusions either (see previous paragraph).

#### **A. Prohibition of different forms of sexual orientation discrimination in employment**

Existing and proposed legislation in all thirteen Member States covers both direct and indirect sexual orientation discrimination, as required by Article 2(2) of the Directive. However, the wording of the prohibition of *direct discrimination* in the implementing legislation in PRT and ESP falls short of the minimum requirements of the Directive (because their definitions of direct discrimination does not allow for comparison with how another "would" be treated). Contrary to the Directive, a definition of *indirect discrimination* is missing in FRA; and the wording of such a definition in BEL, NLD and the UK seems a little too narrow. Contrary to Article 2(4) of the Directive, *instruction to discriminate* is not (or not always) prohibited by the legislation of FRA, PRT, SWE and the UK <sup>87</sup>.

The words used in existing and proposed legislation to refer to "sexual orientation" always correctly cover *homosexual, heterosexual and bisexual* orientations (although in NLD only the first two are explicitly mentioned, and in FIN sexual orientation is not explicitly mentioned in two of the five implementing laws). However, the wording

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<sup>87</sup> *Ibid.*, para. 19.2.3, 19.2.4 and 19.2.6.

used in FRA (with a possessive pronoun in front of the words "sexual orientation") does not clearly extend the prohibition of sexual orientation discrimination to discrimination on grounds of a *mistaken assumption* about someone's sexual orientation, which is contrary to Articles 1 and 2 of the Directive <sup>88</sup>.

The existing or proposed legislation of the thirteen Member States not only covers discrimination on grounds of a person's heterosexual, homosexual or bisexual *preference*, but also discrimination on grounds of a person's heterosexual, homosexual or bisexual *behaviour* or on grounds of a person's *coming out*. This helps to achieve one of the main goals of the prohibition of sexual orientation discrimination: to give lesbian women, gay men and bisexuals a chance to be as open about their sexual orientation as heterosexuals can be <sup>89</sup>. On the other hand, lesbian women, gay men and bisexuals should also have a right to keep their sexual orientation secret. Therefore it is a good practice in all thirteen Member States to almost always consider it irrelevant and/or discriminatory to ask a job-applicant about his or her sexual orientation. In DNK this is even explicitly prohibited in the Act on Discrimination <sup>90</sup>.

Whether *direct discrimination between same-sex and different-sex (cohabiting) partners* in employment will be covered by the prohibition of sexual orientation discrimination is not completely certain in FRA, ITA, LUX and ESP, although the Directive clearly requires that <sup>91</sup>. With respect to the Directive's requirement to also prohibit *indirect discrimination against same-sex partners*, there appears to be a problem in three Member States. This concerns the most common form of indirect sexual orientation discrimination in employment: discrimination against unmarried employees and their partners. In IRL, ITA and the UK a specific exception in the implementing legislation seeks to prevent the national courts from assessing whether such indirect discrimination is indeed justified. In all thirteen Member States, however, it remains to be seen, whether such indirect discrimination would be considered objectively justified in a concrete case (for example because of the aim not to prejudice national laws on marital status, as indicated in recital 22 of the Directive) <sup>92</sup>.

An important feature of the Directive is its requirement to prohibit *harassment* related to sexual orientation as a form of sexual orientation discrimination. A prohibition of harassment has been enacted or proposed in all thirteen Member States, but in FRA and the UK this is not done *as a form of discrimination* (although the UK legislation at least speaks of harassment "on grounds of sexual orientation"). Four Member States have adopted or proposed a definition of harassment that in

<sup>88</sup> *Ibid.*, para. 19.2.2 and 19.3.1.

<sup>89</sup> *Ibid.*, para. 19.3.1 and 19.3.2.

<sup>90</sup> *Ibid.*, para. 19.3.6.

<sup>91</sup> For a study of the form and extent of such direct discrimination with respect to partner benefits provided by employers, see A. LITTLER, "Discriminatory Partner Benefits", appendix to the report mentioned in note 2, 2004.

<sup>92</sup> K. WAALDIJK, "Comparative analysis", Chapter 19 in the report mentioned in note 2, para. 19.3.3.

some respects is slightly more limited than that of the Directive (AUS, FRA, SWE and UK); it remains to be seen, whether the Court of Justice of the EC would find these limitations to be acceptable under the second sentence of Article 2(3) of the Directive (which states that "the concept of harassment may be defined in accordance with national laws and practice"). For the practical relevance of the prohibition of harassment, however, much will depend on the attitude of employers, managers, co-workers, national courts, etc. towards common forms of anti-homosexual behaviour (such as verbal abuse, or revealing someone's sexual orientation against her or his will) <sup>93</sup>.

The implementation of Article 3 of the Directive seems to be particularly problematic for Member States. Partly, this may be blamed on the less than clear formulation in Article 3 of some aspects of the material and personal scope of the Directive. The *main* shortcomings of the Member States with respect to *material scope* appear to be the following <sup>94</sup>:

- *Public employment* is not yet covered in the legislation proposed in LUX.
- *Vocational guidance* is not yet (fully) covered in AUS, FRA and ESP.
- *Vocational training* is not yet fully covered in AUS.
- *Employment conditions* (including pay and dismissal) are covered in all thirteen Member States, but *working conditions* (in the sense of working environment) for employees are not explicitly covered in FRA and SWE.
- With respect to the working conditions (in the sense of working environment) in *self-employment* there may be an implementation problem in AUS, FRA, ITA, PRT, ESP, SWE and the UK.
- *Access to employment* is covered in all thirteen Member States, but *access to self-employment* is not or not fully covered in PRT and the UK.
- With respect to *other forms of occupation* than employment and self-employment (such as compulsory military or alternative service), there seem to be problems in AUS, FIN and SWE.

As regards the *personal scope* of the implementing legislation, (apart from the omission of public employers in LUX) at least DNK, IRL, SWE and the UK seem to fall short of the minimum requirements of the Directive. This would be so because in their legislation co-workers – unlike employers and their representatives (such as managers, and job or training agencies) – are not subjected to the prohibition of harassment and other forms of discrimination (although the employer may be liable for their actions). This would appear to be incompatible with Article 3(1) of the Directive, which speaks of "all persons", and with Article 2(1), which does not limit the personal scope either <sup>95</sup>.

<sup>93</sup> *Ibid.*, para. 19.2.5 and 19.3.8.

<sup>94</sup> *Ibid.*, para. 19.2.7.

<sup>95</sup> *Ibid.*, para. 19.2.8.

### B. *Exceptions to the prohibition of discrimination*

The Directive *allows* for a variety of exceptions to the prohibition of sexual orientation discrimination. Not all permitted exceptions have been incorporated in all existing and proposed national legislation.

Five countries have enacted or proposed specific exceptions that are based on Article 2(5) of the Directive (measures necessary for *public security*, for the protection of *rights of others*, etc.). These exceptions in IRL, ITA, NLD and the UK are probably not limited enough to be justified by Article 2(5), and that may also be the case for BEL <sup>96</sup>.

All of the Member States except FRA and NLD have enacted or proposed exceptions for sexual orientation as an *occupational requirement*. Of these, the legislation in AUS, BEL, IRL, LUX and ESP (and the main piece of legislation in SWE) is in accordance with the Directive, but the implementation in DNK, FIN, ITA, PRT and the UK falls short of the objectivity and proportionality conditions set by Article 4(1) <sup>97</sup>.

In addition, Article 4(2) of the Directive allows for specific exceptions for employers with an *ethos based on religion or belief*, but only as regards discrimination on grounds of religion or belief. Such specific exceptions for religion based employers have been enacted or proposed in AUS, DNK, IRL, ITA, LUX, NLD and the UK, most of which are not fully compatible with the requirements of Article 4(2). The main problem is that in IRL, NLD and the UK this exception also extends to discrimination on other grounds than religion or belief, including sexual orientation. Another problem may be, that in DNK, ITA and LUX it is not made explicit that the exception for the grounds of religion and belief should not be used to justify discrimination on grounds of sexual orientation <sup>98</sup>.

A majority of the Member States have enacted or proposed exceptions for *positive action* with respect to sexual orientation (AUS, BEL, FIN, IRL, LUX, PRT, ESP and the UK), which are compatible with the wording of Article 7(1) of the Directive <sup>99</sup>.

### C. *Enforcement of the prohibition of discrimination*

In addition to the content of the prohibitions of sexual orientation discrimination, questions relating to their enforcement are of course central to the implementation of the Directive. Article 9(1) of the Directive requires the availability of judicial and/or administrative procedures, but in contrast with the Race Directive (2000/43/EC), the setting up of *specialised bodies* for the application of the principle of equal treatment is not required with respect to sexual orientation. Nevertheless, six Member States have chosen to partly entrust the enforcement of the prohibition of sexual orientation discrimination in employment to such a body. Five of these countries have established bodies covering a multitude of grounds (AUS, BEL, IRL, NLD and, only for Northern

<sup>96</sup> *Ibid.*, para. 19.4.2.

<sup>97</sup> *Ibid.*, para. 19.4.4.

<sup>98</sup> *Ibid.*, para. 19.4.5.

<sup>99</sup> *Ibid.*, para. 19.4.6.

Ireland, the UK) and one has established an enforcement body that deals only with issues of sexual orientation discrimination (SWE). The existence of these bodies allows for specific *non-judicial procedures* for the enforcement of the prohibition of discrimination. Conciliation in discrimination cases is available in several countries. *Judicial procedures*, and in particular *civil* judicial procedures, are available in all thirteen Member States; *penal* judicial procedures are available everywhere except in AUS, DNK, PRT and the UK (and only in very specific circumstances in IRL and SWE) <sup>100</sup>.

It appears that Article 9(2) of the Directive requires that *interest groups* can play an officially recognised role in enforcement procedures, in support or on behalf of complainants. In light of the text of Article 9(2) it would seem reasonable to let the interest groups and complainants themselves make the choice between "in support of" and "on behalf of". It remains to be seen whether the Court of Justice will opt for that interpretation. If so, the implementation in AUS, DNK, FIN and the UK (where interest groups can only act in support of complainants) and in IRL, ESP and SWE (where interest groups cannot themselves be party in an enforcement procedure for the benefit of a complainant) would probably be insufficient. The limitation to trade unions, while excluding other interest groups (as in ITA, PRT, ESP and SWE), is more certainly incompatible with the Directive, as is the limitation in AUS to one particular non-governmental organisation, that can only intervene in private employment cases <sup>101</sup>.

The Directive's important requirement of a shift in the *burden of proof* in discrimination cases (Article 10) appears to have not been fully implemented in AUS, FRA, ITA, PRT and perhaps the UK. Furthermore, in FRA and the UK the victim of sexual orientation discrimination may sometimes have to allege (or even prove) his or her sexual orientation; this is not compatible with Article 2(2) of the Directive. Adequate protection against *victimisation*, as required by Article 11 of the Directive, is not provided in AUS, BEL, DNK and ITA <sup>102</sup>.

Article 17 of the Directive requires that the available *sanctions* must be "effective, proportionate and dissuasive". It is doubtful whether many Member States already fulfil this important requirement:

- AUS, FIN, IRL and SWE can be criticised because of their upper limits imposed on compensatory damages, and AUS also for not providing compensatory damages in case of discriminatory termination of employment <sup>103</sup>.
- At least DNK, FIN, ESP and the UK could be criticised for only having included employers (and their "accomplices") in the circle of persons to whom sanctions may be applied <sup>104</sup>.

<sup>100</sup> *Ibid.*, para. 19.5.2 and 19.5.3.

<sup>101</sup> *Ibid.*, para. 19.5.7.

<sup>102</sup> *Ibid.*, para. 19.5.8 to 19.5.10.

<sup>103</sup> *Ibid.*, para. 19.5.4.

<sup>104</sup> *Ibid.*, para. 19.5.5.

Without a further elaboration of sanctions, in legislation or in case law, the implementation of the Directive cannot be considered complete. Sanctions must be suited to the particular situations in which discrimination normally takes place. Therefore the availability of the following sanctions should be seen as good practices <sup>105</sup>:

- nullity or voidability of discriminatory dismissal (FRA, ITA, NLD and SWE);
- nullity, voidability or automatic conversion of discriminatory contracts or clauses (all thirteen Member States);
- judicial order to reinstate a discriminatorily dismissed employee (AUS, FRA, ITA, IRL, PRT and ESP);
- judicial order to start a new selection procedure or to offer the job to a discriminated job applicant (available in some countries);
- administrative fines (AUS, PRT and ESP);
- exclusion from public procurement contract(s) or public subsidies (AUS and ITA);
- binding or non-binding opinions of specialised enforcement body (AUS, IRL, NLD and SWE);
- judicial order to structurally change recruitment procedures (IRL).

## 5. Conclusions

The main findings of the previous paragraphs are brought together in Table 5 below. All certain or probable shortcomings (indicated with X) and all possible shortcomings (indicated with ?) are highlighted in grey, as are the columns for Germany and Greece, where the governments are not yet proposing any implementing legislation. The information in the column for Luxembourg is based on proposals for legislation that is not yet in force.

<sup>105</sup> *Ibid.*, para. 19.5.4.

Table 5. Major aspects of implementation of the Directive at national level

Article refers to the articles of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;

- X means that the existing or proposed implementation of a provision of the Directive is (certainly or probably) not completely correct;
- ? means that there is doubt about the correctness of the implementation of a provision of the Directive;
- means that the exception allowed by a provision of the Directive is not (yet) part of existing or proposed legislation;
- ✓ means that there do not seem to be major shortcomings in the implementation of a provision of the Directive.

	AUS	BEL	DNK	FIN	FRA	DEU	GRC	IRL	ITA	LUX	NLD	PRT	ESP	SWE	UK
<i>Article 1</i>															
"sexual orientation"	✓	✓	✓	X	X			✓	✓	✓	?	✓	✓	✓	✓
<i>Article 2(2)(a)</i> direct discrimination	✓	✓	✓	✓	✓			✓	✓	✓	✓	X	X	✓	✓
<i>Article 2(2)(b)</i> indirect discrimination	✓	?	✓	✓	X			X	X	✓	?	✓	✓	✓	X
<i>Article 2(3)</i> harassment	?	✓	✓	✓	X			✓	✓	✓	✓	✓	✓	?	?
<i>Article 2(4)</i> instruction to discriminate	✓	✓	✓	✓	X			✓	✓	✓	✓	X	✓	X	X
<i>Article 2(5)</i> rights of others, etc.	-	?	-	-	-			X	X	-	X	-	-	-	X
<i>Article 3(1)</i> material scope	X	✓	✓	?	X			✓	?	X	✓	X	X	X	X
<i>Articles 3(1) &amp; 2(2)</i> personal scope	✓	✓	?	✓	✓			?	✓	X	✓	✓	✓	?	?
<i>Article 4(1)</i> occupational requirements	✓	✓	X	X	-			✓	X	✓	-	X	✓	?	X
<i>Article 4(2)</i> religion based employers	✓	-	?	-	-			X	?	?	X	-	-	-	X
<i>Article 7(1)</i> positive action	✓	✓	-	✓	-			✓	-	✓	-	✓	✓	-	✓
<i>Article 9(1)</i> procedures	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓
<i>Article 9(2)</i> interest groups	X	✓	?	?	✓			?	X	✓	✓	X	X	X	?
<i>Article 10</i> burden of proof	X	✓	✓	✓	X			✓	X	✓	✓	X	✓	✓	?
<i>Article 11</i> victimisation	X	X	X	✓	✓			✓	X	✓	✓	✓	✓	✓	✓
<i>Article 17</i> sanctions	X	✓	?	X	✓			X	✓	✓	✓	✓	?	X	?
<i>Article 18</i> implementation largely completed	July 2004	Mar. 2003	April 2004	Feb. 2004	Nov. 2001			July 2004	Aug. 2003		April 2004	Dec. 2003	Jan. 2004	July 2003	Dec. 2003
	AUS	BEL	DNK	FIN	FRA	DEU	GRC	IRL	ITA	LUX	NLD	PRT	ESP	SWE	UK

In conclusion it can be said, that with respect to sexual orientation discrimination, the implementation of the Directive is more than eight months late in LUX, DEU and GRC. It is interesting to note that the two countries where public opinion is least opposed to discrimination on grounds of sexual orientation, DEU and GRC (see Table 2, above), turn out to be the last countries to start implementing the Directive.

On 20 December 2004 the European Commission has announced that it is referring Germany, Greece and Luxembourg to the Court of Justice of the European Communities, for failure to implement the Directive.<sup>106</sup> This does not mean that the Commission approves of the quality of implementation in the other Member States. The Commission is still examining whether the Directive has been implemented properly by the Member States that have so far enacted implementing legislation.<sup>107</sup> In doing this the Commission can use the report of the independent European Group of Experts on Combating Sexual Orientation Discrimination, on which this contribution is based. The report has shown and argued that in the twelve Member States that have largely completed the implementation, the adopted legislation does not meet all the requirements of the Directive. The countries with the most implementation shortcomings appear to be the UK, ITA, PRT, AUS and FRA. For the first four (but not for FRA) this correlates with relatively negative public opinion attitudes towards homosexuals and/or homosexuality (see Table 1, above).

With respect to the following topics the proposed or enacted implementing legislation is problematic in many (six or more) of the thirteen Member States

- indirect discrimination,
- material scope of the prohibition of discrimination,
- occupational requirements and religion based employers,
- role of interest groups in enforcement procedures,
- sanctions

With respect to other important aspects of the Directive the implementation seems to be problematic in a smaller number of Member States

At the same time in several Member States various good practices were found that could serve as inspiration for further improvement of the implementation of the Directive in other Member States. This is especially true for the various specialised bodies that some Member States have set up or proposed<sup>108</sup>, for the important role in court procedures that a few Member States have given to interest groups, and for the various specific sanctions that can help ensure that the principle of equal treatment will actually work.

<sup>106</sup> Simultaneously, the Commission is also referring AUS (because of non-implementation at regional level) and FIN (because of non-implementation on the small islands of Aland) to the Court of Justice. See the press release IP/04/1512 of 20 December 2004 ([http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/legis/leginfringe\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/legis/leginfringe_en.htm))

<sup>107</sup> *Ibid*

<sup>108</sup> Without this being required by the Directive