

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*

English version

This report was prepared by the independent European Group of Experts on Combating Sexual Orientation Discrimination, which was established and funded under the framework of the Community Action Programme to Combat Discrimination 2001-2006.

The contents of this report do not necessarily reflect the opinion or position of national authorities or of the European Commission.

Combattre la discrimination fondée
sur l'orientation sexuelle en matière d'emploi:
législation dans quinze États membres de l'UE

Rapport du *Groupe Européen d'Experts dans le domaine
de la Lutte contre la Discrimination Fondée sur l'Orientation Sexuelle*
concernant la mise en oeuvre jusqu'en avril 2004 de la
*Directive 2000/78/CE portant création d'un cadre général en faveur
de l'égalité du traitement en matière d'emploi et de travail*

sous la direction de

Kees Waaldijk

et

Matteo Bonini-Baraldi

avec la coopération de

Alan Littler

Version anglaise

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edited by

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Alan Littler

English version

November 2004

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European Group of Experts on Combating **Sexual Orientation** Discrimination

The European Group of Experts on Combating Sexual Orientation Discrimination (EGESO) was established in October 2002 as the result of contract VC/2002/0288-SI2.341816 between the European Community and Universiteit Leiden, Establishment of a European Group of Experts on combating discrimination on the ground of sexual orientation. In October 2003 the contract was renewed (Contract VC/2003/0373-SI2.363440). The group finished its work in the Summer of 2004.

The group was run from the E.M. Meijers Institute of Legal Studies, at the Faculty of Law, Universiteit Leiden, The Netherlands. There the group's European coordinator was Dr. Kees Waaldijk, while the assistant coordinator was Dr. Matteo Bonini-Baraldi. Secretary to the coordinators was Ms. Riekje Boumlak, while Mr. Alan Littler LL.M. worked for the group as researcher and Mr. Wout Morra as research-assistant. See www.emmeijers.nl/experts for contact details.

Members of the group covering the respective Member States were:

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Spain	Professor Ruth Rubio-Marin <i>Facultad de Derecho, Universidad de Sevilla</i>
Sweden	Ombudsman Hans Ytterberg <i>Ombudsmannen mot diskriminering på grund av sexuell läggning, Stockholm</i>
United Kingdom	Professor Robert Wintemute <i>Centre of European Law, School of Law, King's College London</i>

Information for the reader

A short summary of this report can be found in chapter 20 (Conclusions). Chapter 19 (Comparative analysis) can be read as a longer summary of the report.

The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.

There are currently four versions of this report:

English version

This contains all chapters in English, the chapters on France (7) and Luxembourg (12) having been translated from French. As appendices it also contains the Thematic study on Discriminatory Partner Benefits, plus a French translation of the concluding chapter 20.

Version française

This contains French translations of chapter 1 (Introduction), 2 (European law), 18 (Comparative overview), 19 (Comparative analysis) and 20 (Conclusions), plus the original versions in French of the chapters on France and Luxembourg, and French translations of the chapters on Belgium, Portugal, Spain, Italy, Ireland, the Netherlands and Sweden.¹ It also contains translations of the summaries of the six other national chapters, and as appendices a translation of Appendix I (Thematic study on Discriminatory Partner Benefits), plus the original English version of the concluding chapter 20.

Summaries in English

This contains the full text of the chapters 1 (Introduction) and 20 (Conclusions), plus English summaries of all other chapters, the summaries of the chapters on France and Luxembourg having been translated from French.

Résumés en français

This contains the full text of the chapters 1 (Introduction) and 20 (Conclusions), plus the original summaries in French of the chapters on France and Luxembourg, and French translations of the summaries of all other chapters.

The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website of the European Commission:

http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm, links to which will be given at www.emmeijers.nl/experts.

It is also expected that the report will form the basis of one or more academic publications in 2005. These will also be announced on www.emmeijers.nl/experts.

¹ The reason for using the limited budget for translation for just these chapters is twofold: in the first four countries more potential readers would benefit from a French translation, and the latter three countries are the ones with the most extensive experience in fighting sexual orientation discrimination through legal means and may therefore be of interest to a greater number of readers.

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Uniform structure of chapters 2 to 19

In every chapter the 0 is replaced with the number of the chapter.

0.1 General legal situation

- 0.1.1 *Constitutional protection against discrimination*
- 0.1.2 *General principles and concepts of equality*
- 0.1.3 *Division of legislative powers relating to discrimination in employment*
- 0.1.4 *Basic structure of employment law*
- 0.1.5 *Provisions on sexual orientation discrimination in employment or occupation*
- 0.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*
- 0.1.7 *Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation*
- 0.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*
- 0.1.9 *Other aspects of the legal background*

0.2 The prohibition of discrimination required by the Directive

- 0.2.1 *Instrument(s) used to implement the Directive*
- 0.2.2 *Concept of sexual orientation (art. 1 Directive)*
- 0.2.3 *Direct discrimination (art. 2(2)(a) Directive)*
- 0.2.4 *Indirect discrimination (art. 2(2)(b) Directive)*
- 0.2.5 *Prohibition and concept of harassment (art. 2(3) Directive)*
- 0.2.6 *Instruction to discriminate (art. 2(4) Directive)*
- 0.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*
- 0.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*
- 0.2.9 *Other aspects of implementation*

0.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

- 0.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*
- 0.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*
- 0.3.3 *Discrimination between same-sex partners and different-sex partners*
- 0.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*
- 0.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*
- 0.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation*
- 0.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*
- 0.3.8 *Harassment*

- 0.4 Exceptions to the prohibition of discrimination**
 - 0.4.1 *Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)*
 - 0.4.2 *Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)*
 - 0.4.3 *Social security and similar payments (art. 3(3) Directive)*
 - 0.4.4 *Occupational requirements (art. 4(1) Directive)*
 - 0.4.5 *Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)*
 - 0.4.6 *Positive action (art. 7(1) Directive)*
 - 0.4.7 *Exceptions beyond the Directive*
 - 0.4.8 *Other exceptions*

- 0.5 Remedies and enforcement**
 - 0.5.1 *Basic structure of enforcement of employment law*
 - 0.5.2 *Specific and/or general enforcement bodies*
 - 0.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*
 - 0.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*
 - 0.5.5 *Natural and legal persons to whom sanctions may be applied*
 - 0.5.6 *Awareness among law enforcers of sexual orientation issues*
 - 0.5.7 *Standing for interest groups (art. 9(2) Directive)*
 - 0.5.8 *Burden of proof of discrimination (art. 10 Directive)*
 - 0.5.9 *Burden of proof of sexual orientation*
 - 0.5.10 *Victimisation (art. 11 Directive)*
 - 0.5.11 *Other aspects of remedies or enforcement*

- 0.6 Reform of existing discriminatory laws and provisions**
 - 0.6.1 *Abolition of discriminatory laws (art. 16(a) Directive)*
 - 0.6.2 *Abolition of discriminatory administrative provisions (art. 16(a) Directive)*
 - 0.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)*
 - 0.6.4 *Discriminatory laws and provisions still in force*

- 0.7 Concluding remarks**

List of literature used in footnotes

Structure uniforme des chapitres 2 à 19

Dans chaque chapitre le 0 est remplacé par le numéro du chapitre.

0.1 Cadre juridique général

- 0.1.1 *Protection constitutionnelle contre les discriminations*
- 0.1.2 *Principes généraux et concepts d'égalité*
- 0.1.3 *Répartition des compétences législatives concernant les discriminations dans l'emploi*
- 0.1.4 *Structure générale du droit du travail*
- 0.1.5 *Dispositions relatives aux discriminations fondées sur l'orientation sexuelle dans le travail et l'emploi*
- 0.1.6 *Jurisprudence relative aux discriminations fondées sur l'orientation sexuelle dans le travail et l'emploi*
- 0.1.7 *Dispositions relatives aux discriminations dans le travail et l'emploi qui ne comprennent pas (encore) l'orientation sexuelle*
- 0.1.8 *Dispositions relatives aux discriminations fondées sur l'orientation sexuelle dans d'autres domaines que le travail et l'emploi*
- 0.1.9 *Autres considérations juridiques relevantes*

0.2 L'interdiction de discrimination exigée par la directive

- 0.2.1 *Instrument juridique utilisé pour transposer la directive dans l'Etat membre*
- 0.2.2 *Notion d'orientation sexuelle (art. 1 Directive)*
- 0.2.3 *Discrimination directe (art. 2(2)(a) Directive)*
- 0.2.4 *Discrimination indirecte (art. 2(2)(b) Directive)*
- 0.2.5 *Interdiction et concept de harcèlement (art. 2(3) Directive)*
- 0.2.6 *Injonction de discriminer (art. 2(4) Directive)*
- 0.2.7 *Champ d'application matériel de l'interdiction*
- 0.2.8 *Champ d'application personnel : personnes physiques et personnes morales dont les actions sont l'objet de l'interdiction*
- 0.2.9 *Autres aspects de la mise en œuvre*

0.3 Dans le domaine de l'emploi, quelles formes de comportement se trouvent-elles prohibées en tant que discriminations fondées sur l'orientation sexuelle ?

- 0.3.1 *Discriminations sur la base d'une préférence ou d'un comportement hétérosexuel, homosexuel ou bisexuel, vrai ou supposé*
- 0.3.2 *Discriminations sur la base de la déclaration, ou de l'absence d'occultation, de l'orientation sexuelle*
- 0.3.3 *Discriminations entre couples de même sexe et couples de sexe différent*
- 0.3.4 *Discriminations sur la base de l'association avec des personnes, événements ou organisations lesbiens, gays, bisexuels ou hétérosexuels*
- 0.3.5 *Discriminations contre les groupes, les organisations, les événements ou les informations par/pour/sur les lesbiennes, gays ou bisexuels*
- 0.3.6 *Discriminations à l'encontre d'une personne qui a refusé de répondre, ou a répondu inexactement, à une question sur l'orientation sexuelle*
- 0.3.7 *Discrimination sur la base d'une condamnation pénale antérieure relative à un 'délit d'homosexualité' sans équivalent hétérosexuel*
- 0.3.8 *Harcèlement*
- 0.3.9 *Autres catégories*

0.4 Exceptions à l'interdiction de discriminer

- 0.4.1 *Désavantages indirects objectivement justifiés (art. 2(2)(b)(i) Directive)*
- 0.4.2 *Mesures nécessaires à la sécurité publique, à la protection des droits d'autrui, etc., (art. 2(5) Directive)*
- 0.4.3 *Sécurité sociale et bénéfices similaires (art. 3(3) Directive)*
- 0.4.4 *Exigences professionnelles (art. 4(1) Directive)*
- 0.4.5 *Loyauté à l'éthique des organisations fondée sur la religion ou les convictions (art. 4(2) Directive)*
- 0.4.6 *Action positive (art. 7(1) Directive)*
- 0.4.7 *Exceptions qui vont au-delà de la directive*
- 0.4.8 *Autres exceptions*

0.5 Voies de recours et application du droit

- 0.5.1 *Système de mise en œuvre du droit du travail en général*
- 0.5.2 *Organismes spécifiques et/ou généraux chargés d'appliquer la loi*
- 0.5.3 *Procédure civile, pénale, administrative et/ou voies de médiation et de conciliation (art. 9(1) Directive)*
- 0.5.4 *Sanctions civiles, pénales et/ou administratives (art. 17 Directive)*
- 0.5.5 *Personnes physiques ou morales auxquelles peuvent s'appliquer les sanctions*
- 0.5.6 *Conscience des opérateurs de droit sur les questions relatives à l'orientation sexuelle*
- 0.5.7 *Légitimation d'agir des groupes d'intérêt (art. 9(2) Directive et considérant 29 Directive)*
- 0.5.8 *Charge de la preuve de la discrimination (art. 10 Directive et considérants 15, 31 et 32 Directive)*
- 0.5.9 *Charge de la preuve de l'orientation sexuelle (considérant 31 Directive)*
- 0.5.10 *Rétorsions (art. 11 Directive)*
- 0.5.11 *Autres aspects*

0.6 Réforme des lois et dispositions discriminatoires existantes

- 0.6.1 *Suppression des lois discriminatoires (art. 16(a) Directive)*
- 0.6.2 *Suppression des dispositions administratives discriminatoires (art. 16(a) Directive)*
- 0.6.3 *Mesures nécessaires pour assurer la nullité de dispositions discriminatoires figurant dans les contrats, les conventions collectives, les règlements intérieurs des entreprises, les statuts des professions indépendantes ainsi que dans les statuts des organisations de travailleurs et d'employeurs (art. 16(b) Directive)*
- 0.6.4 *Lois et dispositions discriminatoires toujours en vigueur*

0.7 Conclusions

Littérature citée dans les notes

List of abbreviations / liste des abréviations

AB	Ausschussbericht (report of a [parliamentary] committee) (AUS)
ABGB	Allgemeines Bürgerliches Gesetzbuch (General Civil Code) (AUS)
ADP	Avantage(s) discriminatoire(s) au partenaire
art. x	article x
AUS	Austria / Autriche
BDG	Beamten-Dienstrechtsgesetz (Act on the Employment Law of Civil Servants) (AUS)
BEL	Belgium / Belgique
bet.	betänkande (Parliament Standing Committee Report / rapport de la Commission parlementaire permanente) (SWE)
BlgNR	Beilagen zu den stenographischen Protokollen des Nationalrates (papers added to the stenographic protocols of the first chamber of the federal parliament) (AUS)
BGB	Bürgerliches Gesetzbuch (Civil Code) (DEU)
BGBI	Bundesgesetzblatt (Federal Law Gazette) (AUS)
B-GBG	Bundes-Gleichbehandlungsgesetz (Federal Equal Treatment Act / Loi fédérale sur l'égalité de traitement) (AUS)
B-VG	Bundes-Verfassungsgesetz (Federal Constitutional Act / Loi constitutionnelle fédérale) (AUS)
C.A.	Cour d'Arbitrage (Court of Arbitration) (BEL)
CE	Communauté(s) européenne(s)
(art. x) CE	(art. x du) Traité instituant la Communauté européenne
CEDH	Convention Européenne des Droits de l'Homme
CERESGOSIG	Centro di Ricerca di Studi Giuridici comparati sull'Orientamento Sessuale e l'Identità de Genere (Center for Research and Legal Comparative Studies on Sexual Orientation and Gender Identity / Centre d'études et de recherches juridiques comparées sur l'orientation sexuelle et l'identité de genre)
Ch.	Chapter / Chapitre
CJCE	Cour de justice des Communautés européennes
DEU	Deutschland (Germany / Allemagne)
Directive	Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation / Directive 2000/78/EC portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail
DNK	Denmark / Danemark
DPB	Discriminatory partner benefit(s)
EAT	Employment Appeal Tribunal (UK)
EC	European Community / Communities
(art. x) EC	(art. x of the) Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice

ECR	European Court Reports
ECtHR	European Court of Human Rights
e.g.	for example
ESP	Espagne / Spain
ET Commission	Equal Treatment Commission / Commission pour l'Égalité de traitement (Commissie gelijke behandeling) (NLD)
EU	European Union
(art. x) EU	(art. x of the) Treaty on European Union
EUR	Euro
FIN	Finland / Finlande
FRA	France / France
Framework Directive	see: Directive
GB	Great Britain / Grande-Bretagne (UK)
GBK/GAW-G	Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft (Federal Act on the Equal Treatment Commission and the Equal Treatment Agency / Loi fédérale relative à la Commission de l'égalité de traitement et l'Agence de l'égalité de traitement) (AUS)
GET Act / loi GET	General Equal Treatment Act / loi générale d'Égalité de traitement (Algemene wet gelijke behandeling) (NLD)
GIBG	Gleichbehandlungsgesetz (Equal Treatment Act / Loi sur l'égalité de traitement) (AUS)
GP	Gesetzgebungsperiode (legislative period) (AUS)
GRC	Greece / Grèce
HRA	Human Rights Act (UK)
ICCPR	International Covenant on Civil and Political Rights (Pacte international relatif aux droits civils et politiques)
i.e.	that is to say
ILGA	International Lesbian and Gay Association
ILO	International Labour Organisation
IRL	Ireland / Irlande
ITA	Italy / Italie
IWEPS	Insitut Wallon de l'Évaluation, de la prospective et de la statistique (BEL)
JO	Journal officiel
kap.	kapitel / kapitlet (chapter / chapitre) (SWE)
LGB	Lesbian, Gay and/or Bisexual / Lesbien, Gay et/ou Bisexuel
LUX	Luxembourg
NGO	Non governmental organisation
NI	Northern Ireland / Irland du Nord (UK)
NJA	Nytt Juridiskt Arkiv (a bulletin of the decisions of the Swedish Supreme Court / un bulleting qui publie les arrêts de la Cour suprême suédoise) (SWE)
NLD	The Netherlands / Pays-Bas

NÖGIBG	Niederösterreichisches Gleichbehandlungsgesetz (Lower Austria Equal Treatment Act) (AUS)
nr. / no.	Number / nombre
OJ	Official Journal
OLT	Organisation Internationale du Travail
OMS	Organisation Mondiale de la Santé
ONG	organisations non gouvernementales
Pacs	Pacte civil de solidarité
para.	paragraph(s) / paragraphe(s)
par ex.	par exemple
PRT	Portugal
Race Directive	Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin / Directive 2000/43/EC relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinctions de race or d'origine ethnique (la directive sur la race)
reg. x	regulation nr. x of Regulations (UK)
RENFE	Red de Ferrocarriles Nacional (national railway company / la société nationale de chemins de fer) (ESP)
RRA	Race Relations Act (UK)
s. x	section x (UK)
SDA	Sex Discrimination Act (UK)
SERV	Sociaal Economische Raad van Vlaanderen (Flanders Social and Economic Council / Le Conseil économique et social de Flandres) (BEL)
StG	Strafgesetz (Penal Act) (AUS)
StGB	Strafgesetzbuch (Criminal Code) (AUS)
StGG	Staatsgrundgesetz (Basic Law of the State) (AUS)
SWE	Sweden / Suède
UE	Union européenne
(art. x) UE	(art. x du) Traité sur l'Union européenne
UK	United Kingdom / Royaume-Uni
U.N.T.S.	Collection des Traités des Nations Unies
Vol.	volume
voy.	see / voyez