Combating sexual orientation discrimination in employment:

legislation in fifteen EU member states

Report of the *European Group of Experts on Combating Sexual Orientation Discrimination* [1]

about the implementation up to April 2004 of *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*

2 European law

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[1] The European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/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/index_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 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.
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 just mentioned; links to it will be given on www.emmeijers.nl/experts.

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2.1 General legal situation

2.1.1 Constitutional protection against discrimination

The principle of non-discrimination is mentioned by or inspires the Treaty establishing the European Community (hereinafter EC) in a number of areas: nationality (art. 12), free movement (art. 39, 43, and 49-50), producers and consumers in the field of agriculture (art. 34(2)), equal treatment between men and women (art. 141), taxation (art. 90).

In the field of social policy, title XI EC spells out the importance for the Community of promoting employment and improved working conditions, of combating exclusion (art. 136) and of supporting activities in the field of equality between men and women (art. 137)[3]. Art. 141(1), which applies directly to State action and to collective or individual contracts, requires each Member State to ensure the principle of equal pay between men and women; art. 141(3), subsequently added, broadens Community action by enabling the Council to 'adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'. Furthermore, gender mainstreaming is foreseen as a Community task by art. 2 EC[4].

Historically, anti-discrimination measures specifically mentioned in the EC Treaty have been functional to the market integration, until the Court of Justice of the European Communities (hereinafter ECJ) ruled that art. 141 EC pursues both economic and social objectives and may be viewed as a guarantee for social progress, mentioned in the Preamble of the Treaty[5].

Only after the adoption of art. 13 EC[6] a less market-oriented approach to issues of equality seems to have been embodied into the Treaty, although still characterised by a lack of uniformity[7].

In contrast with art. 141 and 12 EC, art. 13 EC has no direct effect but must be substantiated by secondary legislation. Its applicability is limited both by

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[3] See Bell, 1999, 15: 'The references to improving living and working conditions and combating exclusion are particularly relevant as combating discrimination fulfils both these objectives'.

[4] Art. 2: 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'.

[5] ECJ, 8 April 1976, Case 43/75, *Defrenne* v. *Sabena II*, [1976] ECR 455, para. 8-11. See Blanpain, 2002, 115; Bell, 2002, 191; Tesauro, 2003, 120-1; Mancini & O'Leary, 1999, 331; Barnard, 2000, 198.

[6] Art. 13: '(1) Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. (2) By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251'. Inserted in the EC Treaty by the 1997 Treaty of Amsterdam, in force since 1 May 1999.

[7] Bell, 2003, 91**;** McCrudden, 2003, 10; Fredman, 2001, 149 argues that 'it was only with the acceptance of a convergence between economic goals, and goals of justice and fairness that a generalised power to legislate in the discrimination field was enacted'.

existing provisions of the Treaty and by the powers conferred by it to the Community[8], limitations that cast doubts over the legality of Community action in borderline fields such as education, housing, and health care[9]. Its location in the Chapter on 'Principles' indicates its centrality, although the wording makes it clear that it is not intended to delineate a new, autonomous competence for the Community in the field of anti-discrimination[10]. Art. 13 EC has attracted criticism because of its vagueness as far as other important aspects are concerned; the article does not specify which measures may be taken within the meaning of 'appropriate action', nor the approach to be adopted *vis-à-vis* indirect or positive discrimination[11]. The risk of art. 13 EC creating a *de facto* hierarchy among different grounds of discrimination has also been highlighted and connected to the political will of the Council[12]: several authors are of the opinion that measures taken under art. 13 EC did make that potential risk come true[13].

Nevertheless, art. 13 EC clearly stands as an example of a significant commitment of Community action in the field of equality[14], which in turn has been seen as an important step in the construction of a new political space[15]. Articles 20[16], 21[17], and 23[18] of the EU Charter of fundamental rights further testify of this commitment, although may reflect different visions of equality (see *infra*, 2.1.2), often adapted to the specific relevance of the ground of discrimination considered. Therefore, if art. 20 reflects the classical view of equality before the law, art. 21(1) embraces the concept of non-discrimination among a number of grounds, but treats nationality as a separate concern (art. 21(2)) mirroring art. 12 EC. The relationship between art. 21 EU Charter, art. 13 EC and secondary legislation is manifold: firstly - once the status of the Charter is clarified - art. 21 of the Charter could have binding force, unlike art. 13 EC: individuals and organisations will be able to request judicial review of legislative choices. Secondly, art. 13 EC does not tackle the issue of justification of discrimination, whereas art. 21 of the Charter must be read in

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[8] In contrast with art. 12 EC which, limited by other *special* provisions of the Treaty and by its *scope of application*, provides broader margins of application: see Bell, 1999, 8 ff. See also Flynn, 1999, 1132 ff.
[9] Bell, 2002, 135.
[10] Council Directive 2000/43/EC is seen as an example of broad Community action *vis a vis* anti-discrimination because its scope encompasses additional realms (other than employment), and because it does not require a cross-border situation in order to be applicable (in contrast with art. 12 EC). See Bell, 2002, 136 ff.
[11] Flynn, 1999, 1136.
[12] Flynn, 1999, 1138.
[13] Waddington & Bell, 2001, 610; Fredman, 2001, 151; Waddington, 1999, 3. The Opinion of the Economic and Social Committee on the Proposal for the Framework Directive, OJ 18/7/2000, C 204/82 at 2.3, called on the Commission to 'consider enacting future legislation to protect all grounds…modelled on the principles proposed in the Directive against discrimination on racial or ethnic grounds'. For a more nuanced approach see also Bell & Waddington, 2003, 349.
[14] In 1999 the Commission's action was described as driven by 'relatively ambitious and broad vision', see Waddington, 1999, 4.
[15] Borrillo, 2003, 141.
[16] 'Everyone is equal before the law'.
[17] '(1) 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. (2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited'.
[18] 'Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.

conjunction with art. 52(1) of the Charter[19] (which allows only necessary and objective justification).

The Draft Treaty establishing a Constitution for Europe, adopted by the European Convention on 13 June and 10 July 2003 and submitted to the President of the European Council in Rome on 18 July 2003, clearly states in art. I-2 that the Union is founded on the value of respect for equality, shared by societies characterised by 'pluralism and … non-discrimination'[20]. Art. I-3, in listing the Union's objectives, embraces the fight against 'social exclusion and discrimination'.

A new art. III-8, located in Title II (Non-discrimination and citizenship) of Part III (Policies and functioning of the Union), would rephrase art. 13 EC. One of the clauses of general application of this Part states that 'in defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on … sexual orientation' (art. III-3). In addition, the draft would incorporate in Part II the Charter of fundamental rights of the Union (see art. II-20 and II-21) [21].

In general, the European approach in the field of anti-discrimination legislation has been described as cautious[22] and as lacking uniformity as well as solid theoretical basis[23]. Art. 13 EC only allows action within the limits of existing powers of the Community and art. 51 of the EU Charter[24] reiterates the principle

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[19] Art. 52: 'Scope of guaranteed rights. (1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. (2) Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties. (3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

[20] OJ 18/07/2003, C 164. For the whole text of the draft Constitution see also http://european-convention.eu.int/DraftTreaty.asp?lang=EN.

[21] In the Treaty establishing a Constitution for Europe of 29 October 2004, the three provisions explicitly referring to sexual orientation are re-numbered and phrased as follows:
Art. II-81(1) (former II-21) '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.'
Art. 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.'
Art. III-124 (former III-8) '(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.'
The full text of the Constitution can be found at www.europa.eu.int/constitution/constitution_en.htm.

[22] Craig & De Búrca, 2003, 357.

[23] McCrudden, 2003, 1 ff.a

[24] Art. 51: 'Scope. (1) The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. (2) This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'.

of subsidiarity, while avoiding conferring any new (constitutional) power on the Union as far as fundamental rights are concerned. The body of laws on equality that has grown considerably in recent years has adopted not one but a plurality of concepts of equality.

2.1.2 General principles and concepts of equality

The respect for fundamental rights is a general principle which Community law observes[25]. The ECJ considers fundamental rights deriving from the constitutional tradition common to the Member States binding on legislative and administrative acts of the European Communities[26]; the reference to rights inherent in common constitutional traditions and to the fundamental rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) has been later codified in the Treaty on European Union (art. 6), and several specific rights were later given more visibility by means of codification within the EU Charter (see *supra,* 2.1.1). The ECJ had initially been reluctant to subject EC law to national constitutions because of the detrimental effect on the validity and efficacy of Community measures[27]. Despite the embracing of the respect for fundamental rights as a general principle of Community law, however, the testing of Community measures against fundamental rights has rarely led the Court to strike down such acts; deference to the legislature prevailed[28].

Fundamental rights encompass the right of non-discrimination[29]. In the field of social policy, the Community legislature, both in the Treaty and in secondary legislation, has gradually dedicated most attention to equal treatment between men and women. In turn the ECJ, in time, has conferred to the provision on equal pay between men and women (art. 141 EC) a broader meaning than the literal one[30]. Some scholars argued that equal pay between men and women has been interpreted by the ECJ so broadly that today it can be identified with a general principle of equality *in employment relations*[31], whereas others, giving the case law a more generous interpretation, concluded that equal pay between

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[25] See ECJ's Opinion 2/94 on accession by the Community to the ECHR [1996] ECR I-1759.
[26] ECJ, 12 November 1969, Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 419; 14 May 1974, Case C-4/73 *Nold* v. *Commission* [1974] ECR 491; 28 October 1975, Case 36/75, *Rutili* v. *Minister of the Interior* [1975] ECR 1219.
[27] See ECJ, 17 December 1970, Case 11/70 *Internationale Handelsgesellschaft* v. *Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125. Craig & De Búrca, 2003, 322, argue that the discourse on fundamental rights in the EU stems from and depends on the constitutional status of EC law *vis a vis* national law and the question of its supremacy. See also Bell, 2002, 19; Tesauro, 2003, 115.
[28] See Craig & De Búrca, 2003, 331-2.
[29] See ECJ, 19October 1977, Case 117/76, *Ruckdeschel* [1977] ECR 1753, para 7: 'the second subparagraph of article 40(3) of the treaty provides that the common organisation of agricultural markets 'shall exclude any discrimination between producers or consumers within the community'. Whilst this wording undoubtedly prohibits any discrimination between producers of the same product it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products . This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified'. See also Bell, 2002, 20.
[30] Starting from ECJ, 15 June 1978, Case 149/77, *Defrenne* v. *Sabena* [1978] ECR 1365, para 26-27: 'The court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'. See also Blanpain, 2002, 340.
[31] Tesauro, 2003, 120.

men and women has been elevated 'from an element of labour law to the status of a fundamental norm of *Community law*'[32].

In this context, some have explored the possibility of considering the principle of equal treatment not only as a market-unifier tool or as a rule of administrative law but also - notwithstanding the lack of a written rule - a right of the individual of constitutional nature[33]. In fact, in *P* v. *S*[34] the ECJ interpreted a sex equality Directive as applicable to a case involving unequal treatment of a transsexual person, arguing that the measure was 'simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'; also other Treaty provisions (such as art. 34(2) or 49) and Directives concerning equal treatment between men and women are considered by the ECJ as specific manifestations of an unwritten general principle binding on the Community[35].

Such unwritten general principle of non-discrimination has been put into question when forms of discrimination allegedly different from sex discrimination were at stake, as in *Grant*[36] and *D and Sweden*[37]*.* However, despite the disappointment for a missed chance to 'articulate a broad principle of non-discrimination on *any* arbitrary ground', some have concluded that the general principle survived[38].

Overall, the adoption of art. 13 EC, the inclusion of several other grounds, quite decisive political steps such as the Council's annual human rights report, several Directives in the field of equal treatment, and thorough scholarly studies testify a growing interest and involvement of several actors in the field of equality; some scholars, nevertheless, emphasise the ambiguous and cautious involvement of the EU in social policy matters concerning anti-discrimination[39].

In the employment realm, equality between men and women has historically had an economic objective more than a social one: art. 141 EC and subsequent measures were aimed at avoiding distortion of competition[40]. The object of European social policy has been the 'familiar market citizen', whereas only most recent measures such as the Race Directive appear as an expression of a social policy based on a social citizenship model[41].

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[32] Whittle & Bell, 2002, 688 (emphasis added). In general see also More, 1999, 540; Mancini & O'Leary, 1999, 331.
[33] See More, 1999, 544.
[34] ECJ, 30 April 1996, Case C-13/94, *P* v. *S and Cornwall County Council* [1996] ECR I-2143, para. 18 (see also opinion of G. Tesauro AG, para. 22). See also Craig & De Búrca, 2003, 388.
[35] See *Ruckdeschel*, *supra*; 25 November 1986, joint Cases 201 and 202/85, *Klensch* v. *Sécretaire d'État á l'Agricolture et á la Viticulture* [1986] ECR 3477; 16 January 2003, Case C-388/01, *Commission* v. *Italy* [2003] ECR I-721, para. 13: 'It is also clear from the Court's Case-law (…) that the principle of equal treatment, of which Article 49 EC embodies a specific instance (…)'.
[36] ECJ, 17 February 1998, Case C-249/96, *Grant* v. *South-West Trains Ltd.* [1998] ECR I-621.
[37] ECJ, 31 May 2001, Case C-122/99P and 125/99P, *D and Sweden* v. *Council* [2001] ECR I-4319.
[38] Craig & De Búrca, 2003, 388. Rather more sceptical More, 1999, 546-7. In *Grant* (para. 45) the ECJ argued that the respect for fundamental rights (referring to the ICCPR) 'cannot have the effect of extending the scope of the Treaty' with the effect of protecting grounds of discrimination not yet covered by it.
[39] Bell, 2002, 144: 'The dependency of Article 13 on the limits of the competences of the Community draws it back towards a market focus, because Community competences are strongest and most clear in those areas directly connected to the functioning of the internal market'.
[40] ECJ, 15 May 1986, Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. See also Blanpain, 2002, 339 and *supra*, 2.1.1.
[41] See Bell, 2002, 191-5.

In addition, the argument has been made that the Commission's choice to use art 13 EC (instead of art. 137(2) EC) as a legal basis for the Framework Directive contributes to the shift of anti-discrimination law from labour law to an element capable of strengthening the content of Union citizenship[42]. This, in addition to political objectives, has the effect of 'improv[ing] the status of the Directives before the Court of Justice'[43].

Recently in *Schröder*[44], equality rights were given a dimension more closely related to the human being, rather than as instruments of economic integration; the social aim of art. 141 EC becomes paramount because it constitutes expression of a fundamental human right that the Court has a duty to ensure.

The principle of non-discrimination as applied in Community law generally requires a similarly-situated test[45]; however, scholars, as well as the ECJ, over time increasingly recognised the role of indirect and unintentional discrimination[46]: first defined in the 1997 Burden of proof Directive[47], the notion of indirect discrimination has been subsequently revisited in the 2000 Race Directive and the Framework Directive (see *infra*, 2.2.4). Today it is generally related to a more substantive approach to equality[48]. Furthermore, a less formal analytical approach has been adopted in a line of cases concerning refusal to hire a woman because of her pregnancy, where the Court held that the finding of discrimination 'depends on the reason for that refusal'[49]. Some have seen a more substantive notion of equality also in art. 141(4) EC, introduced by the Treaty of Amsterdam, when it aims at ensuring 'full equality in practice'[50].

Art. 14 of the ECHR prohibits discrimination in the enjoyment of the rights set forth in the Convention[51]. In the *Belgian Linguistic* case the ECtHR clarified what constitutes 'discrimination', ruling that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification; moreover, it held that 'the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies'. A difference of treatment must pursue a legitimate aim and must bear a

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[42] Whittle & Bell, 2002, 688.
[43] Whittle & Bell, 2002, 688.
[44] ECJ, Case C-50/96 *Deutsche Telekom* v. *Schröder* [2000] ECR I-743.
[45] ECJ, 13 November 1984, 10 February 2000, Case 283/83, *Racke III* [1984] ECR 3791.
[46] Craig & De Búrca, 2003, 391; Fredman, 2001, 161. ECJ, 12 February 1974, Case 152/73 *Sotgiu* [1974] ECR 153 ('the rules regarding equality of treatment, both in the Treaty and in article 7 of Regulation no. 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'); 8 May 1990, Case C-175/88 *Biehl* [1990] ECR I-1779; 13 May 1986, Case 170/84 *Bilka* [1986] ECR 1607.
[47] Directive 97/80/EC, OJ 20/1/98, L 14/6.
[48] Schiek, 2002, 305-6: 'its inclusion in the principle of equal treatment under Community law is a consequence of the social purpose of the Equal Treatment Legislation'.
[49] ECJ, 8 November 1990, Case C-177/88, *Dekker* v. *VJV-Centrum Plus* [1990] ECR I-3941; see also 14 July 1990, Case C-32/93, *Webb* v. *EMO Air Cargo (UK)* [1994[ECR I-3567; 13 February 1996, Case C-342/93, *Gillespie and others* [1996] ECR I-475; 3 February 2000, Case C-207/98, *Mahlburg* v. *Land Mecklenburg-Vorpommern* [2000] ECR 3875. See also Schiek, 2002, 306.
[50] Barnard, 1998, 371.
[51] Art. 14 reads 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

'reasonable relationship of proportionality between the means employed and the aim sought to be realised'[52].

In *Salgueiro da Silva Mouta* v. *Portugal* the Court applied art. 14 ECHR for the first time to a case concerning sexual orientation (in conjunction with art. 8)[53]. In *Karner* v. *Austria*, which entailed a comparison between unmarried different-sex and same-sex partners, the Court recalled that 'differences based on sexual orientation require *particularly serious reasons* by way of justification'[54]. In addition, the Court held that the rule which prevents the unmarried same-sex partner of the deceased tenant from succeeding to the tenancy (in contrast with the unmarried different-sex partner) must be shown to be *necessary* for the achievement of the legitimate aim sought. Interestingly, the Court stated that 'the *aim of protecting the family* in the traditional sense is *rather abstract* and a broad variety of concrete measures may be used to implement it (…). The principle of proportionality does not merely require that the measure chosen is *in principle* suited for realising the aim sought'[55]. A test of necessity was, thus, added to the analysis of art. 14 when the margin of appreciation afforded to Member States is narrow, as is the case of difference in treatment based on sex or sexual orientation[56].

2.1.3 Division of legislative powers relating to discrimination in employment

The Framework Directive requires member States to implement its provisions. It is up to rules of national law to determine which lawmakers or other agencies (e.g. through collective agreements) are charged with this implementation (see also para 2.2.1).

2.1.4 Basic structure of employment law

Community law deals with relations between employers and workers (see *supra*, 2.1.1), therefore scholars have deemed it possible to carve out a branch of (Community) law called European labour law[57], which covers employment both in the private and the public sector. Apart from that, there is a whole set of rules and regulations concerning the position of employers of European institutions (see next paragraph).

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[52] European Court of Human Rights, 23 July 1968, Ser. A, nr. 6, para. 10; *Karlheinz Schmidt* v. *Germany*, 18 July 1994, Ser. A, nr. 291-B. See also Ovey & White, 2002, 347 ff.; van Dijk & van Hoof, 1998, 711 ff.; Arai-Takahashi, 2002, 165 ff.

[53] European Court of Human Rights, 21 December 1999, appl. nr. 33290/96, Reports of Judgments and Decisions, 1999-IX. For a precedent in the Commission see *Sutherland* v. *UK*, 27 March 1997, appl. nr. 24186/94.

[54] European Court of Human Rights, 24 July 2003, appl nr. 40016/98, para. 37 (emphasis added). For the heightened scrutiny see *Smith and Grady* v. *UK* , 27 September 1999, Reports of Judgments and Decisions, 1999-VI. Other Cases finding a violation of art. 14 (in conjunction with art. 8) decided after *Salgueiro* were *S.L.* v. *Austria*, 9 January 2003, appl. nr. 45330/99 and *L. and V.* v. *Austria*, 9 January 2003, appl. nr. 39392/98 and 39829/98. See also both the majority and the two dissenting opinions in *Fretté* v. *France*, 26 February 2002, appl. nr. 36515/97 (four judges out of seven found art. 14 applicable but split on the justification of its violation).

[55] Ibid., para. 41 (emphasis added).

[56] See also, in general, Wintemute, 1997; Wintemute, 2001, 713; Ovey & White, 2002, 24; Janis, Kay & Bradley, 2000, 282.

[57] Blanpain, 2002, 32; Barnard, 2000, *passim*.

2.1.5 Provisions on sexual orientation discrimination in employment or occupation

A 1984 European Parliament Resolution on sexual orientation discrimination at the workplace[58], following the Squarcialupi report, first acknowledged the need to tackle the problems faced by lesbian and gay persons.

The 1991 Commission Recommendation[59] on the protection of the dignity of women and men at work first sought to recommend that unwanted sexual conduct (harassment) could constitute a violation of the principle of equal treatment; this elaboration has now been explicitly accepted in the Framework Directive (art. 2(3)) and other measures (see *infra*, 2.2.5). The recommendation was accompanied by a 'Code of practice on measures to combat sexual harassment', designed to expose the problems concerning all workers, and groups particularly vulnerable to sexual harassment. Harassment directed towards lesbians and gay men was specifically indicated as unacceptable conduct: 'it is undeniable that harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour'[60].

The Framework Directive of 2000 requires equal treatment in employment and occupation regardless of religion or belief, disability, age or sexual orientation.

Staff Regulations for officials of the Communities[61] have been amended in 1998[62] in respect of equal treatment, by adding non-discrimination clauses (among which art. 1a and art. 27(2)) which explicitly mention sexual orientation as a prohibited ground of discrimination. The same non-discrimination clauses are applicable to other servants of the European Communities, including temporary staff (among which art. 12(1)).

However, at the time the Council expressly chose not to tackle the allocation of family benefits, because the clause laid down in art. 1a applied 'without prejudice to the relevant provisions [of the Staff Regulations] requiring a specific marital status'. The specific relevance of family allowances provided for by the Staff Regulations with respect to equal treatment for same-sex couples was highlighted already a decade ago[63].

As of 1 May 2004, this exception has been removed by the recently adopted reform of the Staff Regulations[64]. The Commission's proposals for reforming Staff Regulations claimed that the old text no longer reflected the changed social and legal attitudes towards family relationships. Art. 1d (former art. 1a) now provides that 'For the purposes of these Staff Regulations, non-marital partnerships shall be treated as marriage provided that all the conditions listed in Article 1(2)(c) of Annex VII are fulfilled'. New art. 1(2) of Annex VII grants family allowances to a married official (point (a)) and to 'an official who is registered as a stable non-marital partner', provided that a few conditions are met (point (c)). After this recent reform, benefits provided for by the Regulations

[58] OJ 16/4/1984, C 104/46.
[59] 27 November 1991, OJ 24/02/92 L 49/1. Endorsed by the Council with Declaration 19 December 1991, OJ 4/2/92 C 27/1.
[60] See previous note.
[61] Council Regulation (EEC, ECSC, Euratom) N. 259/68, OJ 4/3/68 L 56/1.
[62] Council Regulation (EC, ECSC, Euratom) N. 781/98, OJ 15/4/98 L 113/4.
[63] Snyder, 1993, 258 ff.
[64] Council Regulation (EC, Euratom) N. 723/2004, OJ 27/4/04 L124/1.

(household allowance, pension and sickness insurance, access to canteens and language courses) apply to a registered partnership between persons who are not allowed to marry 'in a Member State'.

In addition, the reform provides a 'reduced social package' for unmarried officials who live in a de facto (unregistered) relationship, provided that it can be proved by a legal document[65].

In accordance with art. 27 of the Regulations, notices of open competitions often emphasise that the institutions are equal opportunities employers that prohibit any discrimination on the basis of sexual orientation[66].

As far as same-sex marriage and spousal benefits are concerned, with a note of 15 May 2001, the Director general of the Commission's Directorate General for Personnel and Administration has clarified that, in light of art.1a of the Staff Regulations and of provisions of the European Charter of fundamental rights - which do not mention 'man and woman' when defining the right to marry - family benefits provided for under Staff regulations will apply to marriages between persons of the same-sex contracted in the Netherlands[67]. It is plausible that the same will now apply for Belgian same-sex spouses.

A first proposal for a Directive on working conditions for temporary workers, although mainly concerned with the principle of non-discrimination among temporary workers and fulltime workers of the enterprise, defined 'basic working and employment conditions' as, *inter alia*, factors relating to 'action taken to combat discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation'[68]. Therefore, it would appear that any action taken by an employer in order to comply with the Directive was considered applicable to temporary workers sent in by job agencies (e.g. staff leasing, etc.); the parallel is with prohibition of instruction to discriminate in the Framework Directive (see *infra*, 2.2.6). A second draft of the proposal states more clearly that 'any action to combat any discrimination based on…sexual orientation must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provision'[69].

In addition to the Community action programme to combat discrimination (2001 to 2006)[70], there are certain documents that seek to inject the meaning of art. 13 EC in various Community policies that present ramifications in employment

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[65] See amendment nr. 65 to art. 72 of the Staff Regulations, and amendment 95 (iii) to Art. 6 of Annex V of the Staff Regulations.
[66] See, e.g., European Parliament, Recruitment notice PE/75/S, OJ 10/12/02, C 306 A/1; Notice PE/22/D, OJ 6/12/02, C 303 A/38; Notice COM/B/2/02, OJ 17/12/02, C 314 A/12, where it is said that: 'The Commission is an equal opportunities employer and accepts applications without distinction on the grounds of age, race, political, philosophical or religious convictions, sex or sexual orientation and regardless of disabilities, marital status or family situation'.
[67] Letter of Director general of Directorate general personnel and administration Horst Reichenbach to Director of DG Admin/A and Director of DG Admin/B, of 15 May 2001, nr. ADMIN.B.2(01)D/18009.
[68] Art.3 (1)(d) of Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, COM(2002) 149 final - 2002/0072 (COD), OJ 27/08/02, C 203 E/1.
[69] Art.5 of Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, 28/11/2002, COM(2002) 701 final- 2002/72 (COD), available on line at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52002PC0701&model=guichett>.
[70] Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ 2/12/2000, L 303/23.

law, such as an interpretative communication of the Commission on the possibility for integrating social considerations into public procurement[71], an Opinion of the Economic and Social Committee on corporate social responsibility (CSR)[72], and a Council Resolution on social inclusion through social dialogue and partnership[73].

2.1.6 Important case law precedents on sexual orientation discrimination in employment or occupation

In *Grant* v. *South West Train Ltd*.[74] the ECJ was asked to clarify whether art. 141 EC (former art.119) and Directive 75/117 (on equal pay for men and women) could apply to the case of an employer who refused travel benefits to the unmarried same sex partner of an employee, while providing such benefits to the unmarried different-sex partner. The employer's staff regulations defined 'spouse' as a married partner or a 'common law opposite sex spouse' for a period of at least two years. The ECJ held that Ms. Grant 'does not satisfy the conditions prescribed in those regulations' because she does not live with a 'spouse' of the opposite sex. On the ground that this condition is applied equally to men and women, the Court rejected the argument that the refusal could be regarded as direct discrimination based on sex (para. 26-28).

However, the Court indulged in discussing the issue of sexual orientation discrimination, concluding that only the legislature could tackle the issue (para. 36) and that any intervention of the Court's jurisprudence in order to cover sexual orientation discrimination within the meaning of art. 141 EC would be tantamount to extending its scope beyond Community competences (para. 45-47).

The ruling in *Grant* allows to articulate two conclusions. First, it states that Community sex equality law does not cover sexual orientation discrimination. Second, the fact-situation constitutes, indeed, sexual orientation discrimination. Given the evolution of Community law, the latter conclusion stands as an important milestone: differential treatment among employees with regard to the sex of their unmarried partner must now be taken to fall within the meaning of sexual orientation discrimination. It seems likely that the ECJ will consider the Framework Directive applicable to such facts as those present in *Grant*.

In *D and Sweden* v. *Council*[75], the ECJ heard an appeal against a decision of the Court of First Instance in a case concerning the refusal of the Council to apply Community's Staff Regulations' provisions on household allowance to the registered (same-sex) partner of an employee. The CFI had held that, following the decision of the ECJ in *Grant*, *unmarried cohabitation* may not be considered as equivalent to *marriage.* However, the CFI failed to see that Grant dealt only

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[71] COM(2001) 566 final, of 15/10/2001, OJ 28/11/01, C 333/27.
[72] General comment 4.2 considers that 'CSR is both about encouraging a spirit of communication and about willingness to keep learning. People who can communicate with each other and are open to new knowledge are also able to live together in a socially acceptable way, so that there is no room for intolerance and discrimination based on ethnicity, disability, sexual orientation or gender'. See Opinion of the Economic and Social Committee on the 'Green paper: Promoting a European framework for Corporate Social Responsibility', OJ 27/5/2002, C 125/44.
[73] 2003/C 39/01, OJ 18/2/2003, C 39/1.
[74] ECJ, 17 February 1998, Case C-249/96 [1998] ECR I-621.
[75] ECJ, 31 May 2001, Cases C-122/99 P and C-125/99 P [2001] ECR I-4319.

with a comparison between same-sex and different sex unmarried couples, whereas no separate issue arose involving marriage.

Unmarried cohabitation, moreover, was taken by the CFI to encompass both registered and unregistered cohabitation. On this point the Court adopted a less rigid approach, by accepting that registered partnership bears legal consequences akin to those of marriage ('since it is intended to be comparable', para. 33). However, the *ratio decidendi* of *D* lies precisely in the assessment on the (ids)similarity between registered partnership and marriage: without feeling the need to indulge in extensive comparative analysis, the ECJ concluded that in the concerned Member States the former is regarded as being distinct from the latter (para. 36). Therefore, the Court refused to interpret Staff Regulations 'in such a way that legal situations distinct from marriage are treated in the same way as marriage' (para. 37).

When called upon to decide whether this state of things could infringe the principle of equal treatment, the ECJ framed the fact-situation as one involving civil status discrimination, not sex discrimination ('it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner', para. 47). Without further elaboration, the ECJ applied a formal similarly situated test and concluded by rejecting the plea, principally on grounds of the 'great diversity' of national registered partnership laws (para. 50-51).

The European Court of Human Rights (ECtHR) has had the chance of deciding two cases concerning employment, *Lustig-Prean and Beckett* v. *UK*[76] and *Smith and Grady* v. *UK*[77] (armed forces). In the context of violation of art. 8 of the Convention (right to respect for private life), the Court argued that the threat to national security, in itself a legitimate aim for the interference, was based 'solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation' (para. 89). Regulations which expressed those attitudes by excluding gay personnel from the armed forces, could not claim that their infringement upon a Convention right was justified, because 'they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority' (para. 90). Therefore, the ECtHR ruled that the dismissal of members of the armed forces on grounds of homosexuality violates the right of respect for private life.

2.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

A number of Community measures are specifically designed for achieving equal treatment between men and women. Areas involved are equal pay[78], access to employment, vocational training and promotion, and working conditions[79]; social

[76] ECtHR, 27 September 1999, appl. nr. 31417/96 and 32377/96.
[77] ECHR, 27 September 1999, appl. nr. 33985/96 and 33986/96, Reports of Judgements and Decisions 1999-VI.
[78] Art. 141 (1) EC and Directive 75/117/EEC, OJ 19/2/1975, L 45/19.
[79] Directive 76/207/EEC, OJ 14/2/76, L 39/40, amended by Directive 02/73/EC of 23 September 2002, OJ 5/10/02, L 269/15.

security[80]; occupational social security schemes[81]; burden of proof in cases of discrimination based on sex[82]; safety and health at work of pregnant workers[83].

The Race Directive[84] requires equal treatment irrespective of racial or ethnic origin, the only differences with the Framework Directive with respect to employment discrimination being that the former requires Member States to designate a body or bodies for the promotion of equal treatment, that the latter contains exceptions not mentioned in the former (see art. 2(5)), and that no 'loyalty' requirement is foreseen in the former.

2.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

European Parliament's Resolution of 8 February 1994[85] calls upon the Commission and the Member States to act in the field of equal treatment of lesbians and gay men in the Community. Several Resolutions on the situation of fundamental rights in the EU, in addition to the 1994 Resolution, subsequently called upon Member States to 'amend their legislation in order to recognise non-marital relationships between persons of the same or the opposite sex and assign them equal rights'[86], or to confer the same rights to unmarried couples (regardless of the sexes of those involved) as to married couples and, for the first time, to recognise the right to marry and to adopt children[87].

There are a number of Community measures that take into account discrimination on grounds of sexual orientation, especially in the context of mainstreaming equality concerns into various acts and proposals for new legislation.

One example consists in the anti-discrimination clauses included in codes of conduct for personnel of European institutions and agencies. On 6 September 2001[88] the European Parliament adopted a resolution approving the European Ombudsman's Code of Good Administrative Behaviour, a text that all European institutions and bodies should respect in their relations with the public. Art. 5 states that when dealing with requests from the public and taking decisions, the official shall ensure that the principle of equality of treatment is respected; members of the public who are in the same situation shall be treated in a similar manner. In particular, sexual orientation discrimination shall be avoided. Several other European institutions and bodies have adopted similar codes, which all forbid discrimination of members of the public based on sexual orientation: the European Parliament[89], the Council[90], the Commission[91], the European

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[80] Directive 79/7/EEC, OJ 10/2/79, L 6/24.
[81] Directive 86/378/EEC, OJ 12/8/86, L 45/40 amended by Directive 96/97/EC of 2 December 1996.
[82] Directive 97/80/EC, OJ 20/1/98, L 14/6.
[83] Directive 92/85/EEC, OJ 28/11/92, L 348/1.
[84] Directive 2000/43/EC, OJ 19/7/00, L 180/22, art. 13.
[85] OJ 28/2/94, C 61/40.
[86] European Parliament resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI)), OJ 14/3/2002, C 65 E/350, at 359.
[87] European Parliament resolution on the situation as regards fundamental rights in the European Union (2002) (2002/2013(INI)), P5_TA(2003)0376, of 4 September 2003. See it online at www.europarl.eu.int/plenary/default_en.htm.
[88] PE 290.602/DEF.
[89] Guide to the obligations of official and other servants of the EP, OJ 5/4/00, C 97/01, at 10.

Investment Bank, the European Environment Agency[92], the European Foundation for the Improvement of Living and Working Conditions[93], the Community Plant Variety Office[94], etc.

Recital 12 of the Council Framework Decision of 13 June 2002 on the European arrest warrant[95] holds that nothing in the Decision may be interpreted as prohibiting a refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the purpose of the warrant will be the prosecution or punishing of a person on several grounds, including his or her sexual orientation.

Furthermore, anti-discrimination clauses that specifically refer to sexual orientation appear in a number of (proposed) measures. One of the first was the proposal for amending Regulation 1612/68 on the freedom of movement of workers within the Community[96]. The proposed measure is especially relevant for gay and lesbian people because it foresees the conditions for free movement and residence of Union citizens and their 'family members' within the territory of the Member States[97]. The original proposal would have inserted a new art. 1a, an anti-discrimination provision referring to all of the grounds mentioned in art. 13 EC. In light of subsequent developments, free movement of workers has been merged in a proposed Directive concerning the right to move and reside freely in the Community for all citizens of the Union (and their family members)[98]. Proposed art. 4 contained an anti-discrimination clause that would encompass all grounds covered by art. 21 of the EU Charter of fundamental rights (membership of a national minority becomes 'membership of an ethnic minority' in the proposal). The amended proposal of 15 April 2003 replicated the same clause, with the addition of 'gender identity'[99]. However, the common position adopted by the Council on 5 December 2003 eliminated the reference to the clause[100], which is now to be found in Recital nr. 31 of the final version of Directive 2004/38/EC (gender identity deleted)[101].

The immigration policy of the Community comprises today a number of measures and proposals in respect to areas such as: family reunification,

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[90] Decision of the Secretary-General of the Council of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council, OJ 5/7/01, C 189/1 (Annex, art.3, grounds not mentioned).
[91] Commission Decision of 17 October 2000 amending its Rules of Procedure, 2000/633/EC, ECSC, Euratom, OJ 20/10/00, L 267/63 (Annex).
[92] Decision of 20/3/00, OJ 26/8/00, L 216/15.
[93] Decision of 11/2/00, OJ 15/12/00, L 316/69.
[94] Decision, OJ 23/12/00, C 371/14.
[95] (2002/584/JHA) OJ 18/7/02, L 190/1.
[96] COM(1998) 394 final - 98/229 (COD), OJ 12/11/98, C 344/9.
[97] See art. 3 of the amended proposal, *supra*, n. 97.
[98] COM(2001) 257 final - 01/111 (COD), OJ 25/9/01, C270/150.
[99] COM(2003) 199 final - 2001/0111 (COD), available on line at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003PC0199&model=guichett>. However, it should be remarked that art. 13 EC does not form a legal basis for the adoption of the Directive; this might explain why the definition of 'family member' in art. 2 does little to tackle the position of same-sex partners.
[100] Common position (EC) No 6/2004 adopted by the Council on 5 December 2003, OJ 2/03/04, C 54 E/12.
[101] Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, OJ 30/4/04, L 158/77.

asylum (minimum standards for the reception of asylum seekers, criteria and mechanisms for determining the member State responsible for examining an asylum lodged in one of the member States), refugees (minimum standards for the qualification as refugees, minimum standards on procedures for granting refugee status), status of third-country long-term residents, entry and residence of third-country nationals for the purpose of paid employment, short-term residence permit for victims of human trafficking. The vast majority of these proposed and/or adopted measures has significant ramifications on family life, and may therefore be deemed to have clear repercussions on gay and lesbian people; however, these aspects will not be tackled in the present report, which is only concerned with the implementation of the Framework Directive. Other aspects of those documents, nevertheless, are of specific relevance for the purposes of this paragraph, because they refer to provisions on sexual orientation discrimination, mostly with a view of complying with art. 21 of the EU Charter of fundamental rights and mainstreaming equality:

- Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers[102]: it shows no trace of a non-discrimination clause (art. 32 of the proposal[103]) that mirrored art. 21 of the EU Charter of fundamental rights, although Recital nr. 6 mentions 'instruments of international law…which prohibit discrimination'.
- Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national[104]: the final text does not contain the anti-discrimination clause of art. 27 of the original proposal[105], although Recital nr. 15 states that 'the Regulation observes the fundamental rights and principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union'.
- Council Directive of 22 September 2003 on the right to family reunification[106]: Recital nr. 5 holds the view that the Directive should be given effect without discrimination on the basis of, inter alia, sexual orientation.
- Council Directive of 25 November 2003 concerning the status of third-country nationals who are long-term residents[107]: the final text does not contain the anti-discrimination clause of art. 4 of the original proposal[108], which is now contained in Recital nr. 5.
- Council Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have

[102] OJ 6/2/03, L 31/18.
[103] COM(2001) 181 final - 2001/91 (CNS), OJ 31/7/01, C 213 E/286.
[104] Council Regulation (EC) No 343/2003 of 18 February 2003, OJ 25/2/03, L 50/1.
[105] COM(2001) 447 final - 2001/182 (CNS), OJ 30/10/01, C 304 E/192.
[106] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 3/10/2003, L 251/12. See also previous proposals: COM(1999) 638 final - 1999/258 (CNS), OJ 26/4/00, C 116 E/66; amended by COM(2000) 624 final - 1999/258 (CNS), OJ 27/2/01, C 62 E/99; further amended by COM(2002) 225 final - 1999/258(CNS), OJ 27/8/02 C203 E/136.
[107] Council Directive 2003/109/EC, OJ 23/01/04, L 16/44.
[108] COM(2001) 127 final - 2001/74 (CNS), OJ 28/8/01, C 240 E/79.

been the subject of an action to facilitate illegal immigration[109]: art. 5 of the proposal[110], which stated that Member States shall apply the Directive without discrimination on the grounds of, inter alia, sexual orientation, has become Recital nr. 7.

- Council Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection[111]: the final text does not mention the anti-discrimination clause of art. 35 of the proposal[112], but reference is made in Recital nr. 11 to 'instruments of international law…which prohibit discrimination'[113].
- Proposal for a Directive on minimum standards on procedures for granting and withdrawing refugee status[114]: art. 41 stated that the provisions of the Directive were to be applied without discrimination based on the six grounds mentioned by art. 13 EC, plus country of origin. A second draft of the whole proposal inserted in art. 42 all of the grounds mentioned by art. 21 of the EU Charter, plus membership of a particular social group, health, or country of origin[115].
- Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities[116]: it contains an identical clause (art. 32).

2.1.9 Other aspects of the legal background

A case recently decided by the ECJ (*KB* v. *National Health Service Pensions Agency*[117]) gave the Court the opportunity to rule on the question of survivor's pensions for the transsexual (unmarried) partner of an employee.

The case concerned the right of a female-to-male transsexual to benefit from the pension of her female partner should she predecease him. The pension scheme of her employer only allows the payment of survivor's pensions to the legally married 'spouse'. KB, the worker, claimed before the ECJ that the denial to pay survivor's pensions to her partner violates art. 141 EC and Directive 75/117/EC on equal pay between men and women. On 10 June 2003 Advocate General Colomer delivered an opinion arguing that:

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[109] Council Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 6/8/2004, L 261/19.
[110] COM(2002) 71 final- 2002/43 (CNS), OJ 28/5/02, C 126 E/393.
[111] Council Directive 2004/83/EC, of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 30/9/2004, L 304/12.

[112] COM(2001) 510 final- 2000/207(CNS), OJ 26/2/02, C 51 E/325.
[113] Note that article 10 of the Directive explicitly mentions sexual orientation as a possible 'reason for persecution', by stating that 'depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article'.
[114] COM(2000) 578 final-2000/238(CNS), OJ 27/2/01, C 62 E/231.
[115] COM(2002) 326 final/2 – 2000/238(CNS), OJ 26/11/02, C 291 E/143 (Corrigendum to proposal of 18.6.2002).
[116] COM(2001) 386 final- 2001/154 (CNS), OJ 27/11/01, C 332 E/248.
[117] ECJ, 7 January 2004, Case C-117/01, not yet published in ECR.

(i) the national rule is contrary to Community law, because:

- according to the rules and practices of thirteen out of fifteen Member States, transsexuals are allowed to marry;
- according to the ECtHR in *Christine Goodwin* v. *UK*[118], States enjoy a degree of discretion in cases of gender reassignment and marriage, but may not curtail altogether the right to marry of transsexual people;

(ii) the dispute concerns a matter covered by the Treaty.

The Advocate General pointed out that clearly 'the discrimination at issue does not directly affect enjoyment of a right protected by the Treaty but rather one of the preconditions of such enjoyment'. On this matter, he refrained from suggesting to the Court to issue any decision on matrimonial law (*a fortiori* on 'European matrimonial law'), but cautioned that any differential treatment in the enjoyment of rights conferred upon individuals by Community law for the reason of gender reassignment must be considered direct discrimination on grounds of sex covered by art. 141 EC (para. 76). Therefore, he concluded that art. 141 '*precludes* national rules which, by not recognising the right of transsexuals to marry in their acquired sex, denies them entitlement to a widow(er)'s pension'.

The Court has not completely clarified the principle that distinguishes *Grant* (*supra,* 2.1.6) from *P*. v. *S*. (*supra*, 2.1.2), nor has it elaborated on the characters of the kind of discrimination at issue. The *ratio* expressed in *P.* v. *S.* (discrimination because of gender reassignment is sex discrimination) was not recalled, because for the purposes of awarding the survivor's pension what matters is the (married) status of the beneficiary, being irrelevant whether the claimant is a man or a woman. However, the Court accepted the reasoning of the Advocate General about sex discrimination, ruling that when inequality of treatment concerns not the right protected by Community law, but one of the conditions (the capacity to marry) for granting that right, art. 141 EC is in principle violated. British legislation preventing transsexuals from marrying seems to have been considered incompatible with the EC Treaty principally because already declared in breach of art. 12 of the Convention by the Strasbourg Court (see *Goodwin*). Finally, the Court held that 'it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension'.

2.2 The prohibition of discrimination required by the Directive

2.2.1 Instrument(s) used to implement the Directive

According to art. 249 EC, a Directive 'shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. The Treaty, thus, chose to accept a possible lack of uniformity among national implementing measures. However, this lack of uniform rules must not undermine the proper

[118] ECtHR, 11/7/2002, appl. nr. 28957/95, online at <http://www.echr.coe.int/Eng/Judgments.htm>.

functioning of the Community system, which requires absence of discrimination based on nationality[119]: according to the ECJ, transposition of Community law (i.e. of a directive) into Member States' legal order must not put into question equality of Member States before Community law, nor create discriminations at the expenses of their citizens[120] (see also *infra*, 2.5.4).

In general, settled case law of the EJC has established that 'the provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'[121]. In addition, the ECJ held that 'the principle of legal certainty requires appropriate publicity'[122], that 'mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty'[123], and that 'a Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations arising under Community law'[124] (the latter with respect to the plea that the matter fell under the competences of local or regional authorities). The question of breach of Member States' obligations 'must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion'[125].

Moreover, the Court ruled that provisions of the Constitution, even when directly applicable, do not supply an appropriate means of transposition, because 'the principles of legal certainty and the protection of individuals require an unequivocal wording'[126].

Collective agreements that do not conform with Community law must be brought in line through supplementary State legislation. In addition, a lack of explicit implementing legislation may not be justified by arguing that, according to national practices, regulation of the matter is left to collective agreements. According to the principle stated by the Court in *Commission* v. *Denmark*[127], Member States may leave the implementation of a Directive in the first instance to representatives of management and labour. However, there remain cases in which collective agreements may not be regarded as sufficient means of transposition, because they do not create general rules applicable to all workers, but only to those of a specific industrial sector, or because the workers in question are not union members. The Court ruled that, even if the collective agreement were in accordance with the principle of equal pay laid down by the

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[119] Tesauro, 2003, 95.
[120] ECJ, 7 February 1973, Case 39/72, *Commission* v. *Italy* [1973] ECR 101, at para. 24.
[121] ECJ, 17 May 2001, Case C-159/99, *Commission* v. *Italy* [2001] ECR I-4007, at para. 32; 27 February 2003, Case C-415/01, *Commission* v. *Belgium* [2003] ECR I-2081, at para. 21; 30 May 1991, Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, at para. 24; 19 May 1999, Case C-225/97, *Commission* v. *France* [1999] ECR I-3011, at para. 37.
[122] Case C-415/01, *Commission* v. *Belgium, cit*., at para. 21.
[123] Case C-159/99, *Commission* v. *Italy*, *cit.*, at para. 32; 15 December 1982, Case 160/82, *Commission* v. *the Netherlands* [1982] ECR 4637, at para. 4; 2 December 1986, Case 239/85, *Commission* v. *Belgium* [1986] ECR 3645, at para. 7 (implementation through a circular); 11 November 1999, Case C-315/98, *Commission* v. *Italy* [1999] ECR I-8001, at para. 10 (implementation through circulars).
[124] ECJ,16 January 2003, Case C-388/01, *Commission* v. *Italy* [2003] ECR I-721; 15 December 1982, Case 160/82, *Commission* v. *the Netherlands* [1982] ECR 4637, at para. 4.
[125] ECJ, 16 January 2003, Case C-29/02, *Commission* v. *Spain* [2003] ECR I-811, at para. 9; 13 March 2003, Case C-436/01, *Commission* v. *Belgium* [2003] ECR I-2633, at para. 7.
[126] ECJ, 28 October 1999, Case C-187/98, *Commission* v. *Greece* [1999] ECR I-7713, at 54.
[127] ECJ, 30 January 1985, Case 143/83, *Commission* v. *Denmark* [1985] ECR 427.

Directive, it was far from certain that 'the same implementation of that principle is guaranteed for workers whose rights are not defined in such agreements'[128]. Therefore, State legislation must be unequivocal and cannot rely on existing interpretative solutions of social partners or courts for justifying the absence of thorough transposition.

The effectiveness of Directives has also been promoted by the ECJ through the principle of harmonious interpretation, which subjects national implementing legislation to an interpretation 'in light of the wording and the purpose of the Directive'[129]; the same principle extends to national legislation which predates a Directive and to situations which involve only private parties[130].

2.2.2 Concept of sexual orientation (art. 1 Directive)

The Framework Directive does not define what is to be intended as sexual orientation. The only comment on this aspect is to be found in the Commission's explanatory memorandum on art. 1, which draws a distinction between 'sexual orientation, which is covered (…), and sexual behaviour, which is not'[131]. Initial criticism to this limitation may be found in the short justification of the Opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, part of the European Parliament's Report on the proposal for the Framework Directive[132].

The Commission's comment could be interpreted as taking into account the fears of some Member States that the Framework Directive would prevent them from prohibiting certain forms of unwanted sexual behaviour (see also *infra*, 2.4.2); in this sense, it has been judged as useless and misplaced (because nothing in the Directive affects criminal prohibitions), and as excessively broad (because it could exclude any behaviour, not just that deemed to be unlawful)[133].

Clearly, this limitation, that finds no correspondence within the Directive, could have severe implications on gays and lesbians, should some courts rely on it for finding differential treatment not discriminatory because based only on 'behaviour', not 'orientation'. The same argument would be scarcely convincing if it was proposed in the context of discrimination on grounds of religion, because religious freedom also encompasses freedom to manifest one's own creed according to lawful rituals (see infra, 2.3.1). The explanatory comment would have been better crafted if it said that the Directive does not apply to behaviour different than the one consisting in the choice of the sex of the partner.

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[128] *Commission* v. *Denmark*, *cit.*, para. 9.
[129] ECJ, 10 April 1984, Case 14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR 1891, at para. 26.
[130] ECJ,13 November 1990, Case C-106/89, *Marsleasing SA* v. *La Comercial Internacionale de Alimentacion SA* [1990] ECR I-4135.
[131] COM (1999) 565, 1999/0225 (CNS), OJ 27/6/00 C 177 E/42. On line at <http://europa.eu.int/eur-lex/en/com/pdf/1999/com1999_0565en01.pdf>.
[132] European Parliament, 21 September 2000, A5-0264/2000. At p. 51, n. 23, the rapporteur stated that 'The Commission and the Council should make it clear that this passage certainly does not mean that protection against discrimination on grounds of sexual orientation lapses as soon as it becomes apparent that people do not confine themselves to thoughts and fantasies but also act in a corresponding manner'.
[133] Bell, 2001, 655.

The restrictive interpretation would run contrary to established case law of the Strasbourg Court, according to which homosexual *conduct* is certainly a protected aspect of private life[134] or of the prohibition of sexual orientation discrimination[135] (see infra, 2.3.1). Also, it could be especially troublesome for same-sex couples, but in light of *Grant* (ECJ) and *Karner* (ECtHR) the possibility of regarding 'being in a same-sex couple' as something different than an aspect of sexual 'orientation' appears remote (see supra, 2.1.6).

As far as the types of 'orientation' linked to the gender of the person are concerned, in light of the decision of the ECJ in *P*. v. *S. and Cornwall County Council*[136] it appears fair to say that discrimination on grounds of gender reassignment should be seen as a form of sex discrimination. For 'orientations' linked to sex as 'eroticism' it would be unreasonable to speculate that unlawful conduct falls within the meaning of the formulation, whilst it is doubtful that lawful forms of erotic conduct (e.g. sadomasochism) will be considered as protected by the prohibition of 'sexual orientation' discrimination. See also para 19.2.2.

2.2.3 Direct discrimination (art. 2(2)(a) Directive)

According to art. 2(2)(a) of the Framework Directive, 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.

As far as sexual orientation is concerned, the distinction specifically relevant is the one between heterosexual and homosexual or bisexual persons. Therefore, (put in asymmetrical terms), direct sexual orientation discrimination finds its source in a treatment that places on gay, lesbian and bisexual persons burdens that are not placed on heterosexual persons. These burdens (such as employment discrimination) are often a result of bias, stereotype and prejudice associated with homosexuality. Given the specific features of sexual orientation, such as invisibility, the additional burden placed on lesbians and gay persons could be, and often is, that of imposition of silence for fear of facing such prejudice and its cumbersome consequences. Silence and hiding, in turn, might have a negative impact on a person's self-perception as equally worthy of consideration and respect, and on the possibility of developing a fulfilling life in all of its social and relational dimensions. This frustrates one of the conceptual aims of equality, that of protecting human dignity.

2.2.4 Indirect discrimination (art. 2(2)(b) Directive)

The concept of indirect discrimination reflects a 'results-based principle of equality', which focuses on the effects that an apparently neutral treatment may have on an individual or on a group[137]. In contrast with the definition given by the Burden of proof Directive[138], art. 2(2)(b) of the Framework Directive does not refer to the need of the disadvantaged to be a 'substantially higher

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[134] *Dudgeon* v. *UK*, 22 October 1981, appl. nr. 7525/76, available on line at <http://hudoc.echr.coe.int>.
[135] *L. and V.* v. *Austria*, 9 January 2003, appl. nr. 39392/98 and 39829/98; *S.L.* v. *Austria*, 9 January 2003, appl. nr. 45330/99.
[136] ECJ, 30 April 1996, Case C-13/94, *P* v. *S and Cornwall County Council* [1996] ECR I-2143.
[137] Fredman, 2001, 161.
[138] Council Directive 97/80/EC, OJ 20/1/98, L 14/6, art. 2.

proportion' (than the non-disadvantaged), a wording that has led the ECJ to require quite stringent statistical evidence[139].

Instead, the Commission preferred the definition carved out by the ECJ in cases concerning free movement of workers[140]. In the wording of the Framework Directive indirect discrimination, thus, is taken to occur 'where an apparently neutral provision, criterion or practice would put persons having a particular sexual orientation at a particular disadvantage compared with other persons', unless this is justified (see *infra*, 2.4.1). The French, German and Italian versions of the Directive say that there is indirect discrimination when a neutral provisions, criterion or practice 'can' put persons at a particular disadvantage, and this wording suggests that the mere possibility, and not an actual likelihood, of particular disadvantage is sufficient.

Therefore, lesbians, gays and bisexuals need not to show statistical data. This requirement would constitute an almost invincible burden because principles of privacy/confidentiality forbid a 'head-count' of lesbian and gay employees. As highlighted by Recital 15 of the Framework Directive, indirect discrimination may be inferred from a variety of factors 'in accordance with rules of national law or practice' (or by 'common knowledge or qualitative rather than quantitative sociological studies'[141]), a point that calls for future close observation of evidence required by national courts because severe discrepancies could arise.

2.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

Harassment related to (*inter alia*) sexual orientation is deemed to be a form of discrimination. According to art. 2(3), the unwanted conduct must have the purpose or effect of violating the dignity of a person *and* of creating an intimidating, hostile, degrading, humiliating or offensive environment. The definition of harassment as a form of discrimination is quite a novel concept for a number of Member States and has led some to call upon a new Directive for the forms of harassment not covered by it[142].

The definition of harassment in the Framework Directive is not limited to *sexual* harassment and is identical to that of harassment on grounds of sex found in the Amended Equal Treatment Directive (art. 2(2))[143]. However, the latter also defines 'sexual harassment', as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature'. It has been argued, and the 1991 Commission Recommendation on the protection of the dignity of women and men at work[144] supports the point, that harassment and sexual harassment against lesbians and gay men - 'on grounds of their deviance of traditional gender roles'[145]- would indeed constitute gender discrimination. This could

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[139] See Schiek, 2002, 296; Fredman, 2001, 162.
[140] ECJ, 23 May 1996, *O'Flynn* v. *Adjudication Officer*, Case C-237/94 [1996] ECR 2417. See p. 8 of the Explanatory Memorandum to the first proposal, COM (1999) 565, 1999/0225 (CNS), OJ 27/6/00 C 177 E/42, on line at <http://europa.eu.int/eur-lex/en/com/pdf/1999/com1999_0565en01.pdf>, where it is said that 'the 'liability test' may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned'.
[141] Schiek, 2002, 296.
[142] Driessen-Reilly & Driessen, 2003, 493.
[143] Directive 2002/73/EC of 23 September 2002, OJ 5/10/02, L 269/15.
[144] 27 November 1991, OJ 24/02/92 L 49/1. Endorsed by the Council with Declaration 19 December 1991, OJ 4/2/92 C 27/1.
[145] Schiek, 2002, 297.

sometimes lead to the application of the Amended Equal Treatment Directive, which does not leave open to Member States the possibility of defining harassment in accordance with national laws and practice. The latter possibility in the Framework Directive has been criticised as a way to undermine its effectiveness[146].

2.2.6 Instruction to discriminate (art. 2(4) Directive)

According to art. 2(4), an instruction to discriminate against persons on the ground of sexual orientation must be considered a form of prohibited discrimination. A case immediately relevant would be that of an employer who instructs a job agency to select personnel among heterosexuals only.

2.2.7 Material scope of applicability of the prohibition (art. 3 Directive)

Within the limits of the areas of competence conferred on the Community (note that art. 13 EC speaks of 'powers'), the Directive applies in relation to a number of realms related to employment and occupation:

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

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

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

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

Art. 3 makes it clear that the Directive applies to 'all persons, as regards both the public and private sectors'. This formulation seems broad enough to encompass such grey areas as compulsory military service and voluntary work.

Furthermore, it should be remarked that 'employment' and 'working' conditions appear to be considered as separate aspects from each other. In the amended proposal for a Directive on working conditions for temporary workers, 'basic working and employment conditions' are defined as those conditions 'laid down by legislation, regulations, administrative provisions, collective agreements and/or other general provisions relating to: (i) the duration of working time, overtime, work breaks, rest periods, night work, paid holidays and public holidays, and (ii) pay[147]. The Framework Directive might have chosen to mention explicitly the two types of 'conditions' in order to provide that its material scope also encompasses harassment, clearly not encompassed by employment conditions but by working conditions.

The concept of 'pay' has been interpreted extensively by the ECJ, and it has already been remarked that 'the full variety of benefits which employers may provide in respect of employees' partners fall within the scope of the Directive'[148] (including contributory pensions that qualify as 'consideration

[146] Bell, 2001, 662.
[147] Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, COM(2002)701 final, 28 November 2002.
[148] Bell, 2001, 656.

received by the worker from the employer in respect of his employment'[149]). The broad interpretation of pay as encompassing benefits provided for employees' partners could clash with a number of non-binding statements, including Recital 22 and the Commission's explanatory memorandum[150], all aimed at pointing out that the Directive does not affect marital status and the benefits afforded to married couples. Given the existing jurisprudence of the ECJ there seems to be little room for refusing to accept that denial of benefits to couples because of the combination of the sexes is a form of (direct) sexual orientation discrimination (*Grant*); when the distinction occurs because of the legal tie existing between the partners, however, civil status comes into play (*D and Sweden* v. *Council*).

2.2.8 Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition

The Framework Directive applies to '*all persons*, as regards both the public and private sectors, including public bodies' (art. 3(1)).

From the mentioned provision it does not appear immediately clear who may not discriminate. There is nothing in this text that suggests that the prohibition is directed only against (contractual) employers. The question, then, concerns which other classes of people are subject to the requirements of the Directive. The chosen formula suggests that a broad interpretation of the prohibition is to be preferred. It must be remarked that e.g. harassment often comes from other people than the contractual employer (for example from co-workers or clients) and that certain other acts of discrimination (e.g. denying promotion) may also come from a boss/manager. It would be unreasonable in such cases to deny the application of the Directive on the ground that no contractual relationship between the discriminator and the person(s) affected exists.

Linked to this is the problem of considering the contractual employer (whether a natural or a legal person) liable for acts of third parties; for example, in the case of corporations, the question arises whether the legal person will be held responsible for discriminatory conduct of the boss/manager. It could be noted that art. 2(2)(b)(ii) of the Directive specifically mentions 'any person or *organisation* to whom this Directive applies', leaving less doubts that legal persons, too, are subject to its provisions. Whether it is a natural or legal person, it is realistic to argue that both the wording of art. 3(1) and the spirit of the Directive impose a duty of care on the employer, at least when the issue is sufficiently under his/her/its control.

Employment agencies would be covered, should they refuse to provide a person with any of their services: to consider this case to fall outside the material scope of the Directive - not concerned with the provision of goods and services - would clash with the 'access to employment' provision of art. 3(1)(a). It is generally considered that services provided by employment agencies fall within the meaning of 'employment'.

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[149] ECJ, 13 May 1986, Case 170/84, *Bilka-Kaufhaus* v. *Weber* [1986] ECR 1607, paras. 20-22; see also 17 May 1990, Case C-262/88, *Barber* v. *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paras. 25-28.

[150] Recital 22 holds that 'This Directive is without prejudice to marital status and the benefits dependent thereon'. The Explanatory memorandum, under art. 1, held that 'is should be underlined that this proposal does not affect marital status and therefore it does not impinge upon entitlements to benefits for married couples' (see COM(1999) 565 final, 1999/0225 (CNS), p. 8).

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

2.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

The difference between preference and behaviour may be exemplified by the ECtHR decision in *Lustig-Prean and Beckett*, where the Court held that a blanket policy excluding all homosexuals from the armed forces, irrespective of any concrete conduct, is a violation of art. 8 of the Convention (right to respect of private life). The UK Government contended that in the context of the armed forces stricter rules applied, capable of curtailing individual rights in a manner that would not apply to civil society. This statement was based on existing case law of the Court, such as *Kalaç*[151]. However, in *Lustig-Prean* the Court distinguished the facts from *Kalaç* because the former had been dismissed 'on grounds of his [religious] *conduct* while the applicants were discharged on grounds of their innate *personal characteristics*'[152].

The parallel between sexual orientation and religion is an element specifically relevant, because it highlights the twofold structure of both those characteristics, which encompass an internal dimension (attraction/faith) and an external dimension (behaviour).

The first sexual orientation case positively decided by the Court on the basis of art. 8 of the Convention, *Dudgeon*[153], concerned in fact (sexual) 'conduct'. The ECtHR held that such aspect is covered by the right to respect of private life. With its decision in *Lustig-Prean*, it added that the same right also covers sexual orientation as a 'personal characteristic', regardless of whether any specific behaviour is put in place. In two recent cases concerning a claim against the maintenance in force in Austrian legislation of a provision which penalised only homosexual *acts* of adult men with consenting adolescents between fourteen and eighteen years of age, the Court concluded that the impugned art. 209 of the Penal Code violated art. 14 of the Convention in conjunction with art. 8[154]. Thus, also the prohibition of sexual orientation discrimination guaranteed by the Convention, and not only art. 8 taken alone, forbids discrimination on grounds of (homo)erotic behaviour.

Some statements related to the Framework Directive seem to hold that sexual behaviour alone should not be covered (see *supra*, 2.2.2; *infra*, 2.4.2). However, in *Grant* the ECJ has indicated that unequal treatment because of behaviour (in the form of having a same-sex relationship), may constitute sexual orientation discrimination (see *supra*, 2.1.6). That the Framework Directive's concept of 'sexual orientation' (or indeed 'religion or belief') incorporates behaviour can also be argued on the basis of art. 2(5) of the Framework Directive, a provision which would appear of little or no use if the meaning of these grounds was limited to attraction/faith intended as an internal characteristic of one's identity: in this sense, in fact, the protected grounds could hardly be seen as a potential harm to public security, public order, rights of others, etc.

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[151] ECtHR, 1 July 1997, *Kalaç* v. *Turkey*, appl. nr. 20704/92, *Reports* 1997-IV, p. 1209.
[152] ECtHR, 27 September 1999, appl. nr. 31417/96 and 32377/96 (para. 86, emphasis added).
[153] ECtHR, 22 October 1981, *Dudgeon* v. *UK*, appl. nr. 7525/76.
[154] ECtHR, *L. and V.* v. *Austria*, 9 January 2003, appl. nr. 39392/98 and 39829/98; *S.L.* v. *Austria*, 9 January 2003, appl. nr. 45330/99.

A problem arises in cases of discriminatory conduct because of perceived or assumed sexual orientation. Sexual orientation is generally a fluid and invisible characteristic. When an individual discriminates because he thinks that the victim is gay, lesbian or bisexual, should it matter whether the person discriminated against does or does not belong to the targeted category?

A negative answer is offered by the short justification of the Opinion of the EP Committee on Citizens Freedoms and Rights, Justice and Home Affairs, which is part of the EP's Report on the Commission's initial proposal for a Framework Directive[155].

The Framework Directive does not tackle the issue in an express way. The definition of direct discrimination in art. 2(2) of at least the English and French version does not refer to 'his or her' sexual orientation. Therefore, the expression 'on grounds of sexual orientation' can and should be interpreted as prohibiting unequal treatment of those victims who are not (or do not identify themselves as) gays and lesbians, when the ground for unequal treatment is (assumed) homosexuality[156].

It should not matter whether discrimination occurs because the victim actually identifies as lesbian, gay or bisexual, because of a characteristic that is generally taken to pertain to them, or because of a mere mistake: the broad sentence of art. 2(1) of the Directive must be intended as prohibiting discrimination based on a mistaken assumption about a person's sexual orientation[157].

If discrimination based on a mistaken assumption is not covered, then a question of proof concerning the victim's sexual orientation will arise (see *infra*, 2.5.9).

2.3.2 Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation

Sometimes employers will not object to gay, lesbian, bisexual preference, behaviour or relationship of their employees, but will not accept expression or manifestation (verbally or non verbally) of it to others, such as colleagues or the public. Differential treatment as a consequence of coming-out is likely to be considered a case of direct sexual orientation discrimination, because it would amount to less favourable treatment on grounds of expression or manifestation of sexual orientation, a protected personal characteristic. See *supra*, para. 2.3.1 on the non-use of pronouns. If only coming out as glb persons would be hindered, it would then be a case of direct discrimination; the comparison with a person coming out as heterosexual would only be hypothetical, but art. 2(2)(a) does not exclude this possibility. If also coming out as heterosexual was forbidden, then gay, lesbian and bisexual persons could argue that this

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[155] European Parliament, 21 September 2000, A5-0264/2000. At p. 51 the rapporteur makes the point that 'After all, outlawing discrimination means not allowing one person to treat another differently on the basis of a characteristic or feature which the former attributes to the latter. In principle it is irrelevant whether the latter person genuinely possesses that characteristic or feature'.

[156] Interestingly, the Italian version of the Race Directive speaks of 'on grounds of his/ her race or ethnic origin' (many thanks to Mark Bell for pointing this out), whereas the French version of the same Directive speaks of 'pour des raisons de race ou d'origine ethnique'. The English version speaks of 'on the grounds of racial or ethnic origin'.

[157] Bell, 2002, 115.

constitutes indirect sexual orientation discrimination, because they have a greater need to be clear about their feelings in order to avoid being taken – automatically and almost unconsciously – to be heterosexual.

There might be cases in which an employer reacts negatively to other statements by the employee, only indirectly linked with sexual orientation. In *Morissens*[158], a dated case decided under the ECHR, the ground for dismissal was, in fact, breach of confidentiality. The case concerned termination of employment because of public allegations by a lesbian employee of lack of transparency in promotion procedures, when she voiced rumours that she had not been appointed because of her sexual orientation. The European Commission of Human Rights placed a duty of self-restraint on employees - broader for members of the public service - with respect to their criticism of the management. In the opinion of the Commission art. 10 of the Convention (right to freedom of expression) had not been violated because of (i) the specific nature of the public service, which entails a particular duty of confidentiality (*dévoir de reserve*), and (ii) the means through which expression took place.

2.3.3 Discrimination between same-sex partners and different-sex partners

In the case of unmarried cohabitants, I already remarked that differential treatment between same-sex and different-sex couples has not been found in breach of Community sex equality law (see *Grant*, *supra*, 2.1.6). However, in the same case the ECJ deemed such fact-situation to be a case of sexual orientation discrimination, not yet forbidden by Community law at the time the decision was taken[159].

This fact-situation may be described as an example of direct sexual orientation discrimination, because the only relevant criterion that upholds differential treatment is the combination of the sexes in the couple. Today, it seems reasonable to infer from *Grant* that differential treatment between same-sex partners and different-sex partners is covered by the Framework Directive; this holds especially true in light of art. 3(1)(c), which specifies that the scope of the Directive encompasses items such as 'pay', of which partner benefits are a component. Therefore, when an employer provides spousal benefits for unmarried opposite-sex partners, it should equally provide those benefits to unmarried same-sex partners. As it has been remarked, this interpretation of the Framework Directive could have a shifting practical relevance - more pronounced when employers already recognise unmarried different-sex partners, but irrelevant when they do not recognise them at all - but it amounts to a significant preparation for further adjustments[160]. For example it would also apply to differential treatment between registered same-sex and registered different-sex partners. This case could arise in France, the Netherlands, Belgium and certain Spanish communities, where partnership registration is open to same-sex and different-sex couples.

As far as differential treatment between married and unmarried partners is concerned, the basis for distinction is clearly civil status, because only married spouses are afforded benefits. As already mentioned, the explanatory

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[158] EComHR 3 May 1988, *Morissens* v. *Belgium* [1988] 56 DR 127.
[159] para. 47.
[160] Waaldijk, 2001, 645.

memorandum and Recital nr. 22 claim that the Directive leaves untouched marital status and the benefits that descend from it. Some have discussed the possibility of regarding this form of differential treatment as a case of direct discrimination based on sexual orientation; the argument would be that marriage is a heterosexual-specific institution (because it requires difference in sex), therefore the choice for marriage as a criterion for the distribution of benefits draws a distinction solely based on sexual orientation (except when marriage between persons of the same-sex is allowed)[161]. An analogy has been drawn with pregnancy discrimination, treated as direct sex discrimination because the reason for differential treatment is based on a characteristic that belongs to only one sex[162]. However, it has been more frequently argued that differential treatment between married spouses and unmarried same-sex partners amounts to a form of indirect sexual orientation discrimination, because the requirement of marriage is an apparently neutral criterion that puts lesbians and gays at a particular disadvantage, since they cannot marry each other[163]. Unlike the non-binding Recital nr. 22, the Framework Directive itself does not contain anything that places this form of indirect discrimination outside its prohibitions. Recital nr. 22, however, gives a powerful indicator that some indirect discrimination on grounds of sexual orientation may not be covered by the principle of equal treatment. Does it allow to conclude that indirect sexual orientation discrimination resulting from marital status should always be treated as objectively justified? Who should perform the justification test? The courts? Or do Member States enjoy the option of introducing legislation that excludes all such differential treatment from the reach of the prohibition?

Content-wise, under the Framework Directive, justification for indirect discrimination must be assessed according to the *appropriateness* and *necessity* of means used to obtain a *legitimate* aim. At least the first two elements of this general test involve questions of facts. In theory, the task of determining whether the exclusion of unmarried partners is a criterion that fits within this justification system is left to the case-by-case judgement of national courts, as in any other case of indirect discrimination. In case of uncertainty, a national court could make a reference to the ECJ raising the question of whether the Directive requires an employer to provide benefits to both married (opposite-sex) spouses and unmarried same-sex partners. In *Bilka* the ECJ indicated that, when indirect discrimination is at stake, 'it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds'[164] or, as held in *Rinner-Kühn*[165] and in *Hill*[166], to determine whether the practice 'is justified by reasons which are objective and unrelated to any discrimination on grounds of sex'.

In light of this case law it seems possible that, in case of reference for a preliminary ruling on whether an instance of differential treatment put in practice

[161] Bell, 2001, 668.
[162] Bell, 2001, 668.
[163] Bell, 2001, 668; Waaldijk, 2001, 645; Waaldijk, 1999, 41.
[164] ECJ, Case 170/84 *Bilka*, *cit.,* para. 36.
[165] ECJ, 13 July 1989, Case 171/88 [1989] ECR 2743, para. 15.
[166] ECJ, 17 June 1998, Case C-243/95 [1998] ECR I-3739, para. 35.

(even unintentionally) by employers between married and same-sex unmarried partners constitutes justified indirect sexual orientation discrimination, the ECJ would refer the question to the national courts, because the answer involves findings of fact. It remains to be seen whether the ECJ is also saying that *only* national courts are entrusted with the assessment of objective justification, which would presumably exclude national parliaments. This interpretation seems supported by Recital nr. 15, which holds the view that 'the appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies'.

The argument could be made that a categorical exception in national legislation (similar to Recital nr. 22, but binding) would limit the scope of application of the Directive, thus preventing *any* national court from assessing the necessity and appropriateness of the exclusion; and therefore that there would be no adequate procedure for the defence of rights.

In *Karner*, a case of direct discrimination between unmarried different-sex and same-sex spouses, when assessing whether differential treatment was justified the ECtHR made clear that the analytical test must take into account the concrete circumstances of the case: 'The Court can accept that protection of the family in the traditional sense is, *in principle*, a weighty and legitimate reason which *might* justify a difference in treatment (…). It remains to be *ascertained* whether, *in the circumstances of the case*, the principle of proportionality has been respected'[167]. A similar perspective is shared by the views of the UN Human Rights Committee in *Young* v. *Australia*[168], a dispute concerning the entitlement of the same-sex partner of a war veteran to a pension upon the death of his partner. After being denied the pension, Mr. Young claimed that s. 5E(2) of the Veteran's Entitlement Act, which states that 'member of a couple' encompasses only the legally married spouse or the opposite-sex unmarried partner, was contrary to art. 26 (equality before the law and equal protection of the law) of the International Covenant on Civil and Political Rights. The Committee upheld the claim, finding that the Australian government had shown no objective and reasonable justification for the distinction between unmarried opposite-sex and same-sex couples. Again, the issue of justification of differential treatment appears crucial.

In conclusion, it is arguable that both cases, and the more explicit wording of *Karner* in particular, vindicate the role of courts in assessing justification of differential treatment, and disfavour any conspicuous across-the-board statutory exemption from analysis.

As far as differential treatment between married and registered partners is concerned, the fact-situation coincides with the one in *D and Sweden* v. *Council* (see *supra*, 2.1.6), where a household allowance was only granted to married spouses, with the exclusion of registered (and unmarried) partners. This kind of differential treatment would only be possible with regard to workers form those countries that have adopted registered partnership schemes; if registered partnership is considered completely equivalent to marriage, the only difference being that the former is entirely homosexual-specific and the latter is entirely

[167] European Court of Human Rights, *Karner* v. *Austria*, 24 July 2003, appl. nr. 40016/98, at para. 40 (emphasis added).
[168] UN HRC, 29 August 2003, CCPR/C/78/D/941/2000.

heterosexual-specific, then any differential treatment between the two would constitute a form of direct discrimination based on sexual orientation.

However, especially when registered partnership is considered to be a form of registration that does not affect the civil status of the parties involved (who would then be taken to remain, in fact, single, as in France, Belgium and Germany), the fact-situation can be treated in the same way as the previous one (indirect sexual orientation discrimination), because same-sex partners cannot marry each other, and as a form of differentiation based on civil status (see *supra*, 2.1.6).

2.3.4 Discrimination on grounds of a person's association with gay/lesbian/bisexual individuals/heterosexual, events or organisations

This form of discrimination could target people that are in any way associated with lesbians and gay men (because they are parents or other relatives, friends, neighbours, etc. or because they take part in events or organisations). Although it does not cause to the person characterised by the protected ground a less favourable treatment, nor does it place such a person at a particular disadvantage, such differential treatment aims at striking lesbian and gay persons as an unwanted group of people, by refusing to establish (work) relationships with people who associate with them or with their activities, and is therefore discrimination on grounds of sexual orientation. Again, given that the Directive does not make use of possessive pronouns, the sexual orientation on the grounds of which differential treatment takes place need not be the one of the victim, but only one of the reasons for that treatment.

2.3.5 Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals

The Directive applies to 'one person' (art. 2(a)), 'persons' (art. 2(b)) or 'all persons' (art. 3) without further clarification. The case could be made for a group of lesbian or gay employees that is refused time or facilities to meet, or is refused the possibility to distribute flyers or hang posters.

In a decision under art. 11 of the European Convention (freedom of association) that has attracted critiques of various sorts, the ECtHR found that the condition for registration of a gay and lesbian association, requiring that minors be excluded from membership, pursued the legitimate aims of the protection of morals and the rights and freedoms of others, therefore registration could be lawfully denied[169]. A similar fact-situation seems unlikely in the field of employment; apart from that, there is no reason to exclude groups and organisations from the scope of the Directive.

As for the case of coming out (see *supra*, par. 2.3.2), the comparison with a group of heterosexual people would be merely hypothetical, but this is not excluded by the wording of art. 2(2) of the Directive. Discrimination could be direct (if only homosexual groups were targeted) or indirect (when all activities or events dealing with sexuality or discrimination were forbidden).

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[169] ECtHR,12 May 2000, *Szivárvány társulás a melegek jogaiért* v. *Hungary*, appl. nr. 35419/97 (unpublished); see Farkas, 2001, 573.

2.3.6 Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation

In *Lustig-Prean* the ECtHR held that investigations of the applicants' sexual orientation were not justified and infringed art. 8 of the Convention (right to respect of private life)[170]. Therefore, it is clear that questioning an employee about his or her sexual orientation is unacceptable conduct. However, from the EctHR's decision it is not clear whether a retaliatory measure against a refusal to answer a question will be regarded as contrary to the principle of equal treatment. On this issue, the ECJ has given a (less than clear) answer as far as disclosing sickness through consenting to pre-recruitment medical testing is concerned. The ECJ held (in a staff case) that the right to respect of private life ex art. 8 of the Convention had been violated by HIV-testing carried out without the consent of the applicant[171]. However, it also held that following the withholding of consent for an HIV-test considered necessary for proper medical assessment, 'the institutions cannot be obliged to take the risk of recruiting'. This conclusion, thus, does not assist in striking the balance between duty to disclose and right to privacy. It goes without saying that sexual orientation, unlike physical condition, may never be regarded as a ground for unfitness to work, except when it falls under the limits of the art. 4(1) exception.

In a case concerning the discriminatory dismissal of a woman who had not informed the prospective employer of her pregnancy prior to the contract, which was for a fixed term of six months only, the ECJ did not consider failure to inform as a circumstance which could undermine the unlawful nature of the dismissal on grounds of pregnancy[172].

2.3.7 Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent

Some countries used to subject to criminal prohibition homosexual activity between consenting adults, to aggravate the position of certain offenders or to define in a more restrictive way concepts of public scandal and the like when homosexuality played a role, or to foresee different ages of consent with regard to heterosexual and homosexual relations,. These prohibitions did non apply to the same acts when committed between persons of different sex and, in fact, only applied when sexual activity between male people was at issue.

The case could arise that an employer requires a clear criminal record, but a gay man has been convicted for an offence without heterosexual equivalent.

By way of illustration, it could be cited the case of *Thlimmenos* v. *Greece*[173]. The ECtHR found a violation of art. 14 of the Convention in conjunction with art. 9 (freedom of thought, conscience and religion) in the case of a Jehovah Witness - previously convicted of insubordination for refusing to wear a military uniform - whose position had been eliminated from a public competition for

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[170] ECtHR, 27 September 1999, appl. nr. 31417/96 and 32377/96, para. 103-104.
[171] ECJ, 5 October 1994, Case C-404/92 P., *X* v. *Commission*, [1994] ECR I-4737. The Court of First Instance had rejected the claims: see 18 September 1992, joined Cases T-121/89 and T-13/90 [1992] ECR II-2195; 24 June 1992, Case T-11/90, *H. S.* v. *Council* [1992] ECR II-1869; 14 April 1994, Case T-10/93 *A.* v. *Commission* [1994] ECR II-179; see Craig & De Búrca, 2003, 367.
[172] ECJ, 4 October 2001, Case C-109/00, *Tele Danmark A/S* [2001] ECR I-6993.
[173] ECtHR, 6 April 2000, appl. nr. 34369/97, *Reports of Judgements and Decisions* 2000-IV.

recruitment on grounds of his previous criminal record. The Greek government maintained that the requirement of no previous criminal conviction for serious crimes was general and neutral *vis à vis* religion, because it would apply to Greek Orthodox or Catholic Christians had they also been convicted of a serious crime. The Court held that the exclusion from the competition was based on grounds of 'his status as a convicted person' and that such difference of treatment does not generally come within the scope of art. 14 in relation with the 'right to freedom of profession', a right not guaranteed by the Convention (para. 41). However, the complaint was not based on the differential treatment between convicted persons and others, but on the *lack of differential treatment* between certain offenders convicted because of their religious beliefs and other offenders. The Court considered this to be discriminatory because the exclusion based on the complainant's previous criminal record could not be justified: his previous conviction did not imply 'dishonesty' or 'moral turpitude' of the offender, in contrast with other offenders (para. 47).

The Court, thus, carried out a review of the *ratio legis* of the provision on which the conviction was based, found a difference in the position of the claimant in respect to other offenders, and concluded that 'the right not to be discriminated against…is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (para. 44).

This *ratio decidendi* might have far-reaching consequences in many fields (within and beyond the employment realm) where sexual orientation discrimination takes place. Under the Directive a case like this can be construed as one of indirect discrimination (see *supra*, 2.2.4).

2.3.8 Harassment

Making unwelcome sexual advances to a person would amount to harassment within the meaning of art 2(3) of the Framework Directive, regardless of the sex(es) or the sexual orientation(s) of the persons involved. The prohibition, however, is not limited to sexual behaviour.

The broadness of the concept adopted in the Directive seems able to encompass expressions of homophobia, entailing contempt and ridicule directed towards lesbians, gay men and bisexuals, both by the employer and by co-workers or clients[174]. Derogatory language, when it is a display of homophobia, violates the dignity of the victim and creates an intimidating, hostile, degrading, humiliating or offensive environment, giving rise to harassment on grounds of sexual orientation within the meaning of art. 2(3). The explanatory memorandum maintains that harassment may take different forms, 'from spoken words and gestures to the production, display or circulation of written words, pictures or other material'[175], as long as it is of a serious nature. This provides persuasive evidence that the legislature meant to introduce a broad notion of what ought to be considered unacceptable.

[174] Bell, 2001, 661.
[175] COM(1999) 565 final, 1999/0225 (CNS), p. 9.

Expressing negative opinions about homosexuality could be considered to be borderline between harassment and free expression, requiring a sensitive balancing act of those responsible for enforcing the rules of the Directive.

2.4 Exceptions to the prohibition of discrimination

2.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

There is no unlawful (indirect) disadvantage when the apparently neutral provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The point has been made that the possibility of justifying (indirect) disadvantage is likely to tilt the balance in favour of considering marital status discrimination as indirect rather than direct (see 2.3.3)[176]; this invites close observation on the different solutions that courts presumably will adopt.

2.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive

Art. 2(5) lists a number of State objectives that take precedence over equal treatment as intended by the Framework Directive, subject to a test of necessity. Measures that would *prima facie* infringe the prohibition of discrimination will be saved when they are *necessary* for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. With regard to sexual orientation, some have argued that this provision is meant to preserve the State's criminal provisions in cases of paedophilia or other sexual conduct[177]; however, there may be a risk that – in contrast with case law of the ECtHR making it clear that homosexual conduct *per se* cannot be criminalised[178] – it will be relied upon to place particular limitations in sensitive areas, such as the armed forces[179].

2.4.3 Social security and similar payments (art. 3(3) Directive)

According to art. 3(3) of the Directive, the respect for the principle of equal treatment and the right to non-discrimination 'does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes'. Any consequence of this provision on the legislation of Member States will remain to be seen.

2.4.4 Occupational requirements (art. 4(1) Directive)

Member States may provide that a difference of treatment, which would otherwise be prohibited, shall not constitute discrimination where 'by reason of

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[176] Because the presence of the justification test – absent as far as direct discrimination is concerned – allows greater flexibility in controlling indirect disadvantage that the Court is not willing to place (at least entirely) on the employer: Bell, 2001, 668.
[177] Bell, 2002, 115.
[178] ECtHR. 22 October 1981, *Dudgeon* v. *UK*, appl. nr. 7525/76, available on line at <http://hudoc.echr.coe.int>.
[179] Skidmore, 2001, 130.

the nature of the particular occupational activities concerned or of the context in which they are carried out', a characteristic related to one of the forbidden grounds constitutes 'a genuine and determining occupational requirement'. The objective must be legitimate and the requirement must be proportionate.

The meaning of art. 4(1) is to justify a *prima facie* violation of the principle of equal treatment when differential treatment is needed because of the nature of a particular job: for instance, a theatre company advertising a post for an actor who will have to play Shakespeare's Othello might be able to exclude members of the Caucasian race and require that the prospective actor be of a certain skin colour.

It is very difficult to imagine certain jobs where a particular sexual orientation is needed. Recital nr. 18 holds the view that the Directive is not aimed at requiring 'the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the capacity to carry out the range of functions that they may be called upon to perform'. That is a valid argument, it should be remarked, within certain limits: it is so because 'capacity to carry out the functions' is not a protected ground, and might be affected by other characteristics than sexual orientation (such as, for example, physical ability).

The formula used in art. 4(1) is very broad. It has been highlighted that Member States are likely to transpose it without significant changes, thus placing on the judiciary the task of delineating concrete exceptions[180]. The Commission has held that 'whether or not a particular difference of treatment meets the conditions of Article 4(1) will depend on the nature of the specific post or job in question'[181].

One would hope that Member States exercise the highest caution both in introducing specific rules and in giving courts discretionary powers that expand this exception in a way that would run contrary to the Directive.

2.4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

The first part of art. 4(2) safeguards existing domestic legislative rules, or future legislation incorporating existing practices, that allow churches or other 'organisations the ethos of which is based on religion or belief' to differentiate, on grounds of religion or belief, when they act as employers. This provision is not linked to sexual orientation: it only allows those institutions to forego the ban on religious discrimination, thus taking into account a person's religion or belief when it would otherwise be irrelevant and prohibited. The provision states that it does not justify discrimination on any other ground. It is unclear what it adds to the general clause of art. 4(1).

The second paragraph of art. 4(2) concludes from the first part that the Directive does not prejudice the right of churches (and of 'organisations the ethos of which is based on religion or belief') to require individuals working for them to 'act in good faith and with loyalty to the organisation's ethos'. This formulation is

[180] Schiek, 2002, 298.
[181] Answer given by Mrs Diamantopoulou on behalf of the Commission, 28 July 2003, OJ 15.1.2004, C 11 E/250.

considerably vaguer than the first part, and it must be interpreted as a specification of it (in fact it is said 'thus', '*donc*' in the French version). Therefore, it may not be taken to allow any discrimination on grounds of sexual orientation. One of the possible interpretations of this second part is that different treatment *on grounds of religion or belief* may be justified when the loyalty requirement restricts the freedom to express (certain opinions about) a particular sexual orientation[182]. In some instances, this form of differential treatment may lead to discrimination on grounds of sexual orientation, which is clearly not permitted. Furthermore, it is also specified that other provisions of the Directive should be complied with, and that the mentioned organisations should act 'in conformity with national constitutions and laws'. It appears that the meaning of the loyalty requirement will be left to the sensitivity of the judiciary. This, in turn, could be a source of significant discrepancies from State to State and an area where some litigation might be expected.

2.4.6 Positive action (art. 7(1) Directive)

Positive actions in the classical sense of the term do not generally seem a viable instrument for redressing sexual orientation discrimination. However, in sectors where a high degree of pluralism is certainly recommendable, such as broadcasting, police services, teaching, the recruitment of lesbian, gay, and bisexual employees for certain posts may be seen as a form of positive action aimed at 'ensuring full equality in practice' (art. 7 Directive), therefore saved under this provision.

Art. 7 of the Directive seems to allow only those positive measures adopted by Member States, not by employers. In light of this provision, it might be reasonable to argue that employers may take specific positive action only if Member States have, in their implementing legislation, provided a clause allowing them to do so.

It may certainly be that employers take action for tackling specific issues concerning sexual orientation at the workplace, such as confidentiality, visibility, coming out and personal safety. This could hardly be seen as discrimination on grounds of heterosexual orientation[183].

2.5 Remedies and enforcement

2.5.1 Basic structure of enforcement of employment law

The ECJ may issue preliminary rulings when requested by national courts on the interpretation of Community law. Procedures and sanctions for the application of the obligations arising from the Framework Directive are left to Member States, subject to the principle of equivalence (see also infra, 2.5.4).

[182] In any case, the conditions of the first part of art. 4(2) must be respected ('a genuine, legitimate and justified occupational requirement').
[183] Many thanks to Hans Ytterberg for pointing this out.

2.5.2 Specific and/or general enforcement bodies

In contrast with the Race Directive and with the Amended Equal Treatment Directive, the Framework Directive does not require Member States to set up a body specialised in dealing with cases of discrimination or to promote equality. Nevertheless, the establishment of such a body for sexual orientation discrimination may help a State in fulfilling the requirements of art. 9(1) and 9(2).

2.5.3 Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

The requirement of judicial control or review is considered a general principle of Community law[184]. The defence of rights foreseen by art. 9(1) is, therefore, an expression of this principle, that Member States have to comply with. The formulation of art. 9(1) ('available to all persons') suggests that the availability of only a penal procedure is not enough. See also next paragraph.

2.5.4 Civil, penal and/or administrative sanctions (art. 17 Directive)

The choice of sanctions is left to national legislatures, but they must be *effective*, *proportionate* and *dissuasive*. The ECJ has ruled in several occasions on the question of what kind of remedies should be supplied at the national level for the enforcement of a right conferred upon individuals by Community law[185].

Particularly in the employment context, the ECJ ruled in *Von Colson* that full implementation of Directive 76/207 (vaguer in its terms than art. 17) entails sanctions capable of guaranteeing 'real and effective judicial protection'; therefore, compensation for discriminatory conduct must amount to more than purely nominal compensation 'such as, for example, the reimbursement only of the expenses incurred in connection with the application'[186]. This principle has been subsequently upheld in *Dekker*[187], where the Court concluded that national rules chosen by the Member States to govern cases of discrimination (i.e. civil liability) must be disregarded when the practical effect of the principle of equal treatment would be weakened, i.e. by rules on the proof of fault or by the possibility of invoking grounds of exemption. In *Marshall II*[188], the Court held that the guarantee to real and effective judicial protection established in *Von Colson* entailed that the fixing of an upper limit to financial compensation could not constitute proper implementation of art. 6 of Directive 76/207, and that the award of interest must be regarded as 'an essential component of

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[184] ECJ, 15 May 1986, Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. See Craig & De Búrca, 2003, 339.
[185] See ECJ,19 June 1990, Case C-213/89, *Factortame I* [1990] ECR I-2433; 13 March 1991, Case C-377/89, *Cotter and McDermott* v. *Minister for Social Welfare and Attorney General* [1991] ECR I-1155; 25 July 1991, Case C-208/90, *Emmott* v. *Minister for Social Welfare* [1991] ECR I-4269.
[186] ECJ, 10 April 1984, Case 14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR 1891. See also Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, *cit.*; 11 July 1991, Cases C-87-88-89/90, *Verholen* v. *Sociale Verzekeringsbank* [1991] ECR I-3757 (on national rules on standing); 15 October 1987, Case 222/86 *UNECTEF* v. *Heylens* [1987] ECR 4097; 22 September 1998, Case C-185/97, *Coote* v. *Granada Hospitality Ltd* [1998] ECR I-9285 (on the right of access to court).
[187] ECJ, 8 November 1990, Case C-177/88 *Dekker* [1990] ECR I-3941.
[188] ECJ, 2 August 1993, Case C-271/91, *Marshall* v. *Southampton and South West Area Health Authority II* [1993] ECR I-4367.

compensation'. In *Draehmpaehl*[189] the Court applied the principle of equivalence, ruling that the fixing of an upper ceiling to compensation only in cases of discrimination violating Community law, but not in cases of 'similar nature and importance' which constitute infringements of domestic law, do not fulfil the requirement that sanctions for breach of Community law be analogous to those supplied for breach of domestic law. However, the case law of the ECJ also upheld limitations of various kinds existing in national law[190].

The latest amendments to the Equal Treatment Directive 76/207/EEC[191] provide that compensation due in case of discriminatory conduct may be restricted by the fixing of a prior upper limit only in exceptional circumstances specifically mentioned[192].

Finally, a breach of Community law by the State, e.g. in the form of mis-implementation of Directives, may give rise to its liability under the conditions specified in *Francovich*[193] and *Brasserie du Pêcheur/Factortame III*[194].

2.5.5 Natural and legal persons to whom sanctions may be applied

The Framework Directive does not specify who is the person, natural and/or legal, that will be affected by sanctions, but art. 3(1) makes it clear that the Directive 'shall apply to all persons' (see also supra, 2.2.8).

2.5.6 Awareness among law enforcers of sexual orientation issues

An assessment of awareness of issues of sexual orientation discrimination among enforcers of Community law would need to refer back to structures existing in Member States, such as training programmes for police officers, etc. It does not appear that at the Court of First Instance or at the ECJ the issue has been the object of specific attention.

2.5.7 Standing for interest groups (art. 9(2) Directive)

The Framework Directive forces Member States to move (somewhat) beyond individual enforcement, a particularly weak aspect of anti-discrimination law. At least, Member States are required to allow interest groups to engage, on behalf or in support of complainants, in any judicial or administrative procedure. Recital nr. 29 holds the view that the power of interest groups to engage in proceedings shall be 'without prejudice to national rules of procedures concerning representation and defence before the courts'.

It is unclear whether the choice foreseen by art. 9(2) is left to the legislature or must be made available to the associations or other legal entities[195]. While

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[189] ECJ, 22 April 1997, Case C-180/95, *Nils Draehmpaehl* v. *Urania Immobilienservice OHG* [1997] ECR I-2195.
[190] See Craig & De Búrca, 2003, 244 ff.
[191] Council Directive 76/207/EEC, OJ 14/2/1976, L 39/40.
[192] Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 5/10/2002, L 269/15.
[193] ECJ, 19 November 1991, Cases C-6-9/90, *Francovich and Bonifaci* v. *Italy* [1991] ECR I-5357.
[194] ECJ, 5 March 1996, joined Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA* v. *Germany*, and *R.* v. *Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029.
[195] See also *infra*, par. 19.5.7.

acting 'in support' of a party is a possibility generally recognised under existing law of procedure, in some instances the possibility of acting 'on behalf' of the victim challenges existing concepts in various Member States. This formula may be taken to mean more than just acting as legal counsel in Court, because this intrinsically requires approval (or even instruction) by the claimant. Since the Directive says 'with his or her approval', acting 'on behalf' seems to refer to the possibility of e.g. NGOs to bring complaints on their own, subject to approval of the aggrieved person, as opposed to only providing legal representation.

2.5.8 Burden of proof of discrimination (art. 10 Directive)

Once the victim has proven 'facts from which it may be presumed that there has been direct or indirect discrimination' (art. 10(1)), the Directive - as previous measures in the field of sex equality law[196] - places on the respondent the burden of proving that no breach of the principle of equal treatment occurred. This is, indeed, a vital part of any anti-discrimination measure and is aimed at tackling the difficult issues concerning evidence that often characterise claims of discrimination. It should be remarked that according to art. 10(3) the shift of the burden of proof does not apply to criminal procedures and, according to art. 10(4), it 'need not to apply … to proceedings in which it is for the court or competent body to investigate the facts of the case'.

2.5.9 Burden of proof of sexual orientation

In order to establish discrimination, it must be found that less favourable treatment or particular disadvantage is based on one of the prohibited grounds. As seen in para 2.3.1, this test may be particularly problematic for sexual orientation, but only when discriminatory conduct on the basis of a mistaken assumption about the sexual orientation of the victim is considered as *not* being prohibited. The additional burden is not dealt within the body of the Framework Directive. However, Recital 31 holds that 'it is not for the respondent to prove that the plaintiff (…) has a particular sexual orientation'. According to its wording, the Recital seems to suggest an extra burden, placed on the victim of differential treatment, of proving his or her having a particular sexual orientation. This would clash with the respect for privacy rights, as it would force a person to publicly disclose most intimate aspects of his or her life. In addition, courts or administrative agencies entrusted with enforcement would be ill-equipped for making such a determination. Finally, it would deter victims to bring forward their claims, for fear of further exclusion[197].

2.5.10 Victimisation (art. 11 Directive)

The choice of measures to combat victimisation is left to the discretion of Member States, which, nonetheless, may not refrain from adopting them. There is nothing in the Framework Directive that suggests that only victims of discrimination should be protected from retaliatory measures whilst witnesses

[196] Council Directive 97/80/EC of 15 December 19997 on the burden of proof in cases of discrimination based on sex, OJ 20/1/98, L 14/6.
[197] Bell, 2002, 115.

should be excluded. Moreover, nothing suggests that only retaliatory dismissal should fall within the protection from victimisation.

2.6 Reform of existing discriminatory laws and provisions

The core of the provisions laid down in the Directive is aimed at regulating certain aspects of the conduct of employers and of other people (boss/manager, co-workers, clients, etc.). However, an important part of the fight against discrimination also consists in the amendment or abolition of legal distinctions that have become unlawful after the Directive; this effort is principally directed at the legislature and other regulatory bodies. In fact, art. 16 (titled 'Compliance') requires Member States to ensure that:

'a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended'.

At least two clarifications must be made with respect to this provision. They concern the definition of equal treatment, and the material scope.

The first part of this provision, under letter (a), refers to the need of abolishing laws and other measures 'contrary to the principle of equal treatment'. Taken alone, this sentence could have very far-reaching consequences. In order to clarify the exact meaning of this wording, it is necessary to recall what art. 2 of the Directive states about the principle of equal treatment. In light of art. 2, equal treatment means the absence of direct and indirect discrimination on any of the grounds referred to in art. 1. Therefore, the provision of art. 16 only requires the abolition of those laws and measures that still discriminate on those grounds protected by the Directive, not on other grounds.

Secondly, an interpretation of art. 16 consonant to the purpose of the Directive outlined in art. 1 would advise to limit the force of art. 16 only to those discriminatory laws and other measures that concern employment or occupation, although this is not said explicitly. This interpretation, therefore, would leave unaffected those measures that might still discriminate on grounds of sexual orientation in the field of criminal law or family law, though it could be argued that, should these measures be deemed to be indirectly discriminatory in light of art. 2 of the Directive (subject to all the exceptions and justifications of art. 2 ff.), they would fall within the provision of art. 16.

Finally, there are discriminatory measures that, although technically covered by the provision of art. 16, would be saved by art. 2(5) of the Directive; this would only happen when necessary for the attainment of predominant public interests (see *supra*, par. 2.4.2).

2.6.1 Abolition of discriminatory laws (art. 16(a) Directive)

The Directive requires Member States to abolish any laws, regulations, and administrative provisions that still discriminates on grounds of sexual orientation (in the field of employment). This is likely to involve barriers still posed to the access of gays and lesbians to the armed forces (which obviously account for an area of public employment). These barriers could take the form of primary legislation, regulations, circulars, guidelines, etc. In light of art. 16 of the Directive, all provisions must be amended or abolished with a view to ensure proper compliance with the principle of equal treatment.

Those rules might also be observed under a different angle: as acts which embody the will of the public administration considered as (any other) employer. Therefore, it is obvious that they would be considered unlawful (as the acts of any other employer) also in light of the provisions of art. 2 and ff. of the Directive.

2.6.2 Abolition of discriminatory administrative provisions (art. 16(a) Directive)

See *supra*, par. 2.6.1.

2.6.3 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)

A considerable part of rules governing industrial relations is likely to find its source in collective agreements. Although, as seen above (see par. 2.2.1), implementation only through collective agreements might not be sufficient, art. 16 aims to ensure that also such agreements are brought in line with the Directive. The same rectification must occur for individual contracts and other sources of rules regarding employment and occupation.

How this will be done, it is a matter that seems left to the choices of Members States. The Directive, in fact, hints to three different options:

1) that discriminatory provisions *are* declared null and void;

2) that discriminatory provisions *may be* declared null and void;

3) that discriminatory provisions are amended.

The expression 'are or may be declared' seems open to at least two interpretations.

In a first sense it could be taken as a rule on remedies: nullity would, thus, be one option ('provisions…are…declared null an void'), regardless of whether it is automatic or judicially declared; and voidability would be another option ('may be declared', although in this case the provision is usually not 'declared' but 'made' void).

In a second sense, the same expression may be taken to indicate the organs from which the only one remedy foreseen (nullity) is supposed to descend. Nullity may be a direct and automatic consequence of some normative

statement coming from the legislature ('are declared void'), or a consequence of a judicial decision ('may be declared void').

If the first option is preferred, there is room for some creativity by member states. However, the second option seems a more reasonable one. This interpretation would take into account the possibility that in some States nullity of a contractual clause must always be declared by a court (whereas in others it may be considered automatic), so making sure that when no automatic nullity exists there is a clear legal basis for courts to find the discriminatory provision null and void.

In conclusion, the expression 'are or may be' only refers to the different sources from which nullity may stem, and not to different remedies other than nullity.

The 'provisions' mentioned in art. 16, under (b) are not only contractual, but also unilateral ones, such as internal rules of undertakings; furthermore, example of unilateral acts are rules governing independent professions or governing workers' and employers' organisations. In this case, albeit in some countries those rules could be seen as clauses of standard take-it-or-leave-it contracts, in others they could be seen as administrative acts of public bodies. Differences in approaches have suggested that sometimes statutory, sometimes judicial intervention may be preferable.

Moreover, in some countries an action for nullity is not subject to time limitations, whilst an action for voidability may not be brought after a certain period of time has elapsed. Nullity (or amendment) seems to be, thus, the remedy chosen by art. 16 for ensuring compliance.

2.7 Concluding remarks

The general legal situation of the European Communities concerning the protection of fundamental rights has been evolving for over thirty years. Rights of gay, lesbian and bisexual people have only recently been embraced as part of binding measures – such as art. 13 EC and the Framework Directive – to fight discrimination.

The prohibition of discrimination required by the Framework Directive encompasses a number of different areas; some of them are general, some others have specific repercussions and ramifications on sexual orientation. Among the first ones there are questions concerning the proper instruments to implement the Directive, the concepts of direct and indirect discrimination, harassment, personal and material scope, etc. Among the second ones there are aspects concerning the concept of sexual orientation and the many subtle intricacies and nuances concerning actual or assumed preference or behaviour. Other issues meaningful for gay, lesbian and bisexual life, susceptible of causing discriminatory reactions in the field of employment, concern coming out, partnerships, events and activity of organisations, answers to questions concerning sexual orientation, previous criminal record for offences without heterosexual equivalent, burden of proof of sexual orientation, etc.

This chapter has attempted to analyse the concepts and instruments of which the Directive makes use from the point of view of the protection of gay, lesbian and bisexual workers or prospective workers. Whilst the prohibition of sexual

orientation discrimination is today a reality, there are aspects of the Framework Directive that – by attempting to strike the right balance among different interests – call for closer observation as far as their concrete application is concerned, especially in the areas of partner benefits and loyalty to the religious ethos of some employers.

List of literature used in footnotes

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