

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*

19 Comparative analysis

by Kees Waaldijk²

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.

² Dr. C. Waaldijk (c.waaldijk@law.leidenuniv.nl) is a senior lecturer at the E.M. Meijers Institute of Legal Studies of the Universiteit Leiden (www.emmeijers.nl/waaldijk) and the Coordinator of the European Group of Experts on Combating Sexual Orientation Discrimination. I am grateful for the assistance that Dr. Matteo Bonini-Baraldi (assistant-coordinator to the same group of experts) has given me in writing this chapter, especially for his contributions to paragraphs 19.4 and 19.5. Please note that chapter 20 contains a summary of chapter 19.

19.1 General legal situation

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

The then fifteen members states had until 2 December 2003 to implement the Directive (either by pre-existing or by new legislation).³ Only in BEL, FRA, ITA, PRT, SWE, and the UK the legislation to implement the Directive had been more or less completed before that date. In DNK, FIN, NLD and ESP implementation measures came into force early in 2004, and in AUS and IRL during the Summer of 2004 (as did supplementary legislation in PRT). By August 2004 a proposal to implement the Directive is waiting to be debated in the Parliament of LUX (as were supplementary proposals in PRT). In DEU and GRC final Government proposals to implement the Directive still have to be published.

This chapter (from paragraph 19.2 onwards) will give an overview of the current implementation situation with respect to each of the (explicit or implied) requirements of art. 1 to 4, 7 to 11, 16 and 17 of the Directive,⁴ which have been analysed in chapter 2 ('European law') of this report. The other main basis for this comparative overview is the national and sometimes regional legislation that has been enacted or proposed in the fifteen member states, and that has been described in the fifteen preceding national chapters.⁵

³ The ten countries that joined the European Union on 1 May 2004, had to implement the Directive before that day. This report does not discuss the implementation in these ten new member states.

⁴ It is too early to say anything substantial about art. 12, 13, 14 and 19, and art. 5, 6 and 15 are not relevant with respect to sexual orientation.

⁵ Often, the references to these chapters are silent, i.e. the mention of a particular country in a specific paragraph of chapter 19 means that the information about that country is based on what is written in the corresponding paragraph of the chapter on that country (the numbers of the paragraphs are standardised in all chapters). Sometimes, reference is made explicitly to specific paragraphs of these other chapters. See also the list of literature at the end of chapter 19. The chapters referred to are the following (with the names of the member states abbreviated):

2	European law	by Bonini-Baraldi
3	AUS	by Graupner
4	BEL	by De Schutter
5	DNK	by Baatrup
6	FIN	by Hiltunen
7	FRA	by Borrillo
8	DEU	by Baer
9	GRC	by Peponas
10	IRL	by Bell
11	ITA	by Fabeni
12	LUX	by Weyembergh
13	NLD	by Waaldijk
14	PRT	by Freitas
15	ESP	by Rubio-Marin
16	SWE	by Ytterberg
17	UK	by Wintemute
18	Comparative overview	by Bonini-Baraldi

Chapter 20 (itself a summary of chapter 19) contains the main conclusions from all chapters.

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

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

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

Table 10: Data from the 1999/2000 European Values Study Survey⁶

The countries are listed here in the same order as in table 11 (see below).

	Percentage of the sample that answered that they would <i>not</i> like to have <i>homosexuals</i> as neighbours ⁷	Mean answer to question whether <i>homosexuality</i> can always be justified, never, or something in between (10 = always, 0 = never) ⁸
SWE	6	7.7
DNK	8	6.6
ESP	16	5.5
NLD	6	7.8
LUX	19	5.9
UK (Great Britain)	24	4.9
UK (Northern Ireland)	35	4.0
FRA	16	5.3
ITA	29	4.8
BEL	18	5.2
IRL	27	4.4
PRT	25	3.2
FIN	21	4.9
AUS	25	5.4
GRC	42	3.4
DEU	13	5.7

⁶ Halman, 2001. This study is based on surveys carried out in 1999 and 2000 among the population of 32 European countries. Per question there were some 900 to 2000 valid answers. More information about the European Values Study can be found at www.europeanvalues.nl (including the full text of the 2001 source book by Halman).

⁷ Halman, 2001, 42.

⁸ Halman, 2001, 223.

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

These and various related social developments have led many citizens (of any sexual orientation, and obviously including politicians, judges, etc.) to conclude that discrimination because of sexual orientation should be combated just as much as discrimination on other grounds (see table 11 below). And that again has contributed to series of political decisions to abolish forms of sexual orientation discrimination that could be found *in legislation* (mainly in criminal law and in family law),⁹ and to combat sexual orientation discrimination in society in general, often *through legislation*.¹⁰ It seems probable that both this decrease in legal discrimination and this increase in legal protection against social discrimination, in turn are reinforcing the social developments just mentioned. One could specifically expect a further rise in the number of women and men who feel free to come out as lesbian, gay or bisexual.

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

⁹ Paragraph 19.1.9 below, contains a table showing the years when the fifteen member states have taken major legislative steps to decriminalise homosexual sexual acts, and to recognise same-sex partners.

¹⁰ See para. 19.1.5 and 19.1.8.

¹¹ See *Discrimination in Europe (Report A & Report B)* by Marsh & Sahin-Dikmen, 2002 (*Report B* is available at http://europa.eu.int/comm/employment_social/fundamental_rights/publi/pubs_en.htm; the results per country given in the tables in this chapter are part of annexes to *Report A*).

Table 11: Data on attitudes towards discrimination from the 2002 Eurobarometer¹²

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

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

Data of the same Eurobarometer also indicate that actual sexual orientation discrimination is indeed taking place in all member states (see table 12 below).

¹² Idem.

¹³ See Marsh & Sahin-Dikmen, 2002, p. 27.

¹⁴ Chart 78 of Report A of Marsh & Sahin Dikmen.

¹⁵ Chart 79 of Report A of Marsh & Sahin Dikmen. 'All grounds' includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

¹⁶ Chart 78 of Report A of Marsh & Sahin Dikmen.

¹⁷ Chart 79 of Report A of Marsh & Sahin Dikmen. 'All grounds' includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

Table 12: Data on extent of perceived sexual orientation discrimination from the 2002 Eurobarometer¹⁸

The countries are listed here in the same order as in table 11 above. The scores in the first two columns are the combined results of questions relating to seven domains of discrimination: at work, while looking for a job, in primary school, in secondary school, at university, in obtaining housing, and in accessing public and commercial services.¹⁹

	Percentage of respondents that reported having <i>experienced</i> discrimination or harassment on grounds of sexual orientation ²⁰	Percentage of respondents that reported having <i>witnessed</i> discrimination or harassment on grounds of sexual orientation ²¹	Percentage of respondents that answered that they think 'a homosexual (a gay or lesbian person)' with the same skills or qualification would have <i>less chance</i> than anyone else of getting a job, training or promotion ²²
SWE	< 0,5	10	43
DNK	< 0,5	4	26
ESP	< 0,5	3	45
NLD	> 1,0 and < 1,5	11	24
LUX	> 0,5 and < 1,0	8	37
UK	> 0,5 and < 1,0	6	28
FRA	> 0,5 and < 1,0	6	33
ITA	< 0,5	3	39
BEL	> 0,5 and < 1,0	5	26
IRL	< 0,5	2	22
PRT	< 0,5	3	44
FIN	< 0,5	9	56
AUS	< 0,5	5	34
GRC	> 0,5 and < 1,0	4	54
DEU (east)	> 0,5 and < 1,0	5	32
DEU (west)	> 0,5 and < 1,0	6	39

The fact that on average less than 1% of the respondents in all countries experienced sexual orientation discrimination (i.e. 81 persons among a total of

¹⁸ See note to table 11 above.

¹⁹ See Marsh & Sahin Dikmen, 2002, p. 10 and 17.

²⁰ Chart 7 of Report A of Marsh & Sahin Dikmen. In their report B (2002, p. 14) they write: 'In all countries except Netherlands, less than 1 per cent of respondents reported discrimination on grounds of sexual orientation. The differences between countries are too small to allow a meaningful comparison, but it is interesting to note that Netherlands (...) has the highest number of respondents who reported discrimination because of sexual orientation. It is possible that this higher rate of discrimination is more of a reflection of a cultural openness about the issue than it is an indication of comparatively higher actual incidence rates.' One might add to that, that the higher rate of coming out among gay men and lesbian women in the Netherlands than in several other countries, may also make them more likely to be confronted with discrimination because of their orientation.

²¹ Chart 39 of Report A of Marsh & Sahin Dikmen. See their report B, 2002, p. 17-21.

²² Chart 71 of Report A of Marsh & Sahin Dikmen. See their report B, 2002, p. 25.

around 16,000 respondents),²³ should be read in combination with the assumption that only around 5% of adults identify as gay or lesbian, and that a lesser percentage come out as such. It is noteworthy that the percentage of respondents reporting having experienced discrimination on grounds of race or ethnicity (3%), religion or beliefs (2%), physical disability (2%), learning difficulties or mental illness (2%), or age (5%) are only a little higher.²⁴ It should also be noted that these figures do not necessarily give an accurate picture of the full extent of actual discrimination taking place.

The mutually reinforcing social and legal developments indicated above are not only occurring in the member states, but also at the European level. The inclusion of sexual orientation in art. 13 of the EC Treaty in 1999 and in the Directive in 2000 can be seen as a product of this. For eight member states this Directive has meant that additions had to be made to already existing legislation prohibiting sexual orientation discrimination in employment (DNK, ESP, FIN, FRA, IRL, LUX, NLD, SWE), for the seven other member states the Directive has meant that for the first time sexual orientation discrimination in employment needed to be made the object of national legislation (BEL, AUS, DEU, GRC, ITA, PRT, UK). On the basis of the fifteen preceding national chapters in this report, this chapter will provide a comparative analysis of pre-existing, recently adopted or proposed legislation to implement the Directive in the fifteen member states.

Given these rather different social and legal starting points with respect to sexual orientation, it will come as no surprise that existing and proposed laws in the member states also vary considerably. In part, that variation can also be attributed to the differences in traditions and structures that characterise the existing laws of the member states on employment in general and on anti-discrimination with respect to other grounds than sexual orientation. For example, in employment and/or anti-discrimination law the legal relevance of constitutions, collective labour agreements, or judicial law-making varies from country to country.²⁵

19.1.1 *Constitutional protection against discrimination*

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

The law of the European Union, so far, does not provide any real constitutional protection in this matter: art. 13 EC lacks direct effect, and it remains to be seen what the legal status of the non-discrimination provision of art. 21(1) of the EU Charter of fundamental rights will be. Nevertheless, the explicit inclusion of sexual orientation in both the art. 13 of the EC Treaty and art. 21 of the EU Charter, helps to strengthen the idea that sexual orientation discrimination should be considered as unconstitutional. This has been made even more

²³ See Marsh & Sahin-Dikmen, 2002, p. 13.

²⁴ See chart 1 of Report A of Marsh & Sahin Dikmen.

²⁵ See para. 19.1.1, 19.1.2, 19.1.3, 19.1.4 and 19.1.7.

evident by the inclusion of these two provisions into the and agreed text for the European Constitution, and by the insertion in that text of a new article, on the aim of combatting discrimination in EU policies (see para. 2.1.1).²⁶

In PRT a constitutional amendment adding 'sexual orientation' to the prohibition of discrimination in art. 13 of the Portuguese Constitution came into force on 31 July 2004.²⁷

As far as the other national constitutions are concerned,²⁸ the words 'sexual orientation' so far can only be found in one of the constitutional instruments of SWE, but Sweden (together with DNK, LUX and the UK) is one of the few countries without a general constitutional prohibition of discrimination. The Swedish provision (which is not legally binding) merely obliges Parliament, Government and other public bodies to take action against discrimination on several grounds, including sexual orientation (see para. 16.1.1). An instruction to combat discrimination in general, can also be found in some other constitutions (ITA, PRT, ESP).

In the eleven member states that do have a constitutional prohibition of discrimination on many grounds (AUS, BEL, FIN, FRA, DEU, GRC, IRL, ITA, NLD, PRT, ESP), that prohibition is (most probably) at least binding on the legislature,²⁹ and on public employers. In some countries it is not yet clear whether it is covered (DEU, FRA, GRC and IRL). But in six countries there is enough authority (in case law, in the doctrine, or in the *travaux préparatoires*) to consider sexual orientation implicitly covered as a prohibited ground for discrimination (AUS, BEL, FIN, ITA, NLD, ESP).

Especially for the nine countries where national constitutional protection against sexual orientation discrimination is unclear or absent, it is relevant to see if this is made good by any direct applicability of the European Convention on Human Rights. By the end of 2003, the Convention had indeed become directly applicable in all of the then fifteen member states of the EU,³⁰ although in the

²⁶ In the Treaty establishing a Constitution for Europe of 29 October 2004, the three provisions explicitly referring to sexual orientation are 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.

²⁷ Constitutional Law 1/2004. On Madeira and the Azores this amendment came into force on 10 August 2004.

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

²⁹ In NLD with the restriction that parliamentary acts cannot be declared unconstitutional by the Dutch courts (see para. 13.1.1).

³⁰ The last member state to make the Convention directly applicable, was IRL (in 2003); see para. 10.1.1.

courts of some of them the Convention does not take precedence over parliamentary legislation (DEU, IRL, UK and possibly ITA).

The European Convention on Human Rights binds its State Parties, and therefore all legislatures, and all public employers. This has been recognised in the case law of the European Court of Human Rights, most clearly in the cases where it ruled that the UK's ban on gays and lesbians in the armed forces violated art. 8 of the Convention (respect for private life).³¹ Art. 14 of the Convention prohibits discrimination on many grounds with respect to the enjoyment of the other rights and freedoms it guarantees. Sexual orientation discrimination in employment will almost always fall within the ambit of one of these other rights, especially the right to respect for private life. This is so because the European Court of Human Rights considers at least three of the main aspects of sexual orientation as (very intimate) aspects of private life: sexual conduct,³² sexual preference,³³ and relationships.³⁴ Whether the Court will also consider *coming out* as an aspect of private life, remains to be seen, but this could also be considered as falling in the ambit of the freedom of expression (art. 10).³⁵ Some cases of discrimination will fall within the ambit of the right to property (art. 1 of the First Protocol to the Convention). So far the European Court of Human Rights has five times found unlawful sexual orientation discrimination,³⁶ in the only cases of alleged employment discrimination on that ground, the Court has chosen to reach its conclusion directly on the basis of art. 8.³⁷

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

Invoking a generally worded provision in a national constitution or in the European Convention on Human Rights is not easy, for an ordinary victim of employment discrimination (and for his ordinary lawyer). Therefore more specific legislation is necessary (see para. 19.1.5 below), especially in private employment where constitutional protection is very limited. But there is also another reason why whatever constitutional protection may exist, is not enough: the principles and concepts of equality used in constitutional law are often vague and capable of different applications, and allowing for rather more justifications than are acceptable under the Directive (see below).

³¹ ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96; *Smith and Grady v. UK*, appl. 32377/96; 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535-48537/99.

³² ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76; 26 October 1988, *Norris v. Ireland*, appl. 10581/83; 22 April 1993, *Modinos v. Cyprus*, appl. 15070/89; 31 July 2000, *A.D.T. v. UK*, appl. 35765/97; 9 January 2003 *S.L. v. Austria*, appl. 45330/99; *L. & V. v. Austria*, appl. 39392/98 and 39829/98; 10 February 2004, *B.B. v. UK*, appl. 53760/00.

³³ ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96; *Smith and Grady v. UK*, appl. 32377/96; 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96; 26 February 2002, appl. 36515/97, *Fretté v. France*; 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535-48537/99.

³⁴ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98.

³⁵ See European Commission of Human Rights, 3 May 1988, *Morrissens v. Belgium*, appl. 11389/85.

³⁶ In the cases of *Salgueiro*, *S.L.*, *L. & V.*, *Karner*, and *B.B.* (see the previous notes).

³⁷ In the cases of *Lustig-Prean and Beckett*, *Smith and Grady*, and *Beck, Copp and Bazeley* (see the previous notes).

19.1.2 *General principles and concepts of equality*

Long before the Directive was adopted, the existence of a general principle of non-discrimination was recognised by the Court of Justice of the EC. In the application of this principle the Court often uses a similarly situated test, but sometimes also simply investigates whether a decision depends on a certain (discriminatory) reason.³⁸ Both elements can be found in the Directive's definition of direct discrimination.³⁹

Even earlier, the European Court of Human Rights had had a chance to elaborate on the prohibition of discrimination contained in art. 14 of the European Convention on Human Rights. The Court considers a distinction to be discriminatory if it lacks an objective and reasonable justification. With respect to grounds as 'suspect' as sexual orientation it has specified that such a justification requires particularly serious reasons, and that the distinction must be shown to be proportionate in relation the legitimate aim sought, and necessary for achieving that aim.⁴⁰

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

19.1.3 *Division of legislative powers relating to discrimination in employment*

In all member states legislation to implement the Directive is required at national level. In the UK separate (national) implementing legislation has been adopted for Great Britain (that is Scotland, England and Wales), for Northern Ireland and for Gibraltar.⁴¹ In addition to national legislation, some regional legislation is required in AUS (primarily with respect to public employees and agricultural workers), BEL (with respect to public employment and vocational guidance and vocational training) and DEU (with respect to public employment).⁴² In some countries, implementation of the Directive can be accomplished (on the basis of delegation) by governmental decree (GRC, ITA, UK); in the other countries primary parliamentary legislation is required.

19.1.4 *Basic structure of employment law*

In most countries employment law is regulated through a great number of legislative and other sources. These include, Labour Codes, Civil Codes, general employment acts, specific employment acts, governmental decrees, collective agreements, etc. Most countries distinguish between private employment, public employment, self-employment and sometimes other forms of occupation.

³⁸ See para. 2.1.2.

³⁹ See para. 19.2.3.

⁴⁰ ECtHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98 (see further para. 2.1.2 and 19.1.1).

⁴¹ See para. 17.1.3, 17.1.5 and 17.2.1.

⁴² See para. 3.1.3, 4.1.3 and 8.1.3, respectively.

19.1.5 Provisions on sexual orientation discrimination in employment or occupation

Since the 1980s, gradually legislative and other steps have been taken by the member states and the Institutions of the EC to *explicitly* combat sexual orientation discrimination *in employment* (and occupation).⁴³

The following (not exhaustive) listing demonstrates both the increasing speed of this process, and the accelerating role that the Institutions of the EC seem to have played in it.⁴⁴ There appears to be some correlation between the timing of the legal data in this listing and the data on values and attitudes given in tables 10 and 11 above.

1984	European Parliament	<i>Resolution on sexual discrimination at the workplace</i>
1985	FRA	Penal Code (using 'moeurs' to cover sexual orientation)
1986	FRA	Labour Code (also using the term 'moeurs')
1987	-	-
1988	-	-
1989	-	-
1990	-	-
1991	Commission EC	<i>Recommendation on the protection of the dignity of women and men at work, including Code of practice on measures to combat sexual harassment</i>
1992	NLD	Penal Code
1993	IRL	Unfair Dismissals Act 1977
1994	NLD	General Equal Treatment Act
1995	ESP	Penal Code
	FIN	Penal Code
1996	DNK	Act on Discrimination
1997	LUX	Penal Code
1998	Council EC	<i>Staff Regulations of officials of the EC</i> (art. 1a, among others) and the <i>Conditions of Employment of other servants of the EC</i> (art. 83, among others)
	Court of Justice EC	<i>Grant v. South West Trains Ltd.</i> (considering a disadvantage based on the sex of an employee's partner to be sexual orientation discrimination, but leaving it to the member states and the Council to legislate against it)
	IRL	Employment Equality Act 1998
1999	Member States EU	<i>Art. 13 EC</i> (inserted into the EC Treaty on 1 May 1999 by the Treaty of Amsterdam of 2 February 1997)
	BEL	Collective agreement (made binding by Royal Decree)
	SWE	Sexual Orientation Discrimination Act
2000	Council EC	<i>Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation</i>
2001	FIN	Employment Contracts Act
	FRA	Inclusion of the words ' <i>orientation sexuelle</i> ' in the provisions of Penal Code and Labour Code
	FRA	Amendment of Law 83-634 governing the rights and obligations of civil servants
	DEU	Industrial Relations Act

⁴³ For national legislation the years of entry into force are given; full citations can be found in the paragraphs 1.5 and 2.1 of each national chapter. For regional legislation on sexual orientation discrimination in employment in Belgium, Germany and Spain see the relevant national chapters (4, 8 and 15). For a more detailed overview of the legislation used to implement the Directive, see para. 19.2.1 below. For a brief overview of laws against sexual orientation discrimination in other fields, see para. 19.1.8 below.

⁴⁴ See also chapter 2.

2002	SWE	Equal Treatment of Students at Universities Act
2003	BEL	Law of 25 February 2003 on combating discrimination
	SWE	Discrimination Prohibition Act
	SWE	Amendment of Sexual Orientation Discrimination Act
	SWE	Amendment of Equal Treatment of Students at Universities Act
	ITA	Legislative Decree implementing the Directive
	UK	Employment Equality (Sexual Orientation) Regulations 2003
	UK	Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003
	PRT	Labour Law Code
	Council EC	<i>Implementation deadline of Directive 2000/78/EC</i> (2 December)
2004	ESP	Act 62/2003 (also amending the Workers' Statute, and Act 45/1999 concerning the relocation of workers in the framework of a trans-national contractual work relation)
	FIN	Equality Act 26/2004 (also amending Employment Contracts Act)
	FIN	Act on Holders of Municipal Office as amended by Equality Act
	UK	Equal Opportunities Ordinance, 2004 (Gibraltar)
	NLD	Amendment of the General Equal Treatment Act
	DNK	Amendment of the Act on Discrimination
	Council EC	<i>Staff Regulations of officials of the EC</i> (art. 1d, among others) and the <i>Conditions of Employment of other servants of the EC</i> (art. 124, among others)
	AUS	Equal Treatment Act Federal Act on the Equal Treatment Commission and the Equal Treatment Agency Federal Equal Treatment Act
	PRT	Law 35/2004 containing supplementary provisions to the Labour Law Code
	IRL	Equality Act 2004, amending the Employment Equality Act 1998
	IRL	Pensions Act 1990, as amended by Social Welfare Act 2004 (not yet in force)

The adoption of a pending legislative proposal to (further) implement the Directive is to be expected in 2005 in LUX. Government proposals to implement the Directive are to be expected in DEU and GRC.⁴⁵

To what degree all the listed legislation can be said to fully implement the Directive, will be considered in paragraphs 2 to 6 of this chapter.

It should be noted that several member states also prohibit employment discrimination on one or more related grounds, such as civil status (NLD, BEL, PRT),⁴⁶ family status (IRL), family situation (FRA, LUX, PRT), family relations (FIN), and *moeurs* (FRA and LUX; the term may be translated as 'morals, manners, customs, ways').

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

Even before there was explicit legislation banning such discrimination, some national courts, and also the main European courts, have had to rule on cases

⁴⁵ In GRC, in May 2004, the opposition in Parliament has introduced a bill to implement the Directive. It is very unlikely that this opposition bill will become law. When the current opposition was still in government, before the elections of March 2004, the then Government had introduced an implementation bill, but that bill 'died' because of the elections (see chapter 9).

⁴⁶ The term 'marital status' is used in ESP and IRL, but there it does not cover the status of *not* being married (see para. 10.3.3); similarly the UK has prohibitions of discrimination against 'married persons' (see para. 17.1.5).

of sexual orientation discrimination in employment. Sometimes they accepted the claim, sometimes they rejected it.

Among the ‘important case law’ signalled in the national chapters of this report, less than ten cases can be counted in which the claimant was successful. This number includes two French cases that were decided after the entering into force of the French anti-discrimination provisions: in 1991 the *Cour de Cassation* considered discriminatory the dismissal by a church of a gay man who worked as a verger; and in 2002 a court of first instance ordered a company to pay out EUR 130.000 to a employee who had been a victim of sexual orientation discrimination and of moral harassment (see para. 7.1.6).

The oldest decision condemning sexual orientation discrimination that has been signalled in the national chapters of this report, dates back to 1978, when an Employment Tribunal in the United Kingdom ruled that dismissal on grounds of homosexual orientation was unfair; this decision was not appealed. However, in all similar cases that were appealed, the higher UK courts rejected the sexual orientation discrimination claim (see para. 17.1.6). Similarly the Central Work Tribunal in Spain in 1986 found that the dismissal of a worker because of his homosexuality was unacceptable discrimination; but in Spanish law this decision of an intermediate court did not set a precedent (see para. 15.1.6). So before the entry into force of anti-discrimination legislation neither in the UK nor in Spain sexual orientation discrimination was outlawed by case law.

The first decision by a superior court finding that there had indeed been unlawful sexual orientation discrimination came in 1982, when in the Netherlands the highest court for public employment cases found that a man had been unlawfully dismissed from his job in the armed forces on the sole fact of his homosexual orientation (see para. 13.1.6). More recently the European Court of Human Rights in 1999 ruled against the British ban on the employment of homosexuals in the armed forces.⁴⁷ And in 2002 the German Federal Administrative Court ruled that the military is not allowed to differentiate on the basis of sexual orientation (see para. 8.1.6).

From the Dutch case it may be concluded that such discrimination was already unlawful (at least in the armed forces, and *a fortiori* in other sectors of public employment) in 1982, i.e. ten years before the first explicit anti-discrimination legislation. Similarly, the German case of 2002 indicates that such discrimination in public employment is also already unlawful in Germany, even before the first explicit anti-discrimination legislation that should be expected in 2005 or 2006. But the 1999 judgements of the European Court of Human Rights allow for a wider conclusion, certainly since the Court subsequently ruled that ‘sexual orientation’⁴⁸ and three of its main aspects (preference,⁴⁹ conduct⁵⁰ and relationships⁵¹) are indeed covered by the prohibition of discrimination in art. 14 of the European Convention. Now it can be maintained that since 1999 sexual orientation discrimination with respect to *military and other public employment* is

⁴⁷ ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96; *Smith and Grady v. UK*, appl. 32377/96.

⁴⁸ ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96.

⁴⁹ *Idem*.

⁵⁰ ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99; *L. & V. v. Austria*, appl. 39392/98 and 39829/98; 10 February 2004, *B.B. v. UK*, appl. 53760/00.

⁵¹ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98.

unlawful in all State Parties to the European Convention on Human Rights, and therefore throughout the European Union.

With respect to *private employment*, the little case law there is, seems less helpful. The European Court of Human Rights cannot pronounce on discrimination by private employers, because the European Convention only binds the State Parties. The Court of Justice of the EC so far has had only one case on sexual orientation discrimination in private employment, *Grant v. South West Trains Ltd.*, and it decided to leave it to the member states and the Council to legislate on it.⁵² And apart from the two important French cases mentioned above, national case law has either been:

- *negative*: UK up to very recently (see above and para. 17.1.6); FRA before the introduction of the *Pacs*⁵³ and the recognition of same-sex concubinage; NLD before anti-discrimination legislation was enacted; and IRL,⁵⁴ or
- *non-binding*: ESP (see above and para. 15.1.6), or
- *non-existent*: in most chapters of this report a complete lack of reported case law was indicated: AUS, BEL, DNK, GRC, ITA, LUX, PRT and SWE.

The lack of case law does not mean that there are no cases. Especially in countries where anti-discrimination legislation is already in force, cases can be settled before going to court; examples of such cases are given in the chapters on DNK (para. 5.1.6), FIN (para. 6.1.6) and SWE (para. 16.1.6). For examples that were neither settled nor litigated (quite possibly because of lack of legislation) see the chapters on GRC (para. 9.1.6) and ITA (para. 11.1.6). The fact that many cases don't make it to court, can also be learned from figures about the specialised bodies set up in three countries to deal with cases of sexual orientation discrimination (see para. 19.5.2 below):

- In Ireland in four years since 2000 the *Equality Tribunal* received 15 complaints about sexual orientation discrimination in employment, and in two years since 2001 the *Equality Authority* has been working on a total of 17 cases of such discrimination (see para. 10.1.6).
- In Sweden in five years since 1999 the *Ombudsman against Discrimination on grounds of Sexual Orientation* has had to deal with over 60 employment related complaints (see para. 16.1.6).
- And in the Netherlands in nine years since 1995 the *Equal Treatment Commission* has given 29 opinions about alleged sexual orientation discrimination in employment. In addition to that, staff of this Commission answers questions about sexual orientation discrimination by telephone: 18 times in the year 2002 (see para. 13.1.6).

Finally, it should be pointed out that in several countries there have been many cases about the denial to gay or lesbian employees of certain spousal benefits because of their not being married to their partner. Mostly, these cases have been presented or read as cases of civil status discrimination (for example in ESP, see para. 15.1.6, and in NLD, see para. 13.3.3). The second sexual

⁵² ECJ 17 February 1998, C-249/96, *Grant v. South West Trains*, ECR 1998, I-621; see para. 2.1.6.

⁵³ *Pacte Civil de Solidarité*, the French form of registered partnership introduced in 1999.

⁵⁴ See para. 7.1.6, 13.1.6 and 10.1.6.

orientation case to come to the Court of Justice of the EC, *D. and Sweden v. Council*,⁵⁵ also falls in this category. The Court chose to treat the distinction between (same-sex) registered partnership and (different-sex) marriage as one involving civil status, and rejected the claim of the Swedish employee of the Council of the EU for a household allowance for his registered partner. Whether a similar case involving a private or public employer in a member state would or could be decided differently, will be discussed in para. 19.3.3 below.

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

For several decades already, employment discrimination on grounds of race and sex has been the object of more international and European rules than discrimination on grounds of sexual orientation. Hence, it is not surprising that most member states have older and wider national rules on employment discrimination on these other grounds (see the national chapters for examples of this). However, it should be borne in mind that (apart from specific topics such as social security, pregnancy and enforcement bodies) the actual level of protection required by the Directive with respect to sexual orientation discrimination in employment, is hardly lower than the levels of protection required by the Race Directive and the various directives on the equal treatment of men and women (see para. 2.1.7). Also, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it is mostly undesirable to choose different contents and/or different words for rules with respect to different grounds.

Whether different grounds of discrimination are to be tackled in (the same articles in) the same laws, is a matter of national judgement. But the question whether any differences between the rules on sexual orientation and rules on other grounds are unacceptable in light of the relevant directives and/or needlessly confusing for all concerned, surely is a topic of attention for the Commission of the EC. Therefore, at a later stage, it would make sense to carry out detailed comparisons between the national rules on the different discrimination grounds in the field of employment.

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

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

- Firstly, the borderline between employment and other fields is not always clear cut. This is particularly true for the areas of vocational training, vocational guidance, self-employment and benefits provided for by organisations of workers, employers, or professionals (all covered by art. 3(1) of the Directive). Each of these areas overlaps with that of goods and services. Therefore it is fortunate that the provision of goods and services is

⁵⁵ ECJ 31 May 2001, *D. and Sweden v. Council*, Cases C-122/99 P and C-125/99 P, ECR 2001, I-4319.

subject to a prohibition of sexual orientation discrimination in most member states: BEL, DNK, FIN, FRA, IRL, LUX, NLD, ESP and SWE.

- Secondly, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it can be helpful if the anti-discrimination norm is a *general* norm, and not just one applicable in certain carefully delineated areas.
- Thirdly, the perception of what areas are central to the problem of sexual orientation discrimination varies from country to country. For example, in DEU⁵⁶ and ESP⁵⁷ most attention has been going to the recognition of same-sex partners in family law and beyond, whereas in NLD the topic of incitement to hatred has been getting a lot of attention recently.

As in para. 19.1.5 above, a chronological (not complete) list of measures signalled in the chapters indicates the increasing prevalence of national explicit prohibitions of sexual orientation discrimination beyond the field of employment:

1985	FRA	Penal Code (provision of goods and services)
1986	NLD	Act on Benefits for Victims of Persecution 1940-1945
1987	DNK	Penal Code (incitement to hatred)
	DNK	Act on Race Discrimination (amended so as to also cover sexual orientation)
	SWE	Penal Code (provision of goods and services)
1988	NLD	Data Registration Act
	SWE	Homosexual Cohabitees Act
1989	DNK	Registered Partnership Act
1990	-	-
1991	-	-
1992	NLD	Penal Code (discrimination by a business, by a professional or by a public official; incitement to hatred by anyone)
1993	AUS	Code of conduct for police officers
1994	NLD	General Equal Treatment Act (provision of goods and services)
	ESP	Law on Urban Housing
	SWE	Penal Code (sexual orientation aggravating motive for crimes)
1995	FIN	Penal Code (provision of services)
	ESP	Penal Code (provision of services; incitement to hatred)
	SWE	Registered Partnership Act
1996	-	-
1997	BEL	Immigration circular
	LUX	Penal Code (provision of goods and services; incitement to hatred)
	NLD	Royal Decree on the training of medical doctors
1998	NLD	Civil Code (registered partnership)
	UK	Northern Ireland Act 1998 (duty to promote equality)
1999	UK	Greater London Authority Act (duty to promote equality)
	FRA	Civil Code (registered partnership: <i>Pacs</i> ; and recognition of same-sex <i>concubinage</i>)
2000	AUS	Data Protection Act
	BEL	Law on statutory cohabitation
	IRL	Equal Status Act 2000 (provision of goods and services)
2001	DEU	Law on Ending Discrimination Against Same-Sex Unions: Life Partnerships
	NLD	Civil Code (civil marriage)
	PRT	Law on <i>de facto</i> couples

⁵⁶ See para. 8.1.

⁵⁷ See para. 15.1.6.

2002	SWE	Equal Treatment of Students at Universities Act
	SWE	Penal Code (sexual orientation aggravating motive for crimes)
	FRA	Law 2002-73 (rental housing)
	ESP	Law on Political Parties
	FIN	Registered Partnership Act
2003	SWE	Instrument of Government
	SWE	Discrimination Prohibition Act (provision of goods and services)
	SWE	Penal Code (incitement to hatred)
	SWE	Cohabitation Act
	FRA	Penal Code (sexual orientation aggravating motive for crimes)
	BEL	Law of 25 February on combating discrimination (provision of goods and services)
	BEL	Civil Code (civil marriage)
2004	FRA	Penal Code (sexual orientation aggravating motive for more crimes)
	LUX	Partnership Act
	PRT	Constitution

19.1.9 *Other aspects of the legal background*

Although the Directive does not require any legislation outside the field of employment discrimination, it seems appropriate to include a table briefly indicating the legal situation of homosexuality in each member state in two of the most relevant other areas of law: criminal law and family law (see table 13 below). Developments in these areas are bound to have an impact on the adoption, interpretation and application of anti-discrimination legislation with respect to sexual orientation. Occasionally, the effects of criminal or family law can also be felt in the field of employment, as will be discussed in paragraphs 19.3.3 and 19.3.7.

Table 13: Decriminalisation of homosexuality and legislative recognition of same-sex partners^a

The countries are listed here in the same order as in table 11 (see above).

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

^a Years given are the years in which national legislation came into force. This table is a shortened, and updated, version of an appendix to: Waaldijk, 2003, 84-95 (see also the *Chronological overview* at www.emmeijers.nl/waaldijk).

- ^b Surviving same-sex partner pays the same inheritance tax as surviving married spouse (Law of 4 June 1986, nr. 339, repealed by Law on Registered Partnership of 7 June 1989, nr. 372).
- ^c Although the formal age limits for heterosexual and homosexual acts were equalised at the time of decriminalisation of homosexual acts in 1822, in practice homosexual acts with minors continued to be penalised until 1988 under a general provision against 'serious scandal and indecency' (see Graupner 1997, 665-666).
- ^d Law on Urban Housing of 24 November 1994.
- ^e Partnership legislation has so far been enacted in most autonomous regions: Catalonia (1998), Aragon (1999), Navarra (2000), Valencia (2001), Balearic Islands (2002), Asturia (2002), Madrid (2002), Andalucia (2002), Canary Islands (2003), Extremadura (2003) and the Basque Country (2003). See para. 15.3.3. Not all of these legislative schemes involve a form of *registered* partnership: some only provide for the recognition of *de facto* cohabitation.
- ^f Only in Navarra (2000), the Basque Country (2003) and Aragon (2004). The provisions on joint adoption by unmarried different-sex and same-sex couples in Navarra have been suspended pending a challenge to the constitutional power of the Navarra legislature (as opposed to the national legislature) to enact them (see Pérez Cánovas, 2001, 503).
- ^g Unregistered cohabitation (both for same-sex and different-sex couples) was first recognised in Dutch legislation in a Law of 21 June 1979 (amending art. 7A:1623h of the Civil Code, with respect to rent law), followed by a Law of 17 December 1980 on inheritance tax due by the surviving partner from a 'joint household'. Since then many more laws have been amended so as to recognise cohabitation for a multitude of purposes, including social security, tax, citizenship, and parental authority.
- ^h Law of 9 July 2004 ('relating to the legal effects of certain partnerships'), published in *Mémorial A*, nr. 143, 6 August 2004, entry into force on 1 November 2004.
- ⁱ Decriminalisation of most sexual activities between two men over 21 took place in England and Wales in 1967, in Scotland in 1980 and in Northern Ireland in 1982 (see Graupner, 1997, 711, 727, 739).
- ^j In 1997 the government introduced a 'concession outside the *Immigration Rules*' allowing unmarried long-term cohabiting partners who could not marry each other (for example because they are of the same sex), to apply for leave to enter/remain in the United Kingdom; in 2000 this concession was incorporated into the *Immigration Rules* (paragraphs 295A-295O). The first piece of parliamentary legislation recognising same-sex partners was enacted in 2000 by the Scottish Parliament: *Adults with Incapacity (Scotland) Act 2000* (section 87(2)). In 1999 and 2004 some older legislation has been interpreted so as to also cover same-sex cohabitants. See the judgements of the House of Lords of 28 October 1999, *Fitzpatrick v. Sterling Housing Association* [1999] 4 All ER 707, and of 21 June 2004, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.
- ^k The *Adoption and Children Act 2002* will allow for joint and second-parent adoption by same-sex partners when it comes into force in September 2005 (expected date).
- ^l In several parts of Italy sex between men was decriminalised (and in some parts then re-criminalised) before the general decriminalisation of 1889. See Graupner, 1997, 505, and Leroy-Forgeot, 1997, 66.
- ^m It may be argued that the '*cohabitation légale*' introduced in 2000 by the Law on statutory cohabitation is either a form of registered partnership or a form of not-registered cohabitation.
- ⁿ The Belgian law opening up marriage to persons of the same sex of 13 February 2003 (*Moniteur Belge*, 28 February 2003, Ed. 3, p. 9880) entered into force on 1 June 2003.
- ^o The age limit for any sexual act between men is higher (17) than for an oral or non-penetrative sexual act between a man and a woman, vaginal intercourse of a woman with a boy, or any sexual act between women (all: 15). However, the age limit for anal sex between a man and a woman, and for vaginal intercourse of a man with a girl is also set at 17. See Graupner, 1997, 481 and 487.
- ^p Domestic Violence Act, 1995, and Powers of Attorney Act, 1995 (see Flynn, 2001, 596).
- ^q Between 1945 and 1995 the age limits were equal. See Graupner, 1997, 597-598.
- ^r Several partner-related aspects of criminal law, including the right to refuse testimony against your partner in a criminal court (see Graupner, 2001, 557-559).
- ^s In the case of 'seduction', the age limit for sex between men is higher (17) than for lesbian or heterosexual sex (15). See Graupner, 1997, 466.
- ^t In the former German Democratic Republic (East Germany), homosexual acts between men were decriminalised in 1968, and the age limits were equalised in 1989. In the Federal Republic of Germany (West Germany before the unification), the dates were 1969 and 1994. See Graupner, 1997, 407-410.

19.2 The prohibition of discrimination required by the Directive

19.2.1 *Instrument(s) used to implement the Directive*

According to the case law of the Court of Justice of the EC, the provisions of a directive must be implemented with 'the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'.⁵⁸ This means that all elements of the Framework Directive must be explicitly implemented, if not already explicitly covered in existing law. The Court of Justice has also ruled that provisions in a Constitution cannot be considered as an appropriate means of implementation.⁵⁹

By August 2004 the Framework Directive of 27 November 2000 had been more or less fully implemented in twelve member states. In the chronological order of their implementing legislation, these are: FRA, BEL, SWE, ITA, UK, PRT, ESP, FIN, NLD, DNK, AUS and IRL. In the latter six countries implementation was completed after the Directive's implementation deadline of 2 December 2003. The most important instruments used are the following:⁶⁰

- FRA Penal Code (art. 225-1, 225-2 and 432-7), as amended in 1985, 2001 and 2002;
Labour Code (art. L122-35, L122-45, L122-46, L122-47, L122-49, L122-52 and L122-54), as amended in 1986, 1992, 2001 and 2002;
Law 83-634 of 13 July 1983 governing the rights and obligations of civil servants (art. 6 and 6 quinquès), as amended in 2001 and 2002.⁶¹
- BEL Federal Law of 25 February 2003 on combating discrimination, in force since 27 March 2003;
Flemish Decree of 8 May 2002 on proportionate participation in the labour market, in force in the Flemish Region/Community since 29 June 2003;
Ordinance of 26 June 2003 on the mixed management of the labour market in the region of Brussels-Capital, in force since 9 August 2003;
Decree of 19 May 2004 on the implementation of the principle of equal treatment, in force in the French-speaking Community since 17 June 2004;
Decree of 27 May 2004 on equal treatment in employment and professional training, in force in the Walloon Region since 3 July 2004;
Decree of 17 May 2004 on guaranteeing equal treatment in the labour market (in force in the German-speaking Community since 13 August 2004).⁶²
- SWE Penal Code (art. 9(4) of chapter 16, on unlawful discrimination), as amended in 1987;
Sexual Orientation Discrimination Act of 1999, as amended per 1 July 2003;
Discrimination Prohibition Act of 2003, in force since 1 July 2003;
Equal Treatment of Students at Universities Act of 2001, as amended per 1 July 2003.⁶³

⁵⁸ See case law cited in para. 2.2.1.

⁵⁹ *Idem*.

⁶⁰ For a chronological overview, see para. 19.1.5 above.

⁶¹ In both Codes, the Directive has been implemented first by law 2001-1066 of 16 November 2001 on combating discrimination, and then by law 2002-73 of 17 January 2002 on moral harassment; law 2001-1066 also introduced a prohibition of sexual orientation discrimination into law 83-634, into which law 2002-73 introduced a prohibition of moral harassment. See para. 7.1.5 and 7.2.1.

⁶² See para. 4.2.1.

⁶³ See para. 16.1.5 and 16.2.1.

- ITA Legislative Decree 216 of 9 July 2003, in force since 28 August 2003;
Workers' Statute (art. 15), as amended per 28 August 2003 by Legislative Decree of 9 July 2003;
Legislative Decree 276 of 10 September 2003 (art. 10, with respect to job agencies), in force since 24 October 2003.⁶⁴
- UK Employment Equality (Sexual Orientation) Regulations 2003, in force since 1 December 2003;
Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, in force since 2 December 2003;
Equal Opportunities Ordinance, 2004 (Gibraltar), in force since 11 March 2004.⁶⁵
- PRT Labour Law Code (art. 22-24), in force since 1 December 2003;
Law 35/2004 containing supplementary provisions to the Labour Law Code, in force since 29 August 2004.⁶⁶
- ESP Penal Code (art. 314), as amended in 1995;
Act 62/2003 on fiscal, administrative and social measures, in force since 1 January 2004;
Workers' Statute (art. 4, 16 and 17), as amended per 1 January 2004 by Act 62/2003;
Act 45/1999 (art. 3) concerning the relocation of workers in the framework of a transnational contractual work relation, as amended per 1 January 2004 by Act 62/2003.⁶⁷
- FIN Penal Code (art. 3 of chapter 47), as amended in 1995;
Employment Contracts Act of 2001 (art. 2 of chapter 2), as amended per 1 February 2004;
Equality Act 21/2004, in force since 1 February 2004;
Act on Holders of Municipal Office (art. 12), as amended per 1 February 2004;
Act on Civil Servants (art. 11), as amended per 1 February 2004;
Seamen's Act (art. 15), as amended per 1 February 2004.⁶⁸
- NLD Penal Code (art. 90quater and 429quater), as amended in 1992;
General Equal Treatment Act of 1994, as amended per 1 April 2004 by the Implementation Act of 21 February 2004.⁶⁹
- DNK Act on Discrimination of 1996, as amended per 8 April 2004 by Act 253 of 7 April 2004.⁷⁰
- AUS Equal Treatment Act (covering private employment), in force since 1 July 2004;
Federal Act on the Equal Treatment Commission and the Equal Treatment Agency (also covering private employment), in force (under this name) since 1 July 2004;
Federal Equal Treatment Act (covering public employment), proposed in November 2003, in force since 1 July 2004;
as far as the required implementation at regional level is concerned, legislation has only been adopted or proposed in five of the nine states of AUS.⁷¹

⁶⁴ See para. 11.2.1.

⁶⁵ See para. 17.1.5.

⁶⁶ See para. 14.2.1.

⁶⁷ See para. 15.1.5 and 15.2.1.

⁶⁸ See para. 6.1.5 and 6.2.1.

⁶⁹ See para. 13.2.1.

⁷⁰ See para. 5.2.1.

IRL Unfair Dismissal Act 1977 (art. 6(2)(e)), as amended in 1993;
Employment Equality Act 1998, in force since 1999, as amended per 18 July 2004 by the Equality Act 2004;
Pensions Act 1990, as amended by the Social Welfare Act 2004 (not yet in force).⁷²

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

LUX Penal Code (art. 454 and following), as amended in 1997;
Bill to implement the Directive, submitted to Parliament on 10 November 2003 (it will not become law before 2005).⁷³

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

In DEU it is expected that proposals to implement the Directive at national level will be published later in 2004.⁷⁴ At regional level there is no implementation activity yet; the *Länder* are waiting for the federal Government to act first.

In GRC first a proposal for a Presidential Decree to implement the Directive was presented in July 2003. This proposal was abandoned when a Bill proposing to implement the Directive by Act of Parliament was published in November 2003 and presented to Parliament in January 2004. This Bill did not live long, because Parliament was dissolved for the elections of March 2004. In May 2004 the opposition re-introduced the old government implementation Bill, but this opposition Bill has little chance of being adopted.

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

19.2.2 *Concept of sexual orientation (art. 1 Directive)*

So far, thirteen member states are using explicit words in their existing or proposed employment anti-discrimination legislation to refer to sexual orientation. Most of them use more or less direct equivalents of the English 'sexual orientation', but in some countries possessive pronouns are added in all or some legislation:

⁷¹ Regional implementation draft bills have been adopted or proposed in four of the nine Austrian states (Vienna, Upper Austria, Lower Austria, Styria and Carinthia). See para. 3.2.1 plus the addendum before para. 3.1.

⁷² See para. 10.1.5 and 10.2.1.

⁷³ See para. 12.1.5. On 4 July 2002 a Bill (nr. 4979) was proposed to combat moral harassment (see para. 12.2.5).

⁷⁴ Certain forms of sexual orientation discrimination in *public* employment had already been prohibited in four of the German *Länder* (Hamburg, Lower Saxony, Saarland and Saxony-Anhalt).

ITA	<i>orientamento sessuale</i> ⁷⁵
PRT	<i>orientação sexual</i>
ESP	<i>orientación sexual</i> (implementation Law of 2003) <i>su orientación sexual</i> (Penal Code)
LUX	<i>orientation sexuelle</i> (implementation Bill of 2003) <i>leur orientation sexuelle</i> (Penal Code)
UK	<i>sexual orientation</i>
IRL	<i>sexual orientation</i>
DNK	<i>seksuel orientering</i>
FRA	<i>son / leur orientation sexuelle</i>

In the other countries slightly different words are used in all or some legislation:

AUS	<i>sexuelle Orientierung</i> (federal laws) <i>sexuelle Ausrichtung</i> (regional laws and proposals) ⁷⁶
FIN	<i>sukupuolinen suuntautuminen</i> (Penal Code and Act on Holders of Municipal Office) <i>sukupuolinen suuntautuneisuus</i> (Employment Contracts Act) ⁷⁷ <i>comparable reason</i> (Act on Civil Servants and Seamen's Act) ⁷⁸
NLD	<i>hetero- of homoseksuele gerichtheid</i> (heterosexual or homosexual orientation) (General Equal Treatment Act) ⁷⁹ <i>hun hetero- of homoseksuele gerichtheid</i> (their heterosexual or homosexual orientation) (Penal Code)
BEL	<i>orientation sexuelle / seksuele geaardheid</i> ⁸⁰ / <i>sexuelle Ausrichtung</i>
SWE	<i>sexuell läggning</i> (sexual disposition)

The use of the possessive pronoun in front of 'sexual orientation' in the implementing legislation in FRA (and in the Penal Codes of LUX, NLD and ESP) do not seem to be in conformity with the Directive either. The Directive's definition of direct discrimination is not limited to less favourable treatment on the ground of the *victim's own* sexual orientation. The possessive pronoun seems to exclude protection in cases where the discrimination is based on the sexual orientation of others,⁸¹ or on a mistaken assumption about the victim's sexual orientation,⁸² or on the concern of a group or event or piece of information with sexual orientation.⁸³

The absence in FIN in two of the five implementing laws of an explicit reference to sexual orientation is not compatible with the Directive and the requirements of 'specificity, precision and clarity' (see para. 19.2.1 above).

⁷⁵ The Italian version of the Directive and of art. 13 EC uses the less fortunate term *tendenze sessuali* (sexual tendencies; see para. 11.2.2).

⁷⁶ The latter words are also used in the German version of the Directive.

⁷⁷ See para. 6.2.2 for a discussion of the slight difference between the two terms. The Finnish version of the Directive and of art. 13 EC uses the first term.

⁷⁸ See para. 6.1.5, 6.1.2 and 6.2.2.

⁷⁹ The Dutch version of the Directive and of art. 13 EC uses the less fortunate term *seksuele geaardheid* (sexual inclination). The term *gerichtheid* seems a better translation of 'orientation' (see para. 13.2.2).

⁸⁰ *Idem.*

⁸¹ See para. 19.3.4 and 19.3.5.

⁸² See para. 19.3.1.

⁸³ See para. 19.3.4 and 19.3.5.

The restriction to heterosexual and homosexual orientations in the legislation of the NLD seems to exclude bisexual orientation. The Dutch Government, in the *travaux préparatoires*, has argued that bisexuality is covered, because it consists of homosexual and heterosexual feelings, expressions and relationships. It could be argued that the implied Dutch prohibition of discrimination on grounds of bisexuality lacks the ‘specificity, precision and clarity’ required in the implementation of the Directive (see para. 19.2.1 above).

In SWE the word *läggning* (like the word *geaardheid* which is used in the Dutch version of the Directive and in the Dutch version of the implementing legislation in BEL) might give the impression that the behavioural aspects of sexual orientation are not covered, but that is not the case (see para. 19.3.1)

Only in IRL, SWE and UK the term used is given a legal definition: homosexual, bisexual and heterosexual orientations are covered. The same definition can be found in *travaux préparatoires* in AUS and NLD, and is considered the probable interpretation by the authors of the chapters on BEL, FIN, FRA, ITA and PRT. There is no indication that more (or less) orientations (than homosexual, bisexual and heterosexual) would be covered by the terms used in LUX and ESP. In DNK, however, the doctrine also considers other kinds of orientations to be covered by the concept of sexual orientation, including transvestism.⁸⁴ In DEU a draft Bill, that was later withdrawn, used the words ‘*sexuelle Identität*’ (sexual identity) a term that would cover homosexual, transsexual and intersexual (but not heterosexual and bisexual) identities.⁸⁵

In some countries discrimination on certain related grounds is forbidden; this is not required by the Directive. For example, in FRA and LUX discrimination is also prohibited on the ground of ‘*moeurs*’ (which can be translated as ‘morals, manners, customs, ways’).⁸⁶ This would cover discrimination based on other lawful sexual practices (such as sadomasochism and partner-swapping).⁸⁷ Discrimination on grounds of civil status is prohibited in BEL, NLD and PRT.

The question is whether the various choices of the member states described above, are compatible with the Directive. Obviously, member states are free to give a wide interpretation to the concept of sexual orientation, or to accompany it with other concepts, so as to prohibit more forms of discrimination than actually required by the Directive. It is not easy to say which forms the Directive intends to cover, because the concept of sexual orientation has not been defined in the Directive, nor fully or convincingly in any of the public *travaux préparatoires*.⁸⁸ Therefore a starting point of the interpretation could be an analysis of the words ‘sexual orientation’ used in the Directive.

The word ‘sexual’ in general has at least two distinct meanings: on the one hand it refers to sex-as-gender (the sex you are), on the other it refers to sex-as-eroticism (the sex you do). In the expression ‘sexual orientation’ – and indeed in the words ‘homosexual’, ‘heterosexual’ and ‘bisexual’ – it generally refers to both meanings simultaneously: it can be used to refer to (feelings,

⁸⁴ See para. 5.2.2.

⁸⁵ See para. 8.2.2.

⁸⁶ Between 1985 and 2001 in France the word ‘*moeurs*’ was also used to cover sexual orientation, because the latter term was only inserted into the various anti-discrimination provisions in 2001.

⁸⁷ The examples are given for France in the top of paragraph 7.2.

⁸⁸ See para. 2.2.2.

behaviour or relationships of) persons who (prefer to) have sex and other forms of intimacy with someone who is of the same sex, of the opposite sex, or of either sex. It seems probable that the Council, when adopting the Directive, was using the concept of 'sexual orientation' in the same way. In that interpretation the Directive would only require the prohibition of discrimination that is based on homosexual, heterosexual or bisexual orientations. Such an interpretation would also be in conformity with the understanding of the notion of sexual orientation in most of the countries that have legislated on it (see above).

In *P.v.S. & Cornwall County Council* the Court of Justice has chosen to classify discrimination on grounds of transsexuality as a form of sex discrimination.⁸⁹ Therefore it would not be appropriate or necessary to include transsexuality in the concept of sexual orientation. Presumably, the Court of Justice would also classify as sex discrimination other forms of discrimination that are based on identities, preferences and practices that are primarily linked to sex-as-gender: transvestism, transgenderism, intersexuality, etc. The law would be more consistent if these potential grounds for discrimination were treated in the same way as transsexuality.

That leaves forms of discrimination that are based on identities, preferences and practices that are primarily linked to sex-as-eroticism. It is difficult to imagine, and certainly unreasonable to expect, that the Court of Justice of the EC would extend the protection of the prohibition of sexual orientation discrimination in employment to cover (preferences for) unlawful sexual practices (such as paedophilia). With respect to lawful sexual preferences (such as sadomasochism) such an extension would be less unlikely, and not undesirable. However, for the moment it is difficult to claim that each member state is required by the Directive to explicitly offer protection against discrimination based on other lawful sexual identities, preferences and practices than homosexuality, heterosexuality and bisexuality. The developments in the member states with respect to other 'orientations' will have to be awaited.⁹⁰ There is some evidence that protection will be given under other headings, such as the prohibition of discrimination based on *moeurs* in FRA and LUX,⁹¹ and general provisions on respect for the private life of employees and job-applicants.

In **conclusion**, it could be said that the choice of words in FRA and NLD, and in two of the five laws in FIN, means that the Directive is not being implemented correctly.⁹² In the other ten countries with some legislative text being enacted or proposed, the chosen words clearly cover discriminations based on homosexual, heterosexual or bisexual orientation (whether or not that is the orientation of the victim of the discrimination), which is what the Directive requires. Some countries also cover other 'orientations', which is not required by the Directive.

⁸⁹ ECJ, 30 April 1996, *P.v.S. and Cornwall County Council*, Case C-13/94, ECR 1996 I-2143.

⁹⁰ There does not seem to be a consensus as to whether sadomasochism (etc.) could properly be called an 'orientation'.

⁹¹ See para. 7.2 (introduction) and 12.1.5.

⁹² Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

The question to what degree relationships and other forms of intimate behaviour are covered by the concept of sexual orientation, will be discussed in paragraphs 19.3.1 to 19.3.3 below.

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

In all countries where legislation has been enacted or proposed, a distinction is made, as required by the Directive, between direct and indirect sexual orientation discrimination.⁹³ However, not all countries use each of the three elements of the Directive's definition of direct sexual orientation discrimination:

- *one person is treated less favourably than another is or has been treated or would be treated*

In ESP the words 'would be' are absent, and in PRT they are replaced with 'will be'. Both variations seem incompatible with the Directive.

In BEL the whole phrase is replaced with 'difference of treatment',⁹⁴ and in FRA and NLD with 'distinction between persons', which seems acceptable. However, that the distinction or difference may also be with the hypothetical treatment of a (hypothetical) other person (indicated in the Directive with the words 'or would be treated') is less clear in these four countries. It is important that the phrases used here, will get an interpretation in conformity with the Directive.

- *in a comparable situation*

This phrase is absent in BEL, FRA and NLD (which on occasion may make it less difficult to prove discrimination). The UK uses a similar phrase: 'the relevant circumstances in the one case are the same, or not materially different, in the other.' Both variations seem acceptable.⁹⁵

- *on grounds of sexual orientation*

In FRA a possessive pronoun is used in front of sexual orientation; this limitation to discrimination based on the victim's own sexual orientation, is not compatible with the Directive.⁹⁶

In SWE another phrase is used: 'linked to' sexual orientation. This variation on the Directive's definition is acceptable, and even welcome: sometimes it will be easier to prove that a treatment is *linked to* than that it was *based on* a particular ground.

For the operation of the law in practice, probably the most difficult element in most definitions of direct discrimination is the element '*on grounds of*'. It suggests that sexual orientation must have been a *reason* for the discriminator to treat the victim in a particular way, or a *criterion* in a discriminatory rule. The Directive does not allow requiring the victim to prove that there was an intention

⁹³ An exception is the Ordinance in the Belgian region of Brussels-Capital (see para. 4.2.3).

⁹⁴ The Belgian definition of direct discrimination also incorporates the exception for genuine occupational requirements (see para. 4.2.3 and 19.4.4). The definition of direct discrimination in the region and language communities of BEL is that of the Directive (see para. 4.2.3).

⁹⁵ Clearly incompatible with the Directive is the limitation of direct discrimination to disadvantaging 'without reasonable justification', which can be found in a draft bill in the Austrian region of Vienna (see para. 3.2.3).

⁹⁶ See para. 19.2.2 above.

to disadvantage. Proving that an actual or assumed sexual orientation of the victim or of anyone else was a reason, will often be very difficult (unless that reason is stated in a written or recorded explanation to the decision, or is part of a written rule). Precisely for dealing with this difficulty, a shift in the burden of proof will often be very useful for the victim.⁹⁷ It is also important to note that the Directive's definition does not require that sexual orientation was *the only* reason, but only that sexual orientation played a role as *one of* the reasons for the treatment. This has been recognised in the opinions of the Dutch Equal Treatment Commission,⁹⁸ and is made explicit in the Swedish use of the words '*linked to*' (see above).

The **conclusion** must be that the definitions of direct discrimination in the implementing legislation in PRT and ESP fall short of the minimum requirements of the Directive.⁹⁹

19.2.4 *Indirect discrimination (art. 2(2)(b) Directive)*

An explicit prohibition of indirect discrimination can be found in all countries that have enacted or proposed legislation on sexual orientation discrimination in employment. Only in FRA there is no legislative definition of the concept of indirect discrimination, which is not in conformity with the Directive.

The Directive's definition of indirect sexual orientation discrimination consists of several elements, not all of which are being used in all nine national definitions. Apart from the justification clause (art. 2(2)(b)(i), see below), the Directive's definition consists of three cumulative elements:

- *an apparently neutral provision, criterion or practice*

This element is absent in NLD (see below). It is differently worded in the UK ('a provision, criterion or practice which (...) would apply equally to persons not of the same sexual orientation'), in IRL (no mention of 'criterion or practice') and in ESP (limited to apparently neutral provisions, clauses, agreements and decisions). It is important that these alternative phrases will get an interpretation in conformity with the Directive.¹⁰⁰

- *would put persons having a particular sexual orientation at a particular disadvantage*

This element is absent in NLD and UK (see below).

- *compared with other persons*

This element is absent in NLD and in the federal legislation of BEL. In IRL it is specified that the comparison must be with 'other employees'.

At present, the following alternative and additional elements can be found in the national definitions of indirect sexual orientation discrimination:

⁹⁷ See para. 19.5.8.

⁹⁸ See para. 13.2.3.

⁹⁹ The same is true for the draft proposal in the state of Vienna in AUS.

¹⁰⁰ This also applies to a draft bill in the Austrian region of Vienna (see para. 3.2.4).

- *any distinction on grounds of other characteristics or behaviours than those referred to in [the prohibition of direct discrimination], that results in a distinction between persons on grounds of sexual orientation (NLD)*

This is a more restrictive formulation than the one in the Directive. The Dutch definition excludes provisions and practices that do not make any distinction on any ground.¹⁰¹ It seems fair to say that this is not permitted under the Directive.

- *the provision would put persons of the same sexual orientation [as the affected person] at a particular disadvantage and puts [the affected person] at that disadvantage (UK)*

This narrowing down to persons of the same sexual orientation as the complainant, rules out complaints by persons who are unwilling or unable to disclose their homosexual orientation, or who are heterosexual.¹⁰² This is not compatible with the Directive. It should also be noted that where the English version of the Directive uses 'would' in the definition of indirect discrimination, the German and French versions use words equivalent to 'can'.¹⁰³ That is an extra reason not to make this requirement too narrow.

The Directive's justification clause for indirect discrimination also consists of three cumulative elements, each of which can be found in all definitions except those in BEL and the UK:

- *the provision, criterion or practice is objectively justified by a legitimate aim;*
- *the means of achieving that aim are appropriate;*
- *the means of achieving that aim are necessary.*

In two countries the wording of the justification clause is simpler, and thereby too wide:

- *the provision (...) rests on an objective and reasonable justification (BEL)¹⁰⁴*

This omits the Directive's tests of a *legitimate aim* and *necessary means*, and replaces the Directive's test of *appropriateness* with an even vaguer test of *reasonableness*. Given the complex and controversial character of indirect discrimination, the Belgian wording cannot be said to have 'the specificity, precision and clarity' needed for a correct implementation of the Directive.¹⁰⁵

- *the provision (...) can be shown to be a proportionate means of achieving a legitimate aim (UK)*

Here the tests of *objective justification* and of *necessary means* seem to be omitted, although the British Government in its *travaux préparatoires*

¹⁰¹ See para. 13.2.4.

¹⁰² See para. 17.2.4. A similar problem attaches to the definition in a draft bill in the Austrian region of Vienna (see para. 3.2.4).

¹⁰³ In German 'können' and in French 'susceptible d'entraîner'.

¹⁰⁴ The definition of indirect discrimination in most regional legislation in BEL is that of the Directive (see para. 4.2.4).

¹⁰⁵ The same problem attaches to the definition in a draft bill in the Austrian region of Vienna (see para. 3.2.4).

has argued that the latter is being implied by the word ‘*proportionate*’.¹⁰⁶ It is unclear by what word the former is being implied. Therefore, and because of the difference between the concepts of proportionality and necessity in anti-discrimination law,¹⁰⁷ it seems fair to say that the British wording also falls short of the requirements of the Directive.

The **conclusion** must be that in FRA the Directive is not properly implemented because of the absence of a definition of indirect sexual orientation discrimination, and in BEL, NLD and UK because of the imperfect formulation of such a definition in the implementing legislation.¹⁰⁸

See also para. 19.3.3 with respect to indirect sexual orientation discrimination against same-sex partners.

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

Unlike some national legislation, the Directive does not distinguish between sexual and other forms of harassment. The Directive is concerned with what could be called *discriminatory harassment*, whether sexual in nature or not.

In some countries pre-existing prohibitions of ‘sexual harassment’ also (implicitly) cover sexual harassment related to sexual orientation (BEL, FRA, NLD and SWE, and possibly also in AUS,¹⁰⁹ DNK, DEU,¹¹⁰ ITA,¹¹¹ LUX,¹¹² and ESP¹¹³). In a few countries there also is a prohibition of harassment in general (BEL and FIN), or of so-called ‘moral harassment’ (BEL, FRA, ITA, proposed in LUX).

Art. 2(3) requires that harassment related to sexual orientation ‘shall be deemed to be a form of [sexual orientation] discrimination’. This is already so in existing or proposed legislation in AUS,¹¹⁴ BEL,¹¹⁵ DNK, FIN, IRL, ITA, LUX, NLD, PRT, ESP and SWE, but not (yet) in FRA, DEU, GRC and the UK.

While leaving some scope for defining harassment ‘in accordance with the national laws and practice of the Member States’, the Directive defines harassment using the following five elements, which have been incorporated in the enacted or proposed implementing legislation of several countries (AUS, BEL, DNK, FIN, IRL, ITA, LUX, NLD, PRT, ESP, SWE and UK), and some of which can be found in other existing legislation in FRA,¹¹⁶ all this with a few variations:

- *unwanted conduct*

¹⁰⁶ See para. 17.4.1.

¹⁰⁷ See ECtHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98.

¹⁰⁸ The same is true for the draft proposal in the state of Vienna in AUS and the Walloon Region in BEL.

¹⁰⁹ See para. 3.1.7.

¹¹⁰ Only intentional sexual harassment is prohibited in Germany (see para. 8.2.5).

¹¹¹ See para. 11.2.5.

¹¹² See para. 12.2.5.

¹¹³ See para. 15.2.5.

¹¹⁴ Although not so in a proposal in the region of Upper Austria. See para. 3.2.5.

¹¹⁵ Although in the Flemish region, the Decree of 8 May 2002, confusingly, considers harassment as a violation of the principle of equal treatment that is distinct from direct or indirect discrimination. See para. 4.2.5

¹¹⁶ But not yet in DEU and GRC.

In FRA the conduct needs to consist of '*agissements répétés*' (repeated practices), which means that a single act of unwanted conduct cannot qualify as prohibited harassment.¹¹⁷ The definitions in NLD, FIN, SWE and Gibraltar leave out the limitation and clarification implied by the word 'unwanted', which seems acceptable in light of the Directive.

- *related to any of the grounds referred to in art. 1 of the Directive*

Instead of 'related to', the UK legislation uses the somewhat stricter phrase 'on grounds of'. A relationship to a particular ground is so far not required in FRA.

- *with the purpose or effect*

The definitions in AUS¹¹⁸ and SWE are a little more restrictive, by always requiring effect. In these countries 'purpose' without 'effect' is not enough.

- *of violating the dignity of a person*

In FRA the purpose or effect must either be affecting the rights and dignity of the victim, or his or her physical or mental health, or his or her professional future.¹¹⁹

- *and of creating an intimidating, hostile, degrading, humiliating or offensive environment*

This is not required in FRA, SWE, PRT and the UK.¹²⁰ In the latter two the requirement of creating an intimidating etc. environment merely serves as an alternative to the requirement of violating the dignity of a person ('or' in stead of 'and').

In **conclusion** it can be said that six member states are falling short of the Directive's requirement to prohibit harassment related to sexual orientation as a *form of discrimination* (FRA, DEU, GRC and UK, and AUS and BEL at regional level). Furthermore, four member states have adopted a definition of harassment that in some respects is slightly more limited than that of the Directive (AUS, FRA, SWE and UK), but it remains to be seen, whether the Court of Justice of the EC would find these to be acceptable under the second sentence of art. 2(3) of the Directive: 'in accordance with national laws and practice'.

19.2.6 *Instruction to discriminate (art. 2(4) Directive)*

An explicit, general prohibition of the instruction to discriminate on grounds of sexual orientation in the field of employment has been enacted in AUS, BEL, DNK, FIN, IRL and ITA, NLD and ESP and proposed in LUX. In PRT there is a more limited prohibition, restricted to instructions 'with the purpose of disadvantaging' someone on grounds of sexual orientation; it seems that this phrase would not cover instructing someone to do something that amounts to indirect discrimination. In SWE there are several specific prohibitions like that,

¹¹⁷ See para. 7.2.5.

¹¹⁸ In the Federal Bills and in a proposal in the region of Vienna. See para. 3.2.5.

¹¹⁹ See para. 7.2.5.

¹²⁰ Nor in a proposal in the region of Vienna. See para. 3.2.5.

but because they are limited to certain situations, instructors and instructees, several forms of instructions are not covered by the prohibition.¹²¹

A prohibition on instructions to discriminate is absent in the implementing legislation of FRA and the UK (with the exception of Gibraltar).

The **conclusion** must be, that the legislation of FRA, PRT, SWE and UK is not in conformity with art. 2(4) of the Directive.¹²²

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

According to the opening words of art. 3(1) of the Directive, the prohibition(s) of sexual orientation discrimination must cover not only all private sectors, but also all public sectors.¹²³ Only the proposed legislation in LUX does not cover public sector employment.¹²⁴

It follows from the opening words of art. 3(1), and also from the full title of the Directive which refers to 'employment and occupation', that sectors of self-employment also need to be covered. This is made explicit in parts (a) and (d) of art. 3(1), but the very general wording of parts (b) and (c) also appear to include self-employment (for example art. 3(1)(c) talks about 'employment and working conditions', see below).

Self-employment is explicitly mentioned (though not always fully covered, see below) in AUS, BEL, DNK, FIN, IRL, ITA, ESP, SWE,¹²⁵ NLD (using the somewhat restrictive term 'liberal professions'),¹²⁶ the UK (only specific provisions with respect to the legal professions, to partners and prospective partners in firms, and to persons applying for or holding qualifications for a particular profession or trade).¹²⁷ In FRA self-employment appears to be partly covered by the general prohibition of discriminatory hindrance of any economic activity. Whether self-employment will be covered by the proposal in LUX is uncertain. Self-employment is not covered in PRT.

From the text of the Directive, it does not become very clear what other forms of 'occupation' than self-employment can be distinguished. It seems reasonable to assume that at least the following forms of occupation should also be covered by the prohibition of sexual orientation discrimination:

- compulsory military or alternative service (excluded, for example, in FIN, SWE and AUS);
- contract workers (persons employed by a job agency or by any other employer than the organisation where and for which they are actually

¹²¹ See para. 16.2.6.

¹²² Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹²³ Including public bodies.

¹²⁴ Legislation covering the regional and local public sector (and some other sectors such as agriculture) has not yet been introduced in all states of AUS. Aspects of regional legislation in AUS will not be discussed in this sub-paragraph.

¹²⁵ Since the entry into force of the 2003 Discrimination Prohibition Act; see para. 16.2.7.

¹²⁶ See para. 13.2.7.

¹²⁷ See para. 17.2.7.

working); contract workers are explicitly covered in the UK,¹²⁸ but not fully for example in SWE;

- job agencies (only explicitly covered in AUS, ITA, NLD, ESP, SWE and UK).

The words used in the versions in English (*occupation*), French (*travail*) of art. 3(1)(a) suggest that access to (employment-like) voluntary work should also be covered, but the word used in the version in German (*Erwerbstätigkeit*) suggests otherwise. The very general words used in the title of the Directive, and in the opening of art. 3(1) and in art. 3(1)(b) and 3(1)(c) seem to imply that at least the employment and working conditions in voluntary work, and the possibilities for training and retraining in that sector, should be covered. If that interpretation is right, the legislation of several countries (including FRA and SWE where voluntary work is not covered) would fall short of the requirements of the Directive.

Art. 3(1) also contains a long list of aspects of employment and occupation that need to be covered by the prohibition of sexual orientation discrimination (see the five bullets below). Several countries explicitly cover many aspects of this list. However, in some countries certain aspects are not, or not fully, or not explicitly mentioned. In the 13 countries where explicit provisions on sexual orientation discrimination in employment are in force or proposed, the situation is problematic with respect to the following aspects:

- *conditions for access to employment, self-employment and occupation, including promotion* (art. 3(1)(a))¹²⁹

Access to employment is covered in all thirteen countries. The important aspect of promotion is also explicitly covered in all of them, as is required for a 'specific, precise and clear' implementation of the Directive.

Access to self-employment is not covered in PRT (and perhaps not in LUX). In the UK only access to self-employment in certain professions is covered (see above), and in the NLD only access to a 'liberal profession'. Such limited interpretations of the Directive's term 'self-employment' may derive from the mistaken assumption that most other people who are (hoping to become) self-employed (such as freelance service-providers, journalists, artists, etc.) are not in a position where they can be discriminated in relation to conditions for access to that self-employment. At least in the UK more general terms would be required to cover self-employment.

- *access to all types and to all levels of vocational guidance* (art. 3(1)(b))

Vocational guidance does not seem to be covered in FRA and ESP. The federal legislation in AUS only covers vocational guidance with respect to private employment.

- *access to all types and to all levels of vocational training* (art. 3(1)(b))¹³⁰

In BEL vocational training is not yet covered in the Brussels region.¹³¹ The federal legislation in AUS only covers vocational training with respect to private

¹²⁸ See para. 17.2.7.

¹²⁹ Including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy.

¹³⁰ Including practical work experience, advanced vocational training and retraining.

employment. In ESP only professional training for workers is covered, but it is not clear whether this would also cover people hoping to be employed. In the UK vocational training provided by 'a school' is excluded (although training provided by a university or by an institution of further or higher education is covered); whether this is acceptable (possibly because of the opening words of art. 3(1) of the Directive, 'within the limits of the areas of competence conferred on the Community'),¹³² remains to be seen.

- *employment and working conditions including dismissal and pay* (art. 3(1)(c))

Most countries mention both *employment conditions* and *working conditions*. In FRA and SWE, however, working conditions are not mentioned separately from pay and employment conditions. This seems to be incompatible with the Directive, because the terms used do not seem to clearly cover both the *formal conditions of employment* (such as pay),¹³³ and the *actual working conditions* (in the sense of working environment, which would include a work place without harassment). At the very least the Directive requires that the terms used are to be interpreted in such a way as to also cover actual conditions at the work place. In the UK this is accomplished by referring not only to discrimination with respect to 'terms of employment', but also to 'any other benefit' and to 'any other detriment'.

The Directive considers *dismissal* to be a 'condition of employment'. That may seem a curious choice of words. Therefore, it seems reasonable to assume that for a 'specific, precise and clear' implementation, *dismissal* must be mentioned explicitly. This is not the case in FIN and ESP, although it is most probably implied. Whether occupational pension schemes, which are part of pay,¹³⁴ are covered in ESP is unclear.

Furthermore, it should be noted that the legislation in AUS, FRA, ITA, PRT, ESP, SWE and UK does not (seem to) cover the working conditions of the self-employed, as required by the Directive (see above). Whether these are covered is neither specified nor excluded in BEL, DNK, FIN, LUX and NLD.

- *membership of, and involvement in, an organisation of workers, employers or professionals* (art. 3(1)(d))¹³⁵

In the UK 'involvement' is not explicitly mentioned, although discrimination in relation to involvement may be covered by the prohibition for such organisations of 'any other detriment'.¹³⁶ It can be doubted that this is explicit enough.

The **conclusion** must be that the material scope of pre-existing or implementing legislation appears to be too limited in almost all of the thirteen

¹³¹ See para. 4.1.3 and 4.2.7.

¹³² See para. 17.2.7.

¹³³ See also the Appendix to this report, containing a thematic study on *Discriminatory partner benefits*.

¹³⁴ See para. 2.2.7.

¹³⁵ Including the benefits provided for by such organisations.

¹³⁶ See para. 17.2.7.

member states where a legislative text on sexual orientation discrimination is available:¹³⁷

- Public sector employment is not covered in LUX.
- Some other forms of occupation than employment and self-employment are not covered in AUS, FIN and SWE (and possibly in other countries).
- Access to employment is covered in all countries, but access to self-employment is not or not fully covered in PRT and UK (and possibly in LUX and NLD).
- Vocational guidance is not or not fully covered in AUS, FRA and ESP.
- Vocational training is not or not fully covered in AUS and BEL (and possibly in ESP and UK).
- Dismissal is not explicitly covered in FIN and ESP.
- Occupational pension schemes may not be covered in ESP.
- Actual working conditions of employees are not covered in FRA and SWE.
- Actual working conditions of those in self-employment are not covered in AUS, FRA, ITA, PRT, ESP, SWE and UK (and possibly in other countries).
- Membership in organisations of workers, employers or professionals is covered in all countries, but involvement in such organisations may not be covered in the UK.

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

According to its art. 3(1), the Directive applies 'to all persons, as regards both the public and private sectors, including public bodies, in relation to' various aspects of employment, self-employment and occupation. Obviously, the reference to all persons includes both natural and legal persons.¹³⁸ This means that the Directive at the very least applies to all employers (who can be either natural or legal persons).¹³⁹ As indicated above, only the proposed legislation in LUX does not cover public sector employment.¹⁴⁰

The Directive does not specify what other persons than employers are covered by the words 'all persons'. It seems fair to take these words literally, and assume that indeed any person (including job agencies, vocational trainers, bosses, managers and other employees, students and other clients, freelancers, trade organisations, etc.) is covered,¹⁴¹ as long as they do things 'in relation to' any of the aspects of the material scope listed in art. 3(1). For

¹³⁷ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹³⁸ See para. 2.2.8.

¹³⁹ Some employers may be excluded because of the words 'within the limits of the areas of competence conferred on the Community' at the beginning of art.3(1). This may mean, for example, that employment at (some?) international organisations falls outside the field of application of the Directive. See para. 13.4.7 for an example of this.

¹⁴⁰ Legislation covering the regional and local public sector (and some other sectors such as agriculture) has not yet been introduced in all regions of AUS. Aspects of regional legislation in AUS will not be discussed in this sub-paragraph.

¹⁴¹ See para. 2.2.8.

example, the actual working conditions of many people are dependent on the (non-discriminatory) behaviour of co-workers, clients and others. Of course their employer will have an important responsibility for their working conditions in general, and for preventing harassment in particular, but there is nothing in the Directive that suggests that harassment and other discriminatory behaviour of co-workers, clients and others should not be prohibited.

It is less obvious, however, whether the member states in their implementing legislation will have to explicitly cover all these categories of persons not explicitly listed in the Directive. Such legal clarity would certainly be helpful to those affected by the prohibition of discrimination, and those responsible for enforcing it. But it would be unreasonable to expect national legislation to be that much clearer than the Directive. On the other hand, if a member state chooses to limit its implementation to certain categories of persons, or to exclude certain categories from its anti-discrimination legislation, that cannot be considered proper implementation of the Directive. It is with this in mind, that the following brief assessment is being made of existing and proposed national legislation (with the exception of penal laws, because the various traditions in the member states set limits to the applicability of penal legislation).

No restrictions of the personal scope of applicability were reported from AUS (at national level), BEL, FRA, ITA and ESP. Of these, only the legislation in AUS explicitly prohibits harassment by a co-worker or by another third party. This good practice deserves to be followed in other member states.

In NLD the anti-discrimination provisions do not restrict the personal scope of the legislation, although the Government in the *travaux préparatoires* has suggested that the General Equal Treatment Act does not apply between workers. The legislation in FIN and PRT probably applies to both employers and employees, but probably not to clients. In the UK employees and other third parties may be bound by the implementing legislation, but only if their actions amount to aiding an employer to discriminate. The legislation in DNK and IRL appears to apply only to employers (and their representatives). With a few exceptions, the same is true for the legislation in SWE.

The **conclusion** must be that probably at least DNK, IRL, LUX, SWE and UK,¹⁴² and possibly some other member states, fall short of the minimum requirements of the Directive with respect to personal scope.¹⁴³ Further clarification of both the European and the national rules on this point is urgently needed.

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

In this paragraph DEU and GRC are not discussed, because no final proposals for implementation are available yet. Because of the unavailability of final texts in most states of AUS, these are not discussed either.

¹⁴² And AUS at regional level.

¹⁴³ Apart from DEU and GRC where so far no final proposal for implementation is available.

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

The concept of sexual orientation used by the Directive, and the various words used in the member states to express this concept, have been discussed in para. 19.2.2 above. There it already appeared that the concept of sexual orientation is not limited to *preference* for sex/eroticism and other forms of intimacy with persons of the same sex, or of the opposite sex, or of either sex. It extends to sexual/erotic and other intimate *behaviour* with persons of the same sex, or of the opposite sex, or of either sex. This means that according to the Directive the national legislation must cover not only discrimination between individuals with homosexual or bisexual preferences and individuals with heterosexual preferences, but also discrimination between people who engage in homosexual behaviour and people who engage in heterosexual behaviour. This interpretation of the Directive is strongly confirmed by the case law of the European Court of Human Rights, which not only has condemned discrimination against homosexual preference,¹⁴⁴ but also discrimination against homosexual conduct,¹⁴⁵ and against same-sex relationships.¹⁴⁶ The Court of Justice of the EC has also classified discrimination against same-sex relationships as a form of sexual orientation discrimination.¹⁴⁷ Without such an interpretation the prohibition of sexual orientation discrimination would almost be meaningless, because it would not provide lesbian, gay and bisexual persons with the same freedom as heterosexuals to live according to their sexual preferences.

In each of the chapters about the thirteen member states with some existing or proposed legislation on sexual orientation discrimination, it has been reported that it is to be expected that the national courts will indeed consider discrimination between homosexual and heterosexual behaviour as covered by the prohibition of sexual orientation discrimination (AUS, BEL, DNK, FIN, IRL, ITA, LUX, NLD, PRT, ESP, SWE and UK). In SWE and NLD this is even made explicit in the *travaux préparatoires*. In FIN and ESP there are court decisions recognising that sexual orientation discrimination takes place, when a restaurant or disco, while allowing different-sex kissing, does not allow same-sex kissing on its premises.¹⁴⁸ In IRL the same principle has been applied to same-sex kissing at work.¹⁴⁹ It follows from the Directive that employees in all member states should not be discriminated against because of the homosexual nature of any affection they are showing at work or outside work. This should apply to all sectors of employment.¹⁵⁰

The Directive's definition of direct sexual orientation discrimination is not limited to discrimination because of the actual sexual orientation of the victim. On the contrary, for some treatment to qualify as direct sexual orientation

¹⁴⁴ ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96.

¹⁴⁵ ECtHR 9 January 2003 *S.L. v. Austria*, appl. 45330/99; *L. & V. v. Austria*, appl. 39392/98 and 39829/98; 10 February 2004, *B.B. v. UK*, appl. 53760/00.

¹⁴⁶ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98.

¹⁴⁷ ECJ 17 February 1998, C-249/96, *Grant v. South West Trains*, para. 47, ECR 1998, I-621.

¹⁴⁸ See para. 6.3.1 and 15.3.1.

¹⁴⁹ See para. 10.3.1.

¹⁵⁰ In ESP the Statute on the Disciplinary Regime for the armed forces talks of 'sexual relations that offend military dignity' (see para. 15.3.1). It would be contrary to the Directive to distinguish between homosexual relations and heterosexual relations in the application of this rule.

discrimination, it is sufficient that the treatment is based on ‘grounds of sexual orientation’. The means that discrimination based on a mistaken assumption about the victim’s sexual orientation must be covered by the national prohibition of discrimination. This follows from the absence of possessive pronouns before the words ‘sexual orientation’ in art. 1 of the Directive.¹⁵¹

Nevertheless, the wording of the prohibition of sexual orientation discrimination in FRA (with a possessive pronoun in front of ‘sexual orientation’) seems to imply that only discrimination on grounds of the actual sexual orientation of the victim is covered.¹⁵² This is not compatible with the Directive. In the other member states the words used are capable of covering discrimination based on a mistaken assumption, most explicitly so in Sweden (where a formulation which seemed to refer to the victims own sexual orientation was replaced in 2003 by ‘discrimination which relates to sexual orientation’¹⁵³) and in IRL (where it is specified that situations where a sexual orientation ‘is imputed to the person concerned’ are also covered¹⁵⁴). That discrimination on the basis of a mistaken assumption is indeed covered, has been made explicit in the *travaux préparatoires* in the UK,¹⁵⁵ and also in legislation covering sexual orientation discrimination outside the field of employment in IRL.

With respect to the provisions of FRA and LUX on racial discrimination, it has been specified that both real and assumed ‘race’ is covered, but not with respect to the provisions on ‘*orientation sexuelle*’. In the NLD, in the context of discrimination on grounds of political opinion, the Dutch Equal Treatment Commission has drawn a parallel with art. 1 of the Convention on the Status of Refugees which (at least according to the case law of the Dutch Supreme Court) is also applicable to persecution of someone because of a wrongly ascribed political opinion.¹⁵⁶

If a different approach were taken with respect to sexual orientation, any victim of alleged sexual orientation discrimination would be forced to state (or even prove) his or her own sexual orientation, and that would clash with the constitutionally and internationally guaranteed respect for private life.

In **conclusion** it can be said that the existing or proposed legislation of all thirteen member states seems to cover discrimination on grounds of a person’s heterosexual, homosexual or bisexual behaviour,¹⁵⁷ and that the legislation in most of these member states seems to cover discrimination on grounds of a mistaken assumption about someone’s sexual orientation. Only FRA (by using a possessive pronoun in front of the words ‘sexual orientation’) has so far failed to include this important element, required by the Directive.

¹⁵¹ See para. 2.3.1.

¹⁵² See para. 19.2.2 above.

¹⁵³ See para. 16.3.1.

¹⁵⁴ See the Addendum at the start of chapter 10.

¹⁵⁵ See para. 17.3.1.

¹⁵⁶ See para. 13.3.1.

¹⁵⁷ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

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

It follows from the very general words used in articles 1 and 2 of the Directive (see para. 19.3.1 above) that discrimination on grounds of being open about one's sexual orientation must be seen as a form of sexual orientation discrimination. Not to do so would leave a large part of sexual orientation discrimination unaddressed. One of the main purposes of the prohibition of sexual orientation discrimination is, after all, to give lesbian women, gay men and bisexual men and women, a chance to be as open as heterosexuals about their sexual orientation. The 'right to come out' can also be derived from the freedom of expression, as guaranteed in constitutions and treaties.

It is reported from all thirteen member states with some existing or proposed legislation on sexual orientation discrimination, that discrimination on grounds of being open about one's sexual orientation would most probably be considered a form of sexual orientation discrimination.

The **conclusion** can be that there is little doubt that discrimination because of someone's coming out will be covered in these thirteen member states.¹⁵⁸

19.3.3 *Discrimination between same-sex partners and different-sex partners*

Especially in the field of pay and other employment conditions (such as leave to be with family members, survivor's pensions, and other benefits for an employee's partner or for the children of that partner), discrimination between same-sex and different-sex partners is one of the most frequent forms of sexual orientation discrimination.¹⁵⁹ Such discrimination is often explicitly provided for in collective agreements, or even in legislation.¹⁶⁰ The impact of such discrimination on the employee and his or her family is often considerable (financially or otherwise). Because of the growing trend in most member states of legally recognising same-sex couples (by opening up marriage, by introducing registered partnership, and/or by recognising *de facto* cohabitants), these are also issues which get a great deal of attention in the public debate.

It would not be surprising if the first sexual orientation cases in employment to reach the Court of Justice of the EC under the Directive, would be about this form of discrimination.¹⁶¹

Often, but not always, this form of discrimination is linked to marital status, because many employment conditions only apply to married employees, and in most member states same-sex couples are not allowed to marry.¹⁶² Marital or civil status is not a prohibited ground of discrimination in the Directive; but in its non-binding recital 22 it is stated that the 'Directive is without prejudice to national laws on marital status and the benefits dependent thereon'. The question is, what the meaning of this recital will be for the interpretation of the

¹⁵⁸ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹⁵⁹ See for example para. 13.3.3 and 15.3.3.

¹⁶⁰ See for example para. 6.3.3, 10.3.3, 11.3.3 and 15.3.3. See also para. 19.6 below.

¹⁶¹ In fact, the only sexual orientation cases to reach the ECJ so far, are both about facilities for partners: ECJ 17 February 1998, C-249/96, *Grant v. South West Trains*, ECR 1998, I-621; ECJ 31 May 2001, C-122/99 P and C-125/99 P, *D. & Sweden v. Council*, ECR 2001, I-4319.

¹⁶² The two member states that opened up marriage are BEL (2003) and NLD (2001).

Directive. It seems reasonable to assume that recital 22 can only play a role with respect to *indirect* sexual orientation discrimination.¹⁶³ This is so because only in the case of alleged *indirect* discrimination the Directive leaves room for objective justification; the statement of recital 22 can be one of the factors to assess, in the words of art. 2(2)(b)(i), whether ‘an apparently neutral provision, criterion or practice’ serves a ‘legitimate aim’ and whether the means of achieving that aim are ‘appropriate and necessary’.¹⁶⁴

Apart from the even more complex situations where an employer is confronted with an employee who in another country has obtained a status (for example as registered partner) that is not available in the country of the employer, or where an employer discriminates by not providing certain benefits to the children of the same-sex partner of an employee, it seems useful to distinguish *five types of situations* in which same-sex partners may be discriminated. Not all situation types can be found in all member states, because the latter differ as to the type of legislation, if any, enacted to legally recognise same-sex couples.¹⁶⁵

- *Discrimination between same-sex cohabitants and different-sex cohabitants*

This situation has nothing to do with marital status, and is therefore not influenced by recital 22. The situation can arise in every member state.¹⁶⁶ There is abundant European and international case law to confirm that this form is indeed direct sexual orientation discrimination.¹⁶⁷ In at least nine member states it is considered as such (AUS, BEL, DNK, FIN, IRL, NLD, PRT, SWE and the UK). In some others the same conclusion is not certain (FRA, ITA, LUX and ESP), although the Directive clearly requires it.

- *Discrimination between same-sex registered partners and different-sex registered partners*

This discrimination is not based on marital status either, but only on sexual orientation. The situation can only arise in countries that have introduced a form of registered partnership that is open both to same-sex and different-sex couples (i.e. in BEL, FRA, LUX, NLD and parts of ESP). In BEL and NLD this would certainly be considered as a form of direct sexual orientation discrimination; in FRA, LUX and ESP this is not certain, although the Directive clearly requires it.

- *Discrimination between same-sex married spouses and different-sex married spouses*

This situation can only arise in the two countries that have opened up marriage to same-sex couples (BEL and NLD). In both it would be considered as a form of direct sexual orientation discrimination.

¹⁶³ See para. 2.3.3.

¹⁶⁴ See para. 2.3.3.

¹⁶⁵ Marriage has been opened up to same-sex couples in BEL and NLD, registered partnership for same-sex couples has been introduced in DNK, SWE, FIN and DEU, and also for different-sex couples in BEL, FRA and NLD. Several member states have recognised *de facto* same-sex cohabitants for a smaller or larger number of purposes.

¹⁶⁶ See also the Appendix to this report, containing a thematic study on *Discriminatory partner benefits*.

¹⁶⁷ ECJ 17 February 1998, C-249/96, *Grant v. South West Trains*, ECR 1998, I-621; ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98; UN Human Rights Committee, 29 August 2003, *Young v. Australia*, CCPR/C/78/D/941/2000.

- *Discrimination between same-sex cohabitants and different-sex married spouses*

In countries where marriage has not been opened up to same-sex couples, it can be argued that this type of discrimination is a form of *indirect* sexual orientation discrimination, because providing a benefit only to married spouses would clearly put same-sex partners at a particular disadvantage.¹⁶⁸ The question would then be whether the use of marital status as a 'neutral' criterion is objectively justified under art. 2(2)(b)(i) of the Directive (also in light of its recital 22). In IRL, ITA and the UK the national courts are prevented from making this assessment, because the anti-discrimination legislation contains an explicit exception for benefits dependent on marital status.¹⁶⁹ Arguably, this is not allowed under European law, because a proper assessment of the necessity and appropriateness of the means of achieving a legitimate aim can only be made in light of all the circumstances of the concrete case (see para. 2.3.3 and 17.3.3).

Whether the argument (that this type of discrimination is a form of *indirect* sexual orientation discrimination) can successfully be made, is uncertain in AUS, FRA, LUX, PRT and ESP. The same applies to DNK, FIN and SWE, but here the situation would only arise with respect to benefits that are not being made available to *registered* same-sex partners either (because same-sex partners can choose to register their partnership).

In BEL and NLD the situation would not arise as a form of indirect sexual orientation discrimination, because same-sex couples can marry. In any event, both countries prohibit employment discrimination on grounds of civil status, too (which is also the case in PRT, but it remains to be seen whether this will lead the courts to rule against discrimination between same-sex cohabitants and different-sex married spouses).¹⁷⁰

- *Discrimination between same-sex registered partners and different-sex married spouses*

As a potential form of indirect sexual orientation discrimination, this situation can only arise in countries where marriage is not open to same-sex couples, but registered partnership is (DNK, DEU, FIN, FRA, LUX, SWE, parts of ESP, and probably soon in the UK). In SWE it would certainly be considered as a form of indirect sexual orientation discrimination (and possibly even as a form of *direct* sexual orientation discrimination, because the status of registered partner is essentially equivalent to the status of being married).¹⁷¹ Whether this would also be the case in DNK, DEU, FIN, FRA, LUX, ESP and the UK seems less certain, although it follows from the Directive that this situation must at least be assessed as a form of indirect discrimination. In that context recital 22 may make it possible to conclude that, for example, the aim of protecting marriage is

¹⁶⁸ Drawing an analogy with the classification of pregnancy discrimination as a form of *direct* sex discrimination, it can also be argued that this is a form of *direct* sexual orientation discrimination (see para. 2.3.3 and 17.3.3). However, the Directive probably sees it as *indirect* discrimination, otherwise recital 22 would be in full contradiction with the operative part of the Directive.

¹⁶⁹ See para. 10.3.3, 11.3.3 and 17.3.3; a similar statement can be found in the *travaux préparatoires* in AUS (see para. 3.3.3). See also ECJ, 7 January 2004, Case C-117/01, *KB v. National Health Service Pensions Agency*, in particular para. 28 (about this judgement, see also para. 2.1.9 and 17.3.3).

¹⁷⁰ See para. 4.3.3, 13.3.3 and 14.3.3.

¹⁷¹ See para. 16.3.3.

a legitimate one, but it will be extremely difficult for an employer to demonstrate that it is really appropriate and necessary (in the sense of art. 2(2)(b) of the Directive) to apply different employment conditions for married employees than for employees in a registered partnership.

The **conclusion** must be that with respect to *direct* discrimination between different-sex and same-sex partners it is not certain that it will be covered by the prohibition of sexual orientation discrimination in FRA, ITA, LUX and ESP, although the Directive clearly requires that.¹⁷² With respect to the Directive's requirement to also prohibit *indirect* discrimination against same-sex partners three member states are probably falling short (IRL, ITA and the UK).¹⁷³ The same may be true for AUS, DNK, FIN, FRA, LUX and ESP, but that depends on the interpretation that will be given to their implementing legislation.

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

Because the Directive does not make use of possessive pronouns in front of the term 'sexual orientation', discrimination on the ground of someone else's sexual orientation must also be prohibited. This requirement does not seem to be met in those countries that nevertheless use or imply possessive pronouns in their national legislation (FRA and, with respect to indirect discrimination only, the UK).¹⁷⁴ In other countries discrimination on grounds of a person's association with an LGB individual seems to be covered by the legislation enacted or proposed (AUS, DNK, IRL, ITA, LUX, NLD, PRT, SWE, BEL at national level only, and, with respect to direct discrimination only, the UK; and possibly also in FIN, where at least it would be covered as discrimination based on 'another reason related to his or her person').

For several countries the conclusion that also discrimination on grounds of someone's association with an LGB event or organisation is to be considered as a form of sexual orientation discrimination, is supported with arguments relating to the freedoms of assembly and associations (BEL, DNK, ITA, LUX and PRT).

The **conclusion** can be that at least FRA and UK, and possibly BEL and FIN have failed to fully extend the prohibition of sexual orientation discrimination to discrimination on grounds of the sexual orientation of someone else.¹⁷⁵

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

Because the Directive applies to 'persons' without any limitation, it seems fair to require that sexual orientation discrimination against legal persons, groups (and even against events and information) is also prohibited.¹⁷⁶ Arguments relating to

¹⁷² Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹⁷³ Idem.

¹⁷⁴ See para. 19.2.2 and 19.2.3.

¹⁷⁵ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹⁷⁶ See para. 2.3.5.

the freedoms of association, assembly and expression would support such an interpretation. However, this requirement is not yet met in those countries that use or imply possessive pronouns (FRA and, with respect to indirect discrimination only, the UK),¹⁷⁷ although in FRA there is some criminal law protection against discrimination against legal persons because of the sexual orientation of their members. Some other countries, only protect natural persons against sexual orientation discrimination (DNK, FIN, IRL and SWE). Employment discrimination against LGB organisations etc. so far only seems to be covered in the legislation enacted or proposed in AUS, BEL, LUX, NLD and possibly in FRA, IRL, ITA, PRT and ESP.

The **conclusion** can be that DNK, FIN and SWE (and possibly FRA, IRL, ITA, PRT and ESP) have failed to sufficiently extend the prohibition of sexual orientation discrimination to discrimination against LGB organisations and groups.¹⁷⁸

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

In all countries it would almost always be considered irrelevant and/or discriminatory and therefore unlawful to ask a job-applicant about his or her sexual orientation.¹⁷⁹ In some countries this is reinforced by legislative protection of the privacy of (future) employees (BEL, FRA, FIN, ITA, LUX, PRT and ESP),¹⁸⁰ or even by an explicit prohibition in the Act on Discrimination 'to request, make inquiries about, or receive and use information's about' the sexual orientation of a job-applicant or employee (DNK). Consequently, in all countries it is considered unlawful to deny employment to someone who has refused to give a (correct) answer to such an unlawful question.

Relying on the parallel with situations in which a job-applicant did not inform her prospective employer about her pregnancy (see para. 2.3.6), it seems fair to assume that the Directive requires the classification as discrimination of any denial of employment to someone on the ground that he or she refused to give a (correct) answer to a question about sexual orientation. At least in some countries such denial of employment would most probably be considered a breach of the prohibition of sexual orientation discrimination (AUS, DNK, IRL, NLD, SWE and the UK). It is to be regretted that this does not seem so certain in other member states, since normally only the classification of this sort of situations as discrimination would trigger a shift in the burden of proof, and other additional rules on enforcement (see para. 19.5.8 below).

In **conclusion** it can be said that it would be desirable that other member states follow the example of DNK in specifically classifying the asking of questions about sexual orientation in the context of a job application as a form of sexual orientation discrimination.

¹⁷⁷ See para. 19.2.2 and 19.2.3.

¹⁷⁸ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹⁷⁹ For a possible exception, see para. 17.3.6.

¹⁸⁰ This would come on top of the privacy protection deriving from the European Convention on Human Rights (see para. 2.3.6).

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

Because several member states still have (GRC, IRL and PRT), or until recently had (AUS, FIN, DEU and UK), penal sanctions for homosexual sexual offences without heterosexual equivalents,¹⁸¹ it is quite possible that someone with a previous conviction for such an offence, encounters difficulties from employers who don't want to employ persons with a criminal record. In a case like that it can be argued that the employer applies an apparently neutral criterion that puts homosexuals at a particular disadvantage. In some countries (for example in AUS, NLD and the UK) this would most probably not be considered as objectively justified, but in other countries that is less certain (for example in FIN and PRT).

19.3.8 *Harassment*

For the various existing and proposed national prohibitions and definitions of sexual orientation harassment, see para. 19.2.5 above. The question here is whether certain common forms of anti-homosexual behaviour would indeed be considered as harassment.

Sexual forms of harassment (such as persistent unwelcome sexual advances), would in most countries often be considered as *sexual orientation* harassment, but only if the harassment can be said to be related to grounds of sexual orientation. If the latter element cannot be established, it might still count as *sexual* harassment.

Anti-homosexual verbal abuse may also be considered as a form of sexual orientation harassment, unless it is not deemed serious enough to meet the test of 'violating the dignity of a person' and of 'creating an intimidating, hostile, degrading, humiliating or offensive environment' (or whatever words are used in the national legislation). Much will depend on the appreciation by the various courts and other law enforcers. In FRA and PRT it seems less certain (than for example in FIN, ITA and NLD) that the courts will be prepared to occasionally consider these tests met.

In rare instances, the (non-abusive) expression of anti-homosexual opinions may also be such as to meet the tests of the definition of harassment, but even then a balancing act with the demands of the freedom of expression will have to be made (as is being signalled in the chapters on FIN, ITA, LUX, NLD, SWE and the UK).

In several countries (including FIN, ITA, NLD, SWE and the UK) revealing someone's sexual orientation against her or his will, may be recognised as another possible form of sexual orientation harassment. It may also be considered as a breach of privacy (for example in NLD, PRT and ESP), or as 'subjecting (someone) to any other detriment' (UK).

In **conclusion** it could be said that much will depend on the attitude of courts towards forms of anti-homosexual behaviour that might be considered as forms of sexual orientation harassment. A useful feature of the UK legislation is the

¹⁸¹ See para. 19.1.9.

prohibition (alongside that of discrimination and harassment) of subjecting someone to ‘any other detriment’.

19.4 Exceptions to the prohibition of discrimination

In this paragraph DEU and GRC are not discussed, because no final proposals for implementation are available yet. Because of the unavailability of final texts in most states or AUS, these are not discussed either.

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

The prohibition of indirect discrimination as defined in art. 2(2)(b) does not affect all particular disadvantages for persons of a particular sexual orientation that are caused by an apparently neutral provision, criterion or practice. Not prohibited are disadvantages caused by a provision, criterion or practice that is objectively justified by a legitimate aim, provided that the means of achieving that aim are appropriate and necessary. Although these conditions under which justification is allowed are clearly stated in art. 2(2)(b)(i) of the Directive, the definitions used in two member states vary considerably from that test: BEL and UK. In FRA there is no legislative definition of indirect discrimination at all. The justification test is in line with the Directive in the existing or proposed legislation of AUS (at national level), DNK, FIN, IRL, ITA, LUX, NLD, PRT, ESP and SWE.¹⁸²

The main form of indirect sexual orientation discrimination is caused by the use of marital status as a criterion. The legislation of AUS, IRL, ITA and UK seeks to exempt that form of indirect discrimination from the tests of objective justification, legitimate aim and appropriate and necessary means. In IRL, ITA and the UK this is done by an explicit exception for benefits dependent on marital status; in AUS a similar statement can be found in the *travaux préparatoires*.¹⁸³ Probably this is not in conformity with the Directive.¹⁸⁴

The **conclusion** must be that the laws of BEL, FRA and the UK, and probably those in IRL and ITA, do not correctly implement this part of the Directive.¹⁸⁵

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

The implementing legislation in the UK contains an exception for acts justified by the purpose of safeguarding national security, and with respect to Northern Ireland also for protecting public safety and public order.¹⁸⁶ The legislation in ITA contains such an exception for existing provisions concerning public security, public order, crime prevention and health protection. In both ITA and the UK, the Directive’s requirement that the measures must be ‘necessary in a

¹⁸² See para. 19.2.4 above.

¹⁸³ See para. 19.3.3 above.

¹⁸⁴ See para. 19.3.3 and 2.3.3.

¹⁸⁵ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

¹⁸⁶ In Gibraltar the exception is even wider: ‘any statutory provision or rule of law relating to public security, the maintenance of public order, the prevention of criminal offences, the protections of health or the protection of the rights and freedoms of others’ is exempted (emphasis added); see para. 17.4.2.

democratic society' is not explicitly incorporated in the exception clause. Furthermore, these provisions fail to precisely indicate the national measures that take precedence over the prohibition of discrimination.

Perhaps the same criticisms can be made of the legislation in BEL,¹⁸⁷ where a general exception exists for fundamental rights and freedoms as guaranteed by the Belgian Constitution and international treaties. On the other hand, the exception in BEL is limited to certain categories of *fundamental* rights. In that sense the Belgian exception may almost be redundant, because treaties such as the European Convention on Human Rights anyhow take precedence over national legislation (and indirectly over the Directive).

More specific exceptions can be found in IRL (for employment in a private household; and for job applicants and employees who, according to 'reliable information', engage, or have 'a propensity to engage, in any form of sexual behaviour which is unlawful'),¹⁸⁸ ITA (for employment in 'care, assistance or education of minors' of persons who have been 'condemned for offences related to sexual freedom of minors or child pornography'),¹⁸⁹ in NLD (for political organisations; for employment with a 'private character'; and for the internal affairs of churches and other spiritual congregations, and especially the profession of priest, rabbi, imam, etc.).

Of all these exceptions, only the exceptions for political organisations in NLD are explicitly limited to 'necessary' forms of discrimination.¹⁹⁰ The Dutch exception for private-character employment is limited to requirements that 'may reasonably be imposed', which perhaps could be said to imply a test of necessity. In as far as the exception in ITA is allowing to distinguish between homosexual and heterosexual offenders (because the cases mentioned are exempted from the application of the principle of equal treatment), it does not seem to be compatible with the Directive. Both exceptions in IRL, and the exception for the internal affairs of churches etc. in NLD, would also seem to be incompatible with the Directive, because they are in no way explicitly limited to forms of discrimination that are 'necessary in a democratic society', as required by art. 2(5) of the Directive.

With respect to the latter exception, this is also because the Directive has clearly chosen to deal with the special status of churches and confessional organisations, in the specific provision of art. 4(2) of the Directive. This is confirmed by recital 24. Therefore there does not seem to be any scope to use art. 2(5) for an exception for churches etc. In para. 19.4.4 below it will be argued that the NLD exception, and a somewhat similar UK exception for religious employment,¹⁹¹ are not compatible with art. 4(2) of the Directive.

The **conclusion** must be that IRL, ITA, NLD and the UK have enacted or proposed exceptions that are not or not completely justified by art. 2(5) of the

¹⁸⁷ See para. 4.4.2.

¹⁸⁸ See para. 10.4.7.

¹⁸⁹ See para. 11.4.1.

¹⁹⁰ Whether the exception is necessary is uncertain, because it is only intended to cover political organisations that are also based on religion. See para. 13.4.2.

¹⁹¹ The UK Government has not tried to justify its controversial exception for sexual orientation discrimination by religious employers in terms of art. 2(5); see para. 17.4.5.

Directive. Whether the very generally worded exception of BEL is fully justified, will probably depend on its application.

19.4.3 *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 ‘does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes’. In addition, recital 13 holds the view that the Directive does not apply to ‘social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.’ While in many countries every citizen enjoys an individual right to social security (regardless of sexual orientation), there are cases concerning the treatment of same-sex partners of workers where discrimination could take place (e.g. compensations in case of work-related death or sickness, unemployment subsidies for people with family responsibilities, etc.); nevertheless, they do not fall within the scope of the Directive, if they are to be considered as social security or similar payments.

Occupational pensions of private or public employees, on the other hand, should be considered as falling within the material scope of the Directive (as any benefit or payment that in light of the ECJ’s case law must be treated as work-related ‘income’). Such pension schemes are not exempted by art. 3(3) of the Directive, and are part of pay.¹⁹² Whether occupational pensions are covered in ESP is unclear.¹⁹³

Legislation concerning sexual orientation discrimination in employment does not explicitly cover social security schemes in AUS, BEL, FIN, FRA, IRL, NLD, PRT, ESP, SWE,¹⁹⁴ and the UK. Covering social security is not required by the Directive. Nevertheless, in some countries equal treatment with respect to legislation and administrative discretion in the field of social security is required by existing constitutional and/or administrative principles, and by the prohibition in the Penal Code of discrimination by civil servants (for example in NLD and SWE). In DNK, on the other hand, discrimination in social security is explicitly covered in the Act on Race Discrimination (which also applies to sexual orientation discrimination); in SWE the government has published a proposal for such an explicit prohibition. In contrast, an exception for social security is explicitly mentioned in ITA and LUX.

In **conclusion** it can be said that perhaps ESP still has to prohibit sexual orientation discrimination with respect to occupational pensions. The explicit prohibition of sexual orientation discrimination in social security in DNK and proposed in SWE may be regarded as a good practice, not required by the Directive.

¹⁹² See para. 2.2.7.

¹⁹³ See para. 19.2.7.

¹⁹⁴ Only sexual orientation discrimination with respect to the payment of grants to post-graduate students is explicitly prohibited; see para. 16.4.3.

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

It is difficult to imagine many jobs for which a particular sexual orientation can properly be called a genuine and determining occupational requirement that is proportionate to a legitimate objective. The only examples given (only in the chapters on SWE and the UK) are about LGB organisations who might need an LGB individual for a specific job (for example in the field of counselling).¹⁹⁵ This may explain why in some countries there is no general exception (to the prohibition of sexual orientation discrimination) for occupational requirements at all (FRA and NLD). Even an exception formulated as conditionally as required by art. 4(1) of the Directive, runs the risk of suggesting that sexual orientation may also be considered an occupational requirement because of religious, historical, moral or social mores.¹⁹⁶ The occupational requirements of religious employers are specifically dealt with in art. 4(2), which only allows a limited exception to the prohibition of discrimination on grounds of religion or belief – not on grounds of sexual orientation (see para. 19.4.5 below).

Six countries (AUS, BEL, IRL, LUX, ESP and SWE) have enacted or proposed an exception for occupational requirements that is fully in conformity with the wording of art. 4(1) of the Directive. However, in SWE this has only been done in the main part of its legislation; another part of the implementing legislation still contains a much wider exception ('interests that are obviously of greater importance').¹⁹⁷

Exceptions for genuine and determining occupational requirements have also been enacted in FIN, ITA and the UK, but without at least one of the limiting conditions laid down by art. 4(1) of the Directive:

- *the objective is legitimate*
(missing in FIN and ITA)
- *the requirement is proportionate*
(missing in FIN and UK)

A similarly too wide exception can be found in PRT (where the word 'genuine' has been replaced by the weaker 'justifiable') and DNK (where 'in proper relation to the activity' it must be 'of great importance that someone is of a certain sexual orientation'). An interesting aspect of the Danish exception, however, is that it can only be invoked after consultation of the Minister of Labour. Also incompatible with art. 4(1) of the Directive is the addition to the exception in ITA for occupational requirements, that the taking into account of sexual orientation is not a discriminatory act when sexual orientation is 'relevant with regard to the ability to carry out the functions that the armed forces and the police, prison or emergency services may be called upon to perform'. This is worded much more loosely than the Directive allows, and it seems to suggest that sexual orientation somehow could undermine the capacity to properly take part in military, police, prison or emergency services.¹⁹⁸ The same double criticism can be made of the exception with respect to job agencies etc. for situations in which sexual orientation 'would have affected the carrying out of

¹⁹⁵ See para. 16.4.4 and 17.4.4.

¹⁹⁶ See para. 14.4.4.

¹⁹⁷ See para. 16.4.4.

¹⁹⁸ See para. 11.4.7.

the working activity'.¹⁹⁹ The general exception in ITA for provisions establishing 'work suitability tests' for specific jobs also appears to be at odds with the requirements of the Directive.²⁰⁰

The **conclusion** must be that so far the implementation in DNK, FIN, ITA, PRT, SWE and the UK falls short of the limitations set by art. 4(1).²⁰¹

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

Article 4(2) is one of the most difficult to read in the whole Directive. It consists of two parts, with the second part drawing a specific conclusion from the first part; this follows from the word 'thus' in the second part ('*donc*' in the French version of the Directive). Therefore it seems best to read the provision as a whole.

Article 4(2) is of course inspired by the freedom of religion as guaranteed in national constitutions and international treaties (see also recital 24 of the Directive); its text seems to be loosely based on pre-existing provisions of a similar kind in IRL and NLD. So far, neither of these countries is proposing to change its national formulation to make it more similar to the Directive's formulation. Only some of the other member states have proposed or enacted an exception with respect to the occupational requirements of religious employers. While in AUS, ITA and LUX the exception with respect to religious employment more or less follows the text of art. 4(2), the UK and DNK have chosen a rather different approach (see below). In NLD there is also a blanket exception for the internal affairs of churches and other spiritual congregations (see para. 19.4.2 above). No legislation on this point has been enacted or proposed in BEL, FIN, FRA, PRT, ESP and SWE. But even in member states without a legislative exception, a similar rule has sometimes been articulated in case law (for example in FRA), in the doctrine (for example in ESP and PRT) or in the *travaux préparatoires* (FIN).

In several ways art. 4(2) limits the scope for member states to allow certain occupational requirements (including the requirement for a worker 'to act in good faith and with loyalty to the organisation's ethos'). So far not all of these limitations are being observed in the national rules. There are six limitations:

- *There may only be an exception that can be found in national legislation pre-dating the Directive, or that provides for national practices that pre-date the Directive.*

This restriction may have been disregarded in FIN, where the *travaux préparatoires* of the implementation bill stated the exception more widely than that contained in the existing Church Act.²⁰²

- *The exception can only be about occupational activities within churches or other organisations the ethos of which is based on religion or belief.*

¹⁹⁹ See para. 11.4.4. For other Italian provisions placing certain forms of employment acts outside the scope of the prohibition of sexual orientation discrimination, see para. 19.4.2 above.

²⁰⁰ See para. 11.4.7.

²⁰¹ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

²⁰² See para. 6.4.5.

This is not observed in the ITA legislation, which simply speaks of ‘churches or other public or private organisations’. In DNK the exception extends to political organisations. In NLD the wording of the exception extends to all non-state schools, including schools that are neither based on religion nor on belief, and there is a similar exception for organisations based on political opinion (see para. 19.4.2). The exception for non-state schools in NLD is not limited to ‘occupational activities’, but also covers the provision of vocational training.²⁰³

- *There may only be an exception for differences of treatment based on a person’s religion or belief, and these should not justify discrimination on another ground.*

The exception enacted in the UK explicitly extends to discrimination on grounds of sexual orientation.

In NLD both the general exception for religion based employers, and the specific one for the internal affairs of churches etc, are not explicitly related to the grounds of religion and belief; and only the general exception specifies that the requirements may not lead to a distinction based on ‘the sole fact of’ sexual orientation. The same is true for the jurisprudential exception recognised in FRA by the *Cour de Cassation*. The Dutch rule suggests that difference of treatment would be acceptable in case of ‘additional circumstances’, the French rule would consider such a difference of treatment acceptable if there was evidence of particular unrest (*trouble caractérisé*).²⁰⁴

The second part of the exception in IRL (dealing with action to prevent employees ‘from undermining the religious ethos of the institution’) is not explicitly related to action on grounds of religion or belief.

In DNK, ITA and LUX it is not specified that the difference of treatment should not justify discrimination on another ground.

- *That person’s religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.*

The legislation in some member states uses a similar, but differently worded test: ‘necessary’ in the general exception in NLD, ‘reasonable’ or ‘reasonably necessary’ in IRL, ‘objectively of importance’ in DNK. The test is absent in the NLD exception for the internal affairs of churches etc., and in the UK legislation (although mentioned in the *travaux préparatoires*); there the requirement must either be applied ‘so as to comply with the doctrines of the religion’ or ‘so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers’.

- *And this must be so by reason of the nature of the occupational activities or of the context in which they are carried out.*

This test is not explicitly provided for in DNK and IRL, not in the NLD exception for the internal affairs of churches etc., and not in the first part of the exception in the UK (dealing with requirements ‘so as to comply with the doctrines of the religion’), although in the *travaux préparatoires* it is said that the exception

²⁰³ See para. 13.4.5.

²⁰⁴ See para. 13.4.5 and 7.4.5 respectively.

should only be applied to ‘ministers of religion, plus a small number of posts outside the clergy’.²⁰⁵

- *The implementation of the difference of treatment must take account of national constitutional provisions and principles, and of the general principles of Community law.*

In no country this is specifically specified, probably because it is obvious that these provisions and principles apply anyhow. Depending on the context of the case they may operate so as to narrow or to widen the scope of the exceptions. Constitutional and European principles of privacy, equality and freedom of expression may help to narrow their scope, whereas principles of freedom of religion, education and association may lead the courts to widen them. This cannot completely be avoided by specific legislation, because any legislation needs to be applied in the light of higher norms.

The **conclusion** must be that the legislative exceptions for religious employment enacted in DNK, IRL, ITA, NLD and the UK (and possibly the exception proposed in LUX) are not or not fully compatible with the Directive. In all member states the courts will have an important role in balancing the prohibition of sexual orientation discrimination with other fundamental rights.

19.4.6 *Positive action (art. 7(1) Directive)*

Using the possibility given by art. 7(1), the laws of some member states do explicitly allow measures which seek to ‘prevent or compensate for disadvantages’ linked to the protected grounds. Positive action is seen differently in the various member states, with some of them considering it an exception to equality, and others viewing it as the true fulfilment of equality.

As stated in para. 2.4.6, positive actions in the classical meaning do not seem particularly useful for the kind of inequalities that strike gay, lesbians and bisexuals. Nevertheless, some member states do include the ground of sexual orientation, when providing for positive action. This is the case in AUS (for private employment only), BEL, FIN, IRL and ESP, and in the proposals in LUX). The UK Regulations also explicitly allow positive actions, but only with respect to affording access to facilities for training and with respect to encouraging people ‘to take advantage of opportunities for doing particular work’ or to become members of a trade organisation. In PRT sexual orientation is implicitly covered in a general provision on positive action. In DNK, FRA, ITA, NLD and SWE sexual orientation is not covered in existing legislation on positive action.

In **conclusion** it can be said that positive action for sexual orientation is explicitly being allowed in AUS, BEL, FIN, IRL, LUX, PRT, ESP and the UK. The Directive does not require the other countries to follow this example.

19.4.7 *Exceptions beyond the Directive*

From a recent case before the Equal Treatment Commission in NLD, it appears that the prohibitions required by the Directive are restricted in their operation and enforcement by existing rules on the immunity of international

²⁰⁵ See para. 17.4.5.

organisations. It may be assumed that other member states also allow for the immunity of diplomatic missions, European Institutions, United Nations agencies, etc. It is difficult to say how these exceptions can be reconciled with the Directive, although it seems reasonable not to consider such exceptions as violations of the Directive.

19.5 Remedies and enforcement

In this paragraph DEU and GRC are not discussed, because no final proposals for implementation are available yet. Most details about the legislation in states of AUS and the regions and language communities of BEL are also not covered here.

19.5.1 *Basic structure of enforcement of employment law*

For the enforcement of any prohibitions on sexual orientation discrimination, the member states rely heavily on the general enforcement structure for employment law. Most countries entrust the enforcement of employment law to specialised labour courts; exceptions are GRC, ITA, NLD and ESP. It is not always clear whether these courts would also be competent when discrimination takes place outside the context of an employment contract (for example in the phase of recruitment). In DNK and FIN the enforcement of employment law is divided between specialised labour courts and ordinary courts.

In addition to regular or specialised courts, many member states entrust the application of labour law in general (and sometimes also issues of discrimination in particular), to other enforcement bodies, notably the Labour Inspectorates. In some countries the Labour Inspectorates explicitly have (or will have) a specific task with respect to harassment and/or other forms of discrimination (for example in BEL, FIN, LUX and NLD). In other member states this is not mentioned explicitly in legislation, but Labour Inspectorates enjoy the general power to ensure compliance with labour law, including anti-discrimination legislation (for example in PRT and ESP). In countries where discrimination has been made a criminal offence (BEL, FIN, FRA, IRL, ITA, LUX, NLD, ESP and SWE), the police and public prosecutors also play a role.

See also par.19.5.2 and 19.5.3 below.

19.5.2 *Specific and/or general enforcement bodies*

In addition to the role of courts and other general enforcement bodies (see above), anti-discrimination laws (usually on grounds of sex and/or race) of a number of countries also entrust some enforcement tasks to specific bodies.²⁰⁶ The competence of most of these do not extend to issues of employment discrimination on grounds of sexual orientation.

In contrast with the Race Directive, the setting up of specialised enforcement bodies for the application of the principle of equal treatment is not required by

²⁰⁶ See the Report *Specialised bodies to promote equality and/or discrimination. Final report*, May 2002 (available at http://europa.eu.int/comm/employment_social/fundamental_rights/publi/pubs_en.htm).

the Framework Directive (see para. 2.5.2), although some states have chosen or proposed to entrust the enforcement of the prohibition of sexual orientation discrimination in employment to such a body. This best practice can be found in five member states,²⁰⁷ and has been proposed or recommended in a few other member states. Only one member state has established an enforcement body that deals only with issues of sexual orientation discrimination:

SWE Office of the Ombudsman against Discrimination on grounds of Sexual Orientation (since 1999)

In six other member states enforcement bodies covering a multitude of grounds, including sexual orientation, have been established or proposed:

IRL Equality Authority (since 1998)
Equality Tribunal (since 1998)
Rights Commissioner (covering sexual orientation since 1993)

NLD Equal Treatment Commission (since 1994)

BEL Centre for Equal Opportunities and the Fight against Racism (since 2003)²⁰⁸

UK Equality Commission, for Northern Ireland (covering sexual orientation since 2003)
Commission for Equality and Human Rights, for Scotland, England and Wales (proposed for 2006)

AUS Equal Treatment Commission, for the private sector (2004)
Equal Treatment Commission, for the public sector (2004)
Equal Treatment Ombudsperson, for the private sector (2004)
the Equal Treatment Commissioners, for the public sector (2004)²⁰⁹

FRA High Authority to Fight against Discriminations and for Equality (legislation expected later in 2004)

See para. 19.5.3 for more details on the functioning of the specialised bodies in these countries.

In **conclusion** it can be said that AUS, BEL, IRL, NLD, SWE and the UK have adopted the good practice of having a specialised body to help combat sexual orientation discrimination in employment.

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

The setting up of adequate procedures clearly is seen as an important step towards the fulfilment of the requirements of the Directive, in particular those of art. 17, according to which sanctions must be 'effective and...dissuasive'. According to art. 9 of the Directive, the defence of rights consists primarily in the availability of procedures for the enforcement of the explicit prohibition of sexual orientation discrimination in employment. Procedures may be judicial and/or administrative, and conciliatory where appropriate.

What follows is an overview of the available procedures in each country. See also para. 19.5.4 on sanctions.

Judicial procedures are applicable to existing or proposed legislation in all thirteen member states. Judicial procedures may be

- civil in character (everywhere),

²⁰⁷ There is also a specialised body dealing with sexual orientation discrimination in the Basque Country (ESP); see para. 15.5.2.

²⁰⁸ This Centre is also responsible for the enforcement of the Flemish Decree of 8 May 2002, and will perhaps be made responsible for the enforcement of the other regional anti-discrimination instruments; see para. 4.5.2.

²⁰⁹ There are also proposals for specialised bodies in several states of AUS.

- administrative (e.g. regarding public employees, for example in AUS, FRA, NLD and PRT) or
- penal (in BEL, FIN, FRA, IRL, ITA, LUX, NLD, ESP and SWE).²¹⁰

The specialised bodies in BEL, NLD and SWE have the power to *take a case to court*. The Centre for Equal Opportunities in BEL can do so both on behalf of an identifiable victim and in the public interest. In NLD the Equal Treatment Commission may take a case to court unless the victim of the discriminatory act objects. In SWE the Ombudsman can litigate individual cases on behalf of the victim.

Non-judicial *administrative procedures* are an important aspect of the enforcement of employment law in PRT and ESP, where the Labour Inspectorates can impose administrative fines for breach of the anti-discrimination provisions (see para. 19.5.4 below), and to a lesser extent in AUS and several other countries. In several member states, including AUS, PRT and NLD, non-judicial administrative procedures are available in public employment. The procedures of the specialised enforcement bodies for issues of discrimination (in AUS, BEL, IRL, NLD and SWE) can also be classified as ‘administrative’. Of these bodies, only the Equality Authority and the Equality Tribunal in IRL may give *binding* decisions. The Equality Authority may conduct inquiries and issue binding ‘non-discrimination notices’ in case of breach of the law. The Equality Tribunal is entrusted with quasi-judicial tasks and may issue binding decisions upon complaints from parties. The power to take *non-binding* decisions in individual cases (in a procedure which may be chosen by complainants either in lieu or in addition to the regular courts) is given to the Rights Commissioner in IRL, the Ombudsman against Discrimination on grounds of Sexual Orientation in SWE, the Equal Treatment Commission in NLD, and the two Equal Treatment Commissions in AUS.

With respect to sexual orientation discrimination in employment *conciliatory procedures* are available in several member states.²¹¹

The specific enforcement bodies in AUS, BEL, IRL, NLD, SWE and Northern Ireland (UK) also have certain *advisory functions* (for example advising possible victims of discrimination on whether they have a case, how to handle it, etc., or advising the government on issues of policy).

Specific enforcement bodies for tackling sexual orientation discrimination in employment often do not foresee rigid rules of procedure; this makes it easier for each possible victim of discrimination to bring a case. In addition to the judicial, administrative, conciliatory, advisory procedures indicated above, some specific enforcement bodies enjoy some *other powers*. In IRL the Equality Authority can promote reviews of equality policies of businesses or industries. In AUS and NLD the Equal Treatment Commission can investigate on its own motion instances of structural discrimination. And in SWE the Ombudsman can promote education and information in the fight against homophobia. The

²¹⁰ In IRL penal sanctions are only available in certain specific circumstances; see para. 10.5.4. In SWE penal procedures are not available in cases of discrimination by an employer against an employee. Penal procedures can only be used in cases of discrimination against a student, and in cases of civil servants discriminating against someone who is self-employed or planning to be self-employed; see para. 16.5.3.

²¹¹ See for example para. 4.5.3, 10.5.3, 11.5.3, 13.5.3, 14.5.3 and 16.5.3.

Equality Commission in Northern Ireland (UK) and the Equal Treatment Ombudspersons and Equal Treatment Commissioners in AUS can provide assistance (in Northern Ireland including financial assistance) to individuals seeking to enforce the prohibition of sexual orientation discrimination.

The **conclusion** can be that civil judicial procedures are available or proposed in all countries.²¹² No penal procedures are foreseen in AUS, DNK, PRT and the UK. Specific administrative procedures resulting in binding decisions are only established in IRL, whereas procedures resulting in non-binding decisions are proposed or available in AUS, BEL, IRL, NLD and SWE.

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

The wording of the Directive in many respects sums up the evolution of the case law of the ECJ on sanctions (see para. 2.5.4). According to art. 17 the sanctions chosen by the member states must be 'effective, proportionate and dissuasive', and the member states must 'take all measures necessary to ensure that they are applied'.

While some member states already had a system of sanctions in place, others had to create a new set of rules.

In countries that supply *penal sanctions* there have been reports of a remarkable underuse of them. This phenomenon could be related to several factors: often only particularly serious discrimination is punished, criminal procedures involve greater psychological costs, and criminal justice is generally felt as less close to the citizen. It should also be recalled that criminal law requires the intention or will of the offender, a requirement certainly at odds with the provisions of the Directive on indirect discrimination and on harassment; moreover, in criminal proceeding the presumption of innocence is the rule, therefore no shift of the burden of proof is applied.²¹³ In fact, in FRA (since 1985), NLD (since 1992), FIN (since 1995), ESP (since 1995) and LUX (since 1997) there is no reported case law on the use of these penal sanctions. In several member states it is recognised that criminal law is of limited use. Nevertheless, the availability of penal sanctions (in BEL, FIN, FRA, ITA, LUX, NLD and ESP, and in specific circumstances in IRL and SWE) as part of a larger repertoire of sanctions may be the best way to guarantee that the combination of sanctions is 'effective, proportionate and dissuasive', as required by art. 17 of the Directive. In that perspective, it is interesting to note that in FRA the Penal Code foresees some ancillary measures, such as publication of the measure, closure of the business for five or more years or even permanently, and exclusion from public procurement.

When available, *civil sanctions* may be problematic, too:

- Recovery of damages suffered as a consequence of discriminatory acts is the most widespread measure: it is foreseen in all thirteen member states. The only reported exception concerns AUS, where no compensation can be claimed in case of discriminatory termination of employment (the only

²¹² Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

²¹³ See art. 10(3) of the Directive, and para. 19.5.8 below, and also para. 4.5.8, 7.5.8, 9.5.8, 12.5.8 and 15.5.8.

remedy in that case being reinstatement). Upper limits for compensation apply in AUS, FIN, IRL and SWE. Such limitations may cause the compensation to be less than 'effective, proportionate and dissuasive', and are therefore not permissible under art. 17 of the Directive, and under the case law of the Court of Justice.²¹⁴

- Discriminatory contracts or clauses in contracts are void or voidable in AUS, BEL, DNK, FIN, FRA, ITA, NLD, PRT, ESP, SWE and UK (and will be in LUX). In IRL the Employment Equality Act provides that all employment contracts shall be taken to include a 'non-discriminatory equality clause' that modifies any provisions of the contract that would otherwise give rise to unlawful discrimination; discriminatory provisions in collective agreements are void in IRL.
- Reinstatement is a very useful measure because of its capacity of removing the consequences of an unlawful dismissal. However, reinstatement after discriminatory dismissal on grounds of sexual orientation is only foreseen in some countries: AUS, BEL, FRA, ITA, IRL, PRT and ESP. In some other countries (including NLD and SWE) the same effect is accomplished by the nullity or voidability of discriminatory dismissal (which also applies in FRA and ITA).
- Little is known about the remedies available in case of discrimination against a job applicant. It seems reasonable to require that, in cases where he or she would have been appointed had he or she not be discriminated against, more specific sanctions than recovery of damages should be available. Options would be a judicial order to start a new selection procedure, or a judicial order to offer the job to the discriminated applicant. In ITA the latter option seems possible according to case law, and in ESP according to academic legal writers. The courts in some countries (including PRT, SWE and UK) apparently lack the power to order that a job applicant must be hired.
- In addition to damages, nullity, voidability and reinstatement, some countries foresee a number of non-financial measures, which could be indicated as good practices. In IRL courts have ordered the creation of an equal opportunities policy, the re-training of staff, and the changing of recruitment procedures. In ITA the Decree implementing the Directive explicitly allows courts to order a plan for removing discriminatory practices, or to order the publication of the court decision in a national newspaper.

In PRT there are *administrative sanctions* which derive from the general rules on violations of the Labour Code. These administrative fines (up to € 53,400 for intentional offences by legal persons with a turnover of more than € 10,000,000 per year) can be imposed by the Labour Inspectorate. In ESP, too, administrative fines can be imposed by the Labour Inspectorate. In AUS administrative fines (up to € 360) apply for discriminatory job advertisements in the private sector. In AUS employers not abiding by the principle of equal treatment will automatically be excluded from federal public subsidies. In ITA public subsidies and public procurement contracts must be revoked if a company to which they were awarded is judicially convicted of discrimination. In

²¹⁴ See para. 2.5.4.

serious cases the company may be excluded from such subsidies and contracts for up to two years. The (binding or non-binding) opinions of the specialised enforcement bodies in AUS, IRL, NLD and SWE also fall under the category of administrative sanctions (see para. 19.5.3 above).

It could be argued that by only providing sanctions that must be imposed by a court (rather than by an administrative body), BEL, DNK, FRA, FIN, ITA, LUX and the UK have not taken all 'measures necessary to ensure' that sanctions are applied (as required by art. 17 of the Directive). Accordingly, the availability of administrative sanctions in AUS, IRL, NLD, PRT and SWE arguably is more than just a welcome good practice.

In **conclusion** it must be said that in hardly any member state the total repertoire of sanctions can be considered 'effective, proportionate and dissuasive':

- AUS can be criticised for not providing compensatory damages in case of discriminatory termination of employment.
- AUS, FIN, IRL and SWE can be criticised because of their upper limits imposed on compensation of damages.
- BEL, DNK, FIN, LUX and the UK could be criticised for not providing for nullity, voidability and/or reinstatement in cases of discriminatory termination of employment.
- BEL, DNK, FRA, FIN, ITA, LUX and the UK could be criticised for only providing sanctions that may be imposed by a court.

19.5.5 *Natural and legal persons to whom sanctions may be applied*

The uncertainties surrounding the definition of the personal scope of applicability of the Directive have already been highlighted in para. 19.2.8. Similar uncertainties resurface when it comes to determining who will be subjected to the different kinds of sanctions supplied in the member states, because the Directive does not establish any conditions.

At the very least it seems reasonable to require that sanctions can be applied against the contractual employer (and against the employer with whom a job-applicant has a pre-contractual relationship).²¹⁵ Contractual sanctions such as invalidity of the discriminatory measure, reinstatement and or contractual damages can and must be applied to the formal employer, regardless of the actual person who acted discriminatorily. When the employer is a legal person, there may be a problem with penal sanctions, because the law of some countries (including LUX and ITA) does not recognise criminal liability of legal persons.

However, there are also situations where the discrimination is not actually perpetrated by an employer (nor by an agent of the employer). This can be the case where the workers are employed by another company or organisation (for example a job agency) than that where they are in fact working, or where

²¹⁵ Where an organisation of employers, workers or professionals acts in a discriminatory way, the sanctions can be applied against that organisation, but no member state has felt the need to make that explicit, since it clearly follows from substantive and procedural rules.

someone is harassed or otherwise discriminated by a boss, co-worker or client. The question then arises whether the sanctions can (also) be applied to the actual perpetrators. In most countries the rules are formulated in a way that generally does not preclude the application of sanctions to others than the contractual employer (AUS, BEL, FRA, IRL, ITA, LUX, NLD and PRT). In DNK, FIN, ESP and the UK, on the other hand, most sanctions can only be applied to employers (or to the employer who uses the employees of a job agency, as in FIN, or to the accomplices of employers, as in ESP and the UK). Such a limitation does not seem to be compatible with the Directive: for sanctions to be effective and dissuasive, at least some must be applicable to the actual perpetrators.

When the employer is liable, this normally includes responsibility for acts of an employee or agent of the employer. While this is explicitly stated in the UK,²¹⁶ in many other countries the same follows from general rules, sometimes with substantial limitations (as for example in PRT,²¹⁷ where legal persons are only liable to administrative sanctions for conduct of a manager or employee, if the discrimination was condoned by someone with the power to act in their behalf).

Also in the case of harassment it seems reasonable to require that (at least some) sanctions should be applicable both to the natural person who harasses (for example a boss, co-worker or client) and to the formal employer (unless the harassment cannot be said to have taken place 'in relation to' any of the aspects of the material scope listed in art. 3(1) of the Directive). This double responsibility is not made explicit in the legislation of most countries, with the exception of ESP and AUS. However, in ESP the administrative sanctions on harassment by a co-worker or manager can only be imposed on the employer if the conduct took place within the employer's realm of managerial competence, or if the latter knew about the harassment and did not take the necessary measures to prevent it. And in AUS compensation for harassment by co-workers or third persons can be claimed from the employer only if the employer, by intent or carelessness, did not take the necessary measures to prevent it. Without double responsibility sanctions on harassment can hardly be considered effective and dissuasive.

In **conclusion** it could be said that at least AUS, DNK, FIN, ESP and the UK seem to have drawn the circle of persons to whom sanctions may be applied too narrowly.

19.5.6 *Awareness among law enforcers of sexual orientation issues*

To promote an adequate application of the prohibitions of sexual orientation discrimination, it may well be useful to enhance the awareness of sexual orientation issues among law enforcers (e.g. police, prosecutors, judges, members of equality bodies, counsellors, etc.). An example of such a good practice can be found in SWE, where both public prosecutors and judges are regularly trained by the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation.

²¹⁶ See para. 17.2.5.

²¹⁷ See para. 19.5.4 above and para. 14.5.4.

Such increased awareness would also foster the victims' confidence in the effectiveness of legal remedies. Unfortunately, often a situation of diffidence or mistrust among victims seems to be the case, as some national chapters of this report highlight.²¹⁸ In IRL, NLD and SWE there is room for a less pessimistic view.

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

According to art. 9(2) of the Directive, member states must ensure that 'associations, organisations or other legal entities which have (...) a legitimate interest in ensuring that the provisions of this Directive are complied with', can play a role in the enforcement of the prohibitions of discrimination. The expression 'associations, organisations or other legal entities' is sufficiently broad to encompass not only trade unions, but also other interest groups, such as associations for the defence of a particular professional category, or associations for the defence of LGB rights. The only condition established by the Directive is that such groups must have a legitimate interest ('in accordance with the criteria laid down by their national law') in ensuring the enforcement of the Directive. It is often the case (for example in LUX) that national law requires that the objective of safeguarding the relevant interests (e.g. worker's rights, gay rights, etc.) is stated in the founding charter of the association, or even that the group is recognised by a governmental body. Countries that only allow trade unions to play a role (as is the case in ITA, PRT, ESP,²¹⁹ and SWE), fall short of the minimum requirements of the Directive. Also falling short is AUS, where only one specific non-governmental (umbrella) organisation can play a role in court, and only with respect to private employment.

Legal standing for interest groups is often a controversial issue. The Directive does not go so far as to require that interest groups are allowed to take part in procedures for the enforcement of a collective right, but only that they 'may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. Although autonomous legal standing in case of patterns of discrimination, discriminatory advertising or discriminatory collective agreements is the case in several member states (FRA,²²⁰ ITA,²²¹ LUX, ESP,²²² SWE and NLD), this may not be seen as a requirement of the Directive.

The wording of art. 10(2) (certainly, for example, in the French language version of the Directive) suggests that the choice between engaging 'on behalf of' and engaging 'in support of' (the complainant) should be left to the interest groups and complainants themselves, and should not already be made in the legislation. This interpretation is further supported by the fact that in many member states 'acting in support' is already an option under general rules of

²¹⁸ See para. 7.5.6, 9.5.6, 11.5.6 and 14.5.6.

²¹⁹ In ESP only trade unions can act in the name of individual members, but other interest groups can represent groups of workers that are not individually identified; see para. 15.5.7.

²²⁰ In FRA standing is granted under art. 2-6 of the Code of Criminal Procedure (but the legislature has omitted to add 'sexual orientation' next to '*moeurs*' in this provision; and criminal prohibitions in France do not cover the whole material scope of the Directive), and under art. L411-11 of the Labour Code (but that right is reserved for trade unions). See para. 7.5.7.

²²¹ In ITA only trade unions have standing in cases of collective discrimination; see para. 11.5.7.

²²² In ESP only according to case law; see para. 15.5.7.

procedure. If this interpretation is correct, then national laws which only allow an interest group to act ‘in support of’ (but not on behalf of) the victim, fall short of the Directive’s requirements (this is the case in AUS, DNK, FIN and the UK).²²³

In some other countries (IRL, ESP and SWE) ‘engaging on behalf of’ appears to be understood in the sense that the wronged party is ‘represented’ by the interest organisation, meaning that the organisation acts as legal counsel. Such a minimal interpretation of the words ‘on behalf of’ does not seem compatible with the Directive, because this would make the words ‘with his or her approval’ in art. 10(2) superfluous. That such representation in IRL is not possible in the appeal courts, is also incompatible with the Directive.

In the other six member states ‘engaging on behalf of the complainant’ is (correctly) understood as the interest organisation itself becoming party in the proceedings against the person accused of discrimination (BEL, FRA, ITA,²²⁴ LUX, NLD and PRT²²⁵).

In **conclusion** it can be said that AUS, and possibly DNK, FIN, IRL, ESP, SWE and the UK, are giving interest groups too limited a role in enforcement procedures, and that AUS, ITA, PRT, ESP and SWE are violating the Directive by excluding most interest groups from this role.²²⁶

19.5.8 *Burden of proof of discrimination (art. 10 Directive)*

Art. 10(1) of the Directive requires measures to ensure that when persons who consider themselves wronged ‘establish (...) facts from which it may be presumed that there has been direct or indirect discrimination’ the respondent shall have to ‘prove that there has been no breach of the principle of equal treatment’. As already indicated in the discussion of the difficulty of proving that something was done ‘on grounds of’ sexual orientation,²²⁷ shifting the burden of proof is an essential part of the effective application of the principle of equal treatment. A shift of the burden of proof has now been enacted or proposed with respect to sexual orientation discrimination in all thirteen member states, but not always in full conformity with the Directive:

- The legislation in the UK and PRT does provide a shift in the burden of proof, but it requires the alleged victim to ‘prove’ facts, a wording that may be more stringent than the Directive allows. In PRT the provision on the burden of proof also requires the victim to point to ‘the worker or workers in regard to whom he or she believes to have been discriminated against’; such a requirement is not in line with art. 2(2)(a) of the Directive, which uses the words ‘would be treated’.
- In ITA the relevant provision is very narrowly worded, and does not specify that it shall be for the respondent to prove that there has been no breach of

²²³ Recital 29 holds the view that standing for associations or legal entities is ‘without prejudice to national rules of procedure concerning representation and defence before the courts’. It appears that at least one member state (FIN) is relying on this statement to justify a complete lack of legal standing for interest groups. See para. 6.5.7.

²²⁴ But only for trade unions, see above.

²²⁵ Idem.

²²⁶ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

²²⁷ See para. 19.2.3 above.

the principle of equal treatment. Similarly in AUS the respondent only has to establish facts from which it may be presumed that there has been no discrimination, whereafter the burden of proof shifts back to the victim.

- In FRA the shift in the burden of proof is so far only provided for private employment, not for public employment.

In **conclusion** it can be said that AUS, FRA, ITA, PRT and possibly the UK have not correctly implemented the Directive's requirement of a shift in the burden of proof.²²⁸

19.5.9 *Burden of proof of sexual orientation*

Recital 31 begs the question whether the complainant of discrimination on grounds of sexual orientation is required to disclose and 'prove' a particular sexual orientation. As discussed in para. 2.3.1 (and 19.3.1), this question only becomes relevant if one concludes – contrary to both a textual and a purposive interpretation of art. 2(2) of the Directive – that only discrimination on grounds of the victim's own sexual orientation must be prohibited. The possessive pronoun used in front of 'sexual orientation' in the legislation of FRA seems to imply the duty to allege (and perhaps 'prove') the sexual orientation of the victim. It follows from the wording chosen with respect to indirect discrimination in the UK that the victim may have to allege his or her sexual orientation, although he or she will not be required to 'prove' it. In LUX the suggestion that it may be for the victim to 'prove' his or her sexual orientation can be found in the *travaux préparatoires* (where the confusing text of recital 31 of the Directive is repeated, and where the Penal Code still uses a possessive pronoun in front of '*orientation sexuelle*').

Apart from the incompatibility of these requirements with the Directive, it would also almost always be impossible for someone to 'prove' his or her sexual orientation, and it would almost always be a violation of the right to privacy to require someone to disclose his or her sexual orientation.

The **conclusion** must be that in anti-discrimination proceedings in FRA, UK and perhaps LUX the victim may sometimes have to disclose his or her sexual orientation.²²⁹ This is not compatible with art. 2(2) of the Directive.

19.5.10 *Victimisation (art. 11 Directive)*

The protection of employees from dismissal and other adverse treatment 'as a reaction to a complaint within the undertaking or to any legal proceeding aimed at enforcing compliance with the principle of equal treatment' is a clear requirement set by art. 11 of the Directive. Nevertheless not all member states have implemented it correctly:

- In ITA victimisation as such is not explicitly prohibited, but if a prohibited act of discrimination takes place as retaliation to an earlier complaint or judicial decision about discrimination, the judge must take this into account when

²²⁸ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

²²⁹ Apart from DEU and GRC (and most states of AUS) where so far no final proposal for implementation is available.

fixing the amount of compensation for non-pecuniary damages.²³⁰ In AUS the reverse situation applies: a prohibition of victimisation applies, but with no sanctions attached to it.²³¹

- It appears from the very broad wording of art. 11 ('reaction to a complaint within the undertaking or to *any* legal proceeding') that protection should apply not only to the employee wronged by discriminatory acts, but also to other employees in any way linked to a complaint or proceeding (such as a colleague willing to testify against the employer, or even employees who do not explicitly take the side of the employer). Nevertheless the protection enacted in BEL and DNK is only offered to the complainant, in FRA only to the complainant and to witnesses, and in NLD the protection is limited to the complainant and employees who have supported the complainant.

The **conclusion** must be that adequate protection against victimisation is only provided or proposed in FIN, IRL, LUX, PRT, ESP, SWE and the UK.

19.6 Reform of existing discriminatory laws and provisions

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

Apart from introducing an adequate prohibition of sexual orientation discrimination, the member states also had to remove such discrimination from primary and secondary legislation. In the words of art. 16(a) of the Directive, the member states had to take the 'necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'. The phrase 'principle of equal treatment', defined in art. 2(1) of the Directive, refers both to direct and indirect discrimination.

None of the member states seems to have taken any measures to comply with art. 16(a). And for none of them it was reported that a systematic scrutiny of legislation was carried out to discover what directly or indirectly discriminatory provisions could still be found in legislation in the field of employment and occupation.²³²

Any remaining discriminatory provision could be repealed or amended by the competent legislative or administrative body. In most countries also the courts are competent to deal with such a provision, by declaring it unlawful, void or non-binding, or by annulling it, or by interpreting it in a non-discriminatory way. To that end most national courts can invoke the Directive and/or a constitutional or international non-discrimination clause. In some countries (including FRA) discriminatory provisions may have lost their validity through the operation of the principle that later laws take precedence over previous laws.²³³

The absence of any specific measures with respect to *directly* discriminatory provisions, could be justified in most countries by the (probable) fact that such provisions can no longer be found in their primary and secondary legislation. As regards same-sex and different-sex cohabitants most countries either do not

²³⁰ See para. 11.5.10.

²³¹ See para. 3.5.4.

²³² See for example para. 16.6.2.

²³³ See for example para. 7.6.1.

recognise them at all in employment legislation (for example GRC and ITA), or they do not distinguish between same-sex and different-sex cohabitants (for example in DNK, FRA, NLD and SWE). However, the possible existence of legislative provisions that directly discriminate on grounds of sexual orientation (mainly between same-sex and different-sex cohabitants), has been reported for DEU and the UK (see para. 19.6.4 below). In FRA and SWE, which until recently still had some differences between the legal position of different-sex and same-sex cohabitants, the last examples of direct discrimination have been abolished in 1999 and 2003 respectively.²³⁴ It is expected that the same may happen soon in the UK.²³⁵

Examples of legislative provisions that can be said to *indirectly* discriminate on grounds of sexual orientation, however, can still be found in most member states, including AUS, DNK, DEU, IRL, ESP and the UK (see para. 19.6.4 below). Only for FIN, NLD and SWE it is being claimed that such indirect legislative discrimination (in the field of employment) has been abolished effectively.²³⁶

Conclusion: Because indirectly discriminatory provisions may be justified under art. 2(2)(b) of the Directive, and because it is not certain that directly discriminatory provisions still exist, it is difficult to say in how many member states the primary and secondary legislation is incompatible with art. 16(a) of the Directive.

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

See paragraph 19.6.1.

19.6.3 *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)*

To comply with art. 16(b) all thirteen member states provide that discriminatory provisions in collective agreements and/or other contracts are null and void,²³⁷ and/or they rely on general rules of law that entail nullity.²³⁸ It is not always clear whether discriminatory internal rules, or discriminatory rules governing professions or organisations, are also affected by nullity. Only the proposed legislation in LUX explicitly provides for the nullity of discriminatory provisions in all of the contracts, agreements and rules mentioned in art. 16(b) of the Directive.

Most member states have not taken any specific measures to ensure amendment of such discriminatory provisions. Mostly they rely on the general

²³⁴ See para. 7.6.1 and 7.3.3, and para. 16.6.2.

²³⁵ See para. 17.6.1 and 17.3.3.

²³⁶ See para. 13.6.4 and 16.6.2.

²³⁷ In BEL this is not so in all its regions and language communities.

²³⁸ In PRT discriminatory provisions in collective agreements will only be considered null and void if they are not repealed within one year after the enactment of the Labour Code in December 2003. See para. 14.6.3.

sanctions available in discrimination cases (see para. 19.5.4 above), which may induce the relevant employers and organisations to amend their discriminatory provisions. However, in a few countries the legislation is more specific. In FIN the courts have been given the power to change or ignore discriminatory provisions in contracts;²³⁹ in IRL the Employment Equality Act actually inserts equality clauses into every employment contract and these clauses would modify any discriminatory clause in the same contract;²⁴⁰ and in SWE an employee has a right to demand that his or her employer amends a discriminatory contractual provision.²⁴¹

It is hardly known how many contracts, collective agreements, internal rules, etc. still contain discriminatory provisions (see para. 19.6.4 below).

The **conclusion** must be that it is not certain that all member states have taken all the necessary measures required by art. 16(b) of the Directive.

19.6.4 *Discriminatory laws and provisions still in force*

In primary and secondary employment legislation of most member states, provisions that *directly* discriminate on grounds of sexual orientation no longer exist. Such provisions (mainly discriminating between same-sex and different-sex cohabitants) may still exist in DEU and the UK.²⁴²

An example of an apparently neutral law that because of its application might be indirectly discriminatory on grounds of sexual orientation, can be found in ESP, where the Statute on the Disciplinary Regime provides that those sexual relations on military grounds that offend against military dignity could deserve a disciplinary sanction.²⁴³

In several countries (including AUS, DEU, IRL, ITA, PRT, ESP and the UK) employment legislation still contains provisions that could be said to be indirectly discriminatory, because they limit certain employment conditions to married partners only, thus excluding all same-sex partners. It is debatable whether such exclusion can be justified under art. 2(2)(b) of the Directive.²⁴⁴

The same can be said about employment conditions (such as parental leave) that are only available to legal parents, thus excluding many same-sex partners who cannot adopt their partner's child,²⁴⁵ or have not yet been able to do so because the adoption process takes time.²⁴⁶

It is not only direct discrimination in family law legislation that may lead to indirect discrimination in the field of employment. The remaining examples of direct sexual orientation discrimination in criminal law legislation (in GRC, PRT and IRL) may also lead to indirect employment discrimination.²⁴⁷

As far as contracts, collective agreements and internal rules are concerned, it is almost impossible to know whether any of these still contain provisions that are

²³⁹ See para. 6.6.3.

²⁴⁰ See para. 10.6.3.

²⁴¹ See para. 16.6.3.

²⁴² See para. 8.6.4 and 17.6.1.

²⁴³ See para. 15.6.4.

²⁴⁴ See also para. 19.3.3.

²⁴⁵ For examples in ESP, see para. 15.6.4. See also para. 19.1.9.

²⁴⁶ For an example in DNK see para. 5.3.3 and 5.6.1.

²⁴⁷ See para. 19.3.7 and 19.1.9.

directly or indirectly discriminatory. In no member state has a systematic monitoring effort been made (by the government, by employers, or any other organisation) to check for the existence of such discriminatory provisions. In most member states there will still be many examples of indirect discrimination in contracts, collective agreements and internal rules. In some there still are some examples of direct discrimination in such documents.²⁴⁸

The same can probably be said about rules governing the independent occupations and professions, and about rules governing workers' and employers' organisations.

19.7 Concluding remarks

By 2 December 2003 fifteen member states had to have implemented the Directive. They began from different legal and social starting points, as has been described in the beginning of this chapter. Before the Directive was adopted in 2000, eight member states did already have some legislation against sexual orientation discrimination in employment, but AUS, BEL,²⁴⁹ DEU,²⁵⁰ GRC, ITA, PRT and the UK did not.

Since 2000 twelve member states have enacted implementing legislation with respect to sexual orientation discrimination. In BEL, FRA, ITA, PRT, SWE and the UK this happened mostly before 2 December 2003. In DNK, FIN, NLD and ESP it did shortly after that date. And in AUS (at federal level) and IRL implementing legislation came into force in July 2004. In LUX a proposal has been submitted to Parliament in 2003.

This chapter set out to assess whether the minimum requirements of the Directive are met by the legislation that has been enacted or proposed in these *thirteen* countries. In DEU and GRC so far no such legislation is being proposed by the Government. Legislation is also still lacking in all states of DEU and in most states of AUS.

The conclusions of this tentative implementation assessment, can be found in the various paragraphs of this chapter. There it has become apparent that in many member states (six or more) there appear to be major implementation problems with respect to:

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

With respect to other important aspects of the Directive, the implementation seems to be problematic in a smaller number of member states.

²⁴⁸ For examples in AUS, see para. 3.6.4, and for an example in NLD, para. 13.6.4. See also the Appendix to this report, containing a thematic study on *Discriminatory partner benefits*.

²⁴⁹ Except for a Collective Agreement of 1999 made binding by Royal Decree; see para. 3.1.5.

²⁵⁰ Except in some *Länder*; see para. 8.1.5.

The main conclusions of this chapter have been summarised in chapter 20 (and in its table 14). A general overview of anti-discrimination legislation in the fifteen member states is given in the tables of chapter 18.

List of literature used in footnotes

This chapter is largely based on the preceding chapters on European and national law. Often, the references to these chapters are silent, i.e. the mention of a particular country in a specific paragraph of chapter 19 means that the information about that country is based on what is written in the corresponding paragraph of the chapter on that country (the numbers of the paragraphs are standardised in all chapters). Sometimes, reference is made explicitly to specific paragraphs of these other chapters. In addition to this, some other literature has been used:

Flynn, Leo, 'From Individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 591-604.

Graupner, Helmut, 'The first will be the last: Legal Recognition of Same-Sex Partnerships in Austria', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 549-561.

Graupner, Helmut, *Sexualitaet, Jugendschutz und Menschenrechte*, Teil 2, Frankfurt: P Lang, 1997.

Halman, Loek, *The European Values Study: A Third Wave. Source book of the 1999/2000 European Values Study Surveys*, Tilburg: WORC, Tilburg University, 2001.

Leroy-Forgeot, Flora, *Histoire juridique de l'homosexualité en Europe*, Paris, Presses Universitaires de France, 1997.

Marsh, Alan, & Sahin-Dikmen, Melahat, *Discrimination in Europe (Report A & Report B)*, Policy Studies Institute, London, 2002.

Pérez Cánovas, Nicolás, 'Spain: The Heterosexual State Refuses to Disappear', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 493-504.

Waaldijk, Kees, 'Taking same-sex partnerships seriously: European experiences as British perspectives', *International Family Law*, 2003, p. 84-95.

