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*

20 Conclusions

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The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.
The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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20.1 Introduction

This chapter brings together the main conclusions about the implementation (with respect to sexual orientation) of *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (herinafter: the Directive) at national level in the fifteen EU member states as of April 2004. (Some developments in the following months have also been covered.) These conclusions are based on the fifteen national chapters written by the members of the European Group of Experts on Combating Sexual Orientation Discrimination, and on the more detailed comparative analysis in chapter 19 of this report. In those chapters more detailed information and criticism, and more good practices, arguments and nuances can be found.

It is also important to note that these conclusions only provide a tentative analysis of the implementation of the Directive. Firstly, our Group of Experts had been asked by the Commission of the EC to cover only the fifteen 'old' member states, not the ten countries that would join the EU in May 2004. Secondly, final implemention texts are not yet available in most regional states of AUS, not on national and regional level in DEU, and not in GRC (although in May 2004 the Greek opposition has introduced an implementation bill, which is unlikely to be adopted). Thirdly, in LUX the proposal for implementing legislation is still being discussed and possibly amended in Parliament. Finally, the Court of Justice of the EC has not had a chance to specify the meaning of many words and phrases in the Directive, and it also remains to be seen how national courts will interpret the various implementing laws and regulations.

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

20.2 Legislation to implement the Directive

By 2 December 2003 the then fifteen member states of the EC should have implemented the Directive. However, by that date this Directive had only led to the entry into force of implementing measures with respect to sexual orientation discrimination in six member states: FRA, SWE, BEL, ITA, UK and PRT, the first two of which already had some legislation specifically prohibiting sexual orientation discrimination in employment pre-dating the Directive. (In PRT, supplementary provisions to the Labour Law Code, necessary to complete the implementation of the Directive, came into force in August 2004.)

In six other countries, too, the Directive was already partly 'implemented' by pre-existing legislation explicitly prohibiting sexual orientation discrimination in employment. In four of these (ESP, FIN, NLD and DNK) further implementing legislation entered into force early in 2004; and in IRL the main implementation

law entered into force in July 2004. The proposal submitted to Parliament in LUX in 2003 still awaits being debated.

Proposals to implement the Directive have also been adopted in AUS, one of the countries without a pre-existing legislative prohibition of sexual orientation discrimination. The resulting implementing legislation entered into force in July 2004.

In the two remaining countries (DEU and GRC) no legislation implementing the Directive with respect to sexual orientation discrimination in employment is in force, and no final proposals have been submitted to Parliament. For that reason the legal situation in DEU and GRC is not covered in the remainder of this concluding chapter, which therefore only deals with *thirteen member states*. Regional legislation is not covered in these conclusions either; information on such legislation in AUS, BEL, DEU and UK (Gibraltar) can be found in the national chapters.

20.3 Prohibition of different forms of sexual orientation discrimination in employment

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

The words used in existing and proposed legislation to refer to 'sexual orientation' always correctly cover *homosexual, heterosexual and bisexual* orientations (although in NLD only the first two are explicitly mentioned, and in FIN sexual orientation is not explicitly mentioned in two of the five implementing laws). However, the wording used in FRA (with a possessive pronoun in front of the words 'sexual orientation') does not clearly extend the prohibition of sexual orientation discrimination to discrimination on grounds of a *mistaken assumption* about someone's sexual orientation, which is contrary to art. 1 and 2 of the Directive.

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

her sexual orientation. In DNK this is even explicitly prohibited in the Act on Discrimination.

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

An important feature of the Directive is its requirement to prohibit *harassment* related to sexual orientation as a form of sexual orientation discrimination. A prohibition of harassment has been enacted or proposed in all thirteen member states, but in FRA and the UK this is not done *as a form of discrimination* (although the UK legislation at least speaks of harassment 'on grounds of sexual orientation'). Four member states have adopted or proposed a definition of harassment that in some respects is slightly more limited than that of the Directive (AUS, FRA, SWE and UK); it remains to be seen, whether the Court of Justice of the EC would find these limitations to be acceptable under the second sentence of art. 2(3) of the Directive (which states that 'the concept of harassment may be defined in accordance with national laws and practice'). For the practical relevance of the prohibition of harassment, however, much will depend on the attitude of employers, managers, co-workers, national courts, etc. towards common forms of anti-homosexual behaviour (such as verbal abuse, or revealing someone's sexual orientation against her or his will).

The implementation of art. 3 of the Directive seems to be particularly problematic for member states. Partly, this may be blamed on the less than clear formulation of some aspects of the material and personal scope of the Directive in that provision. The *main* shortcomings of the member states with respect to *material scope* appear to be the following:

- *Public employment* not yet covered in the legislation proposed in LUX.
- *Vocational guidance* is not yet (fully) covered in AUS, FRA and ESP.
- *Vocational training* is not yet fully covered in AUS.
- *Employment conditions* (including pay and dismissal) are covered in all thirteen member states, but *working conditions* (in the sense of working environment) for employees are not explicitly covered in FRA and SWE.
- With respect to the working conditions (in the sense of working environment) in *self-employment* there may be an implementation problem in AUS, FRA, ITA, PRT, ESP, SWE and the UK.

- *Access to employment* is covered in all thirteen member states, but *access to self-employment* is not or not fully covered in PRT and the UK.
- With respect to *other forms of occupation* than employment and self-employment (such as compulsory military or alternative service), there seem to be problems in AUS, FIN and SWE).

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

20.4 Exceptions to the prohibition of discrimination

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

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

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

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

A majority of the member states have enacted or proposed exceptions for *positive action* with respect to sexual orientation (AUS, BEL, FIN, IRL, LUX, PRT, ESP and the UK), which are compatible with the wording of art. 7(1) of the Directive.

20.5 Enforcement of the prohibition of discrimination

In addition to the content of the prohibitions of sexual orientation discrimination, questions relating to their enforcement are of course central to the implementation of the Directive. Article 9(1) of the Directive requires the availability of judicial and/or administrative procedures, but in contrast with the Race Directive (2000/43/EC), the setting up of *specialised bodies* for the application of the principle of equal treatment is not required with respect to sexual orientation. Nevertheless, six member states have chosen to partly entrust the enforcement of the prohibition of sexual orientation discrimination in employment to such a body. Five of these countries have established bodies covering a multitude of grounds (AUS, BEL, IRL, NLD and, only for Northern Ireland, the UK) and one has established an enforcement body that deals only with issues of sexual orientation discrimination (SWE). The existence of these bodies allows for specific *non-judicial procedures* for the enforcement of the prohibition of discrimination. Conciliation in discrimination cases is available in several countries. *Judicial procedures*, and in particular *civil* judicial procedures, are available in all thirteen member states; *penal* judicial procedures are available everywhere except in AUS, DNK, PRT and the UK (and only in very specific circumstances in IRL and SWE).

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

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

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

- AUS, FIN, IRL and SWE can be criticised because of their upper limits imposed on compensatory damages, and AUS also for not providing compensatory damages in case of discriminatory termination of employment.

- At least DNK, FIN, ESP and the UK could be criticised for only having included employers (and their 'accomplices') in the circle of persons to whom sanctions may be applied.

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

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

20.6 Concluding remarks

With respect to sexual orientation discrimination, the implementation of the Directive is more than eight months late in LUX, DEU and GRC. However, also in the member states that have largely completed the implementation, the adopted legislation does not (yet) meet all the requirements of the Directive.

In the previous paragraphs it has become apparent that with respect to the following topics the proposed or enacted implementing legislation is problematic in many (six or more) member states:

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

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

At the same time in several member states various good practices were found that could serve as inspiration for further improvement of the implementation of the Directive in other member states. This is especially true for the various

specialised bodies that some member states have set up or proposed (without being required by the Directive) and for the range of specific sanctions that can help ensure that the principle of equal treatment will actually work.

The main conclusions of the previous paragraphs have been visualised in table 14 below.

In this table:

X means that the existing or proposed implementation of a provision of the Directive is (certainly or probably) not completely correct;

? means that there is doubt about the correctness of the implementation of a provision of the Directive;

– means that the exception allowed by a provision of the Directive is not (yet) part of existing or proposed legislation;

✓ means that their do not seem to be major shortcomings in the implementation of a provision of the Directive.

The numbers before the country abbreviations refer to the number of the corresponding chapter is this report. The corresponding paragraph numbers can be found in the footnotes. All certain, probable and possible shortcomings have been highlighted in grey, as are the columns for DEU and GRC, where the governments are not yet proposing any implementing legislation. The information in the column for LUX is based on proposals for legislation that is not yet in force. More detailed comparative tables on the state of the law in the fifteen member states can be found in chapter 18.

Table 14: Major aspects of implementation of the Directive at national level

Chapter: country:	**3. AUS**	**4. BEL**	**5. DNK**	**6. FIN**	**7. FRA**	**8. DEU**	**9. GRC**	**10. IRL**	**11. ITA**	**12. LUX**	**13. NLD**	**14. PRT**	**15. ESP**	**16. SWE**	**17. UK**
art. 1 'sexual orientation' [1]	✓	✓	✓	**X**	**X**			✓	✓	✓	**?**	✓	✓	✓	✓
art. 2(2)(a) direct discrimination [2]	✓	✓	✓	✓	✓			✓	✓	✓	✓	**X**	**X**	✓	✓
art. 2(2)(b) indirect discrimination [3]	✓	**?**	✓	✓	**X**			**X**	**X**	✓	**?**	✓	✓	✓	**X**
art. 2(3) harassment [4]	**?**	✓	✓	✓	**X**			✓	✓	✓	✓	✓	✓	**?**	**?**
art. 2(4) instruction to discriminate [5]	✓	✓	✓	✓	**X**			✓	✓	✓	✓	**X**	✓	**X**	**X**
art. 2(5) rights of others, etc. [6]	–	**?**	–	–	–			**X**	**X**	–	**X**	–	–	–	**X**
art. 3(1) material scope [7]	**X**	✓	✓	**?**	**X**			✓	**?**	**X**	✓	**X**	**X**	**X**	**X**
art. 3(1) and 2(2) personal scope [8]	✓	✓	**?**	✓	✓			**?**	✓	**X**	✓	✓	✓	**?**	**?**
art. 4(1) occupational requirements [9]	✓	✓	**X**	**X**	–			✓	**X**	✓	–	**X**	✓	**?**	**X**
art. 4(2) religion based employers [10]	✓	–	**?**	–	–			**X**	**?**	**?**	**X**	–	–	–	**X**
art. 7(1) positive action [11]	✓	✓	–	✓	–			✓	–	✓	–	✓	✓	–	✓
art. 9(1) procedures [12]	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓	✓	✓	✓
art. 9(2) interest groups [13]	**X**	✓	**?**	**?**	✓			**?**	**X**	✓	✓	**X**	**X**	**X**	**?**
art. 10 burden of proof [14]	**X**	✓	✓	✓	**X**			✓	**X**	✓	✓	**X**	✓	✓	**?**
art. 11 victimisation [15]	**X**	**X**	**X**	✓	✓			✓	**X**	✓	✓	✓	✓	✓	✓
art. 17 sanctions [16]	**X**	✓	**?**	**X**	✓			**X**	✓	✓	✓	✓	**?**	**X**	**?**
art. 18 implementation largely completed [17]	**July 2004**	**Mar. 2003**	**April 2004**	**Feb. 2004**	**Nov. 2001**			**July 2004**	**Aug. 2003**		**April 2004**	**Dec. 2003**	**Jan. 2004**	**July 2003**	**Dec. 2003**
	3. AUS	**4. BEL**	**5. DNK**	**6. FIN**	**7. FRA**	**8. DEU**	**9. GRC**	**10. IRL**	**11. ITA**	**12. LUX**	**13. NLD**	**14. PRT**	**15. ESP**	**16. SWE**	**17. UK**

Notes to table 14

The notes refer to the paragraphs of chapter 19. For information on a specific country, see also the corresponding paragraph of the relevant national chapter.

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[1] See para. 19.2.2 and 19.3.
[2] See para. 19.2.3.
[3] See para. 19.2.4 and 19.3.3.
[4] See para. 19.2.5.
[5] See para. 19.2.6.
[6] See para. 19.4.2.
[7] See para. 19.2.7.
[8] See para. 19.2.8.
[9] See para. 19.4.4 and 19.4.7.
[10] See para. 19.4.5 and 19.4.2.
[11] See para. 19.4.6.
[12] See para. 19.5.3.
[13] See para. 19.5.7.
[14] See para. 19.5.8.
[15] See para. 19.5.10.
[16] See para. 19.5.4 and 19.5.5.
[17] See para. 19.2.1. Implementation had to be completed by 2 December 2003 (see art. 18 of the Directive).