Universiteit
Leiden
The Netherlands

Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive

Waalwijk, C.; Bonini-Baraldi, M.T.

Citation

Waalwijk, C., & Bonini-Baraldi, M. T. (2006). *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*. The Hague: T.M.C. Asser Press.
Retrieved from <https://hdl.handle.net/1887/16528>

Version: Not Applicable (or Unknown)
License: [Leiden University Non-exclusive license](#)
Downloaded from: <https://hdl.handle.net/1887/16528>

Note: To cite this publication please use the final published version (if applicable).

SEXUAL ORIENTATION DISCRIMINATION
IN THE EUROPEAN UNION:
NATIONAL LAWS AND THE EMPLOYMENT EQUALITY DIRECTIVE

Discrimination based on [...] sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

Employment Equality Directive, recital 11

SEXUAL ORIENTATION DISCRIMINATION
IN THE EUROPEAN UNION:
NATIONAL LAWS AND THE
EMPLOYMENT EQUALITY DIRECTIVE

by

Kees WAALDIJK

and

Matteo BONINI-BARALDI

T•M•C•ASSER PRESS

The Hague

Published by T·M·C·ASSER PRESS
P.O.Box 16163, 2500 BD The Hague, The Netherlands
<www.asserpress.nl>

T·M·C·ASSER PRESS' English language books are distributed exclusively by:

Cambridge University Press, The Edinburgh Building, Shaftesbury Road,
Cambridge CB2 2RU, UK,

or

for customers in the USA, Canada and Mexico:

Cambridge University Press, 100 Brook Hill Drive, West Nyack, NY 10994-2133, USA
<www.cambridge.org>

ISBN 10: 90-6704-213-7
ISBN 13: 978-90-6704-213-0

All rights reserved.

© 2006, T·M·C·ASSER PRESS, The Hague, The Netherlands and the authors

No part of the material protected by this copyright notice may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without written permission from the copyright owner.

PRINTED IN THE NETHERLANDS

Summary contents

Acknowledgements	VII	
Contents	IX	
List of tables	XIV	
List of abbreviations	XV	
Chapter 1	Introduction	1
Chapter 2	The Employment Equality Directive and other aspects of European law	5
Chapter 3	General situation with respect to sexual orientation discrimination at national level	61
Chapter 4	Comparative analysis of legislation implementing the Directive in the fifteen old Member States	87
Chapter 5	Implementation of the Directive in the ten new Member States and in the two acceding countries	149
Chapter 6	Overview of the state of implementation of the Directive	189
Chapter 7	Conclusions	203
Annex	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	221
Bibliography		233
European and international case law		243
European Community legislation		247
Index		251

Acknowledgements

For their help and support in the completion of this book we are deeply indebted to many. It is with a touch of pride that we say this, because we firmly believe in the benefits that collaborative research can offer to the advancement of our understanding of legal phenomena.

From Brussels, the European Commission provided funding for the establishment of the European Group of Experts on Combating Sexual Orientation Discrimination, which we have jointly coordinated at the Universiteit Leiden. Without this funding (under the *Community Action Programme to Combat Discrimination 2001-2006*) we would never have been able to pool together the wealth of expertise and dedication that enabled the group to produce its report, on which this book is based. The Commission's Anti-Discrimination Unit supported the activities of the Group and, through Cécile Le Clercq and Álvaro Oliveira, closely followed the writing and editing of the report and helped us through the many intricacies of performing a contract with the Commission. It goes without saying that neither the report nor this book necessarily reflects the opinion or position of national authorities or of the European Commission.

We are grateful to the national experts that were part of the Group of Experts, that existed from 2002 to 2004: Helmut Graupner, Olivier De Schutter, Søren Baatrup, Rainer Hiltunen, Daniel Borrillo, Susanne Baer, Matthaios Peponas, Mark Bell, Stefano Fabeni, Anne Weyembergh, Miguel Freitas, Ruth Rubio-Marín, Hans Ytterberg and Robert Wintemute. We are equally indebted to those who joined our efforts at a later stage for all of their voluntary work. This informal network was composed of: Mihaela Preslavskaja, Haris Kountouros, Lucie Otáhalová, Juris Lavrikovs, Christian Attard, Krzysztof Smiszek and Iustina Ionescu. It is only thanks to the competence, passion and patience of all of them that we are now able to present this book.

At the Faculty of Law of the Universiteit Leiden, our comparative study of the implementation of the Employment Equality Directive was part of the research programme *Securing the Rule of Law in a World of Multi-Level Jurisdiction* of the E.M. Meijers Institute of Legal Studies.

In Leiden, staff of the Meijers Institute supported us in coordinating the activities of the Group and in overcoming the inevitable difficulties we faced. We would like to mention especially: Riekje Boumlak, secretary to the project, Alan Littler, researcher, Erik Kien, financial adviser, Wout Morra, Caroline

Koetsenruijter and Loes Amperse, research assistants, and Stephen Moran, research assistant and language editor. To all of them, to the T.M.C. Asser Press and to the many other people who helped us complete this book, we wish to express our deepest and sincerest gratitude.

Leiden/Bologna, January 2006

Kees Waaldijk, Matteo Bonini-Baraldi

INSTITUUT VOOR
RECHTSWETENSCHAPPELIJK
ONDERZOEK

Contents

Acknowledgements	VII
List of tables	XIV
List of abbreviations	XV
1 Introduction	1
2 The Employment Equality Directive and other aspects of European law	5
2.1 General legal situation	5
2.1.1 Constitutional protection against discrimination	5
2.1.2 General principles and concepts of equality	9
2.1.3 Provisions on sexual orientation discrimination in employment or occupation	17
2.1.4 Important case law precedents on sexual orientation discrimination in employment or occupation	21
2.1.5 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation	23
2.1.6 Provisions on sexual orientation discrimination in other fields than employment and occupation	24
2.1.7 Other aspects of the legal background	28
2.2 The prohibition of discrimination required by the Directive	30
2.2.1 Instrument(s) used to implement the Directive	30
2.2.2 Concept of sexual orientation (article 1)	32
2.2.3 Direct discrimination (article 2(2)(a))	33
2.2.4 Indirect discrimination (article 2(2)(b))	34
2.2.5 Prohibition and concept of harassment (article 2(3))	35
2.2.6 Instruction to discriminate (article 2(4))	36
2.2.7 Material scope of the applicability of the prohibition (article 3)	36
2.2.8 Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition	37
2.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?	38
2.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour	38
2.3.2 Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation	40
2.3.3 Discrimination between same-sex partners and different-sex partners	41

2.3.4	Discrimination on grounds of a person's association with LGB individuals, events or organisations	45
2.3.5	Discrimination against groups, organisations, events or information of/for/on LGB individuals	45
2.3.6	Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation	46
2.3.7	Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent	47
2.3.8	Harassment	47
2.4	Exceptions to the prohibition of discrimination	48
2.4.1	Objectively justified indirect disadvantages (article 2(2)(b)(i))	48
2.4.2	Measures necessary for public security, for the protection of rights of others, etc. (article 2(5))	48
2.4.3	Social security and similar payments (article 3(3))	49
2.4.4	Occupational requirements (article 4(1))	49
2.4.5	Loyalty to the organisation's ethos based on religion or belief (article 4(2))	50
2.4.6	Positive action (article 7(1))	51
2.5	Remedies and enforcement	51
2.5.1	Basic structure of enforcement of employment law	51
2.5.2	Specific and/or general enforcement bodies	52
2.5.3	Civil, penal, administrative, advisory and/or conciliatory procedures (article 9(1))	52
2.5.4	Civil, penal and/or administrative sanctions (article 17)	52
2.5.5	Natural and legal persons to whom sanctions may be applied	54
2.5.6	Awareness among law enforcers of sexual orientation issues	54
2.5.7	Standing for interest groups (article 9(2))	54
2.5.8	Burden of proof of discrimination (article 10)	55
2.5.9	Burden of proof of sexual orientation	55
2.5.10	Victimisation (article 11)	56
2.6	Reform of existing discriminatory laws and provisions	56
2.6.1	Abolition of discriminatory laws and administrative provisions (article 16(a))	57
2.6.2	Measures to ensure amendment or nullity of other discriminatory provisions (article 16(b))	57
2.7	Concluding remarks	59
3	General situation with respect to sexual orientation discrimination at national level	61
3.1	The social situation	61
3.2	Constitutional protection against discrimination	67
3.3	Provisions on sexual orientation discrimination in employment	72

3.4	Case law precedents on sexual orientation discrimination in employment	76
3.5	Provisions on discrimination in employment that do not cover sexual orientation	78
3.6	Provisions on sexual orientation discrimination in fields other than employment	79
3.7	Other aspects of the legal background	82
4	Comparative analysis of legislation implementing the Directive in the fifteen old Member States	87
4.1	Introduction	87
4.2	The prohibition of discrimination required by the Directive	91
4.2.1	Instrument(s) used to implement the Directive	91
4.2.2	Concept of sexual orientation (article 1)	94
4.2.3	Direct discrimination (article 2(2)(a))	98
4.2.4	Indirect discrimination (article 2(2)(b))	100
4.2.5	Prohibition and concept of harassment (article 2(3))	102
4.2.6	Instruction to discriminate (article 2(4))	104
4.2.7	Material scope of the applicability of the prohibition (article 3)	104
4.2.8	Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition	108
4.3	What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?	110
4.3.1	Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour	110
4.3.2	Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation	112
4.3.3	Discrimination between same-sex partners and different-sex partners	113
4.3.4	Discrimination on grounds of a person's association with LGB individuals, events or organisations	117
4.3.5	Discrimination against groups, organisations, events or information of/for/on LGB individuals	118
4.3.6	Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about sexual orientation	118
4.3.7	Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent	119
4.3.8	Harassment	120
4.4	Exceptions to the prohibition of discrimination	121
4.4.1	Objectively justified indirect disadvantages (article 2(2)(b)(i))	121
4.4.2	Measures necessary for public security, for the protection of rights of others, etc. (article 2(5))	121
4.4.3	Social security and similar payments (article 3(3))	123

4.4.4	Occupational requirements (article 4(1))	124
4.4.5	Loyalty to the organisation's ethos based on religion or belief (article 4(2))	126
4.4.6	Positive action (article 7(1))	129
4.4.7	Exceptions beyond the Directive	129
4.5	Remedies and enforcement	130
4.5.1	Basic structure of enforcement of employment law	130
4.5.2	Specific and/or general enforcement bodies	130
4.5.3	Civil, penal, administrative, advisory and/or conciliatory procedures (article 9(1))	132
4.5.4	Civil, penal and/or administrative sanctions (article 17)	134
4.5.5	Natural and legal persons to whom sanctions may be applied	137
4.5.6	Awareness among law enforcers of sexual orientation issues	138
4.5.7	Standing for interest groups (article 9(2))	139
4.5.8	Burden of proof of discrimination (article 10)	141
4.5.9	Burden of proof of sexual orientation	141
4.5.10	Victimisation (article 11)	142
4.6	Reform of existing discriminatory laws and provisions	143
4.6.1	Abolition of discriminatory laws and administrative provisions (article 16(a))	143
4.6.2	Measures to ensure amendment or nullity of other discriminatory provisions (article 16(b))	144
4.6.3	Discriminatory laws and provisions still in force	145
4.7	Concluding remarks	146
5	Implementation of the Directive in the ten new Member States and in the two acceding countries	149
5.1	Introduction	149
5.2	The prohibition of discrimination	152
5.2.1	Direct and indirect discrimination (article 2(2))	154
5.2.2	Harassment (article 2(3)) and instruction to discriminate (article 2(4))	159
5.2.3	Material scope (article 3)	162
5.3	Exceptions	164
5.3.1	Measures necessary for public security, for the protection of rights of others, etc. (article 2(5))	164
5.3.2	Social security and similar payments (article 3(3))	164
5.3.3	Occupational requirements (article 4(1)) and loyalty to the organisation's ethos based on religion or belief (article 4(2))	165
5.3.4	Positive action (article 7(1))	170
5.4	Enforcement	171
5.4.1	Sanctions (article 17)	172
5.4.2	Enforcement bodies	175
5.4.3	Burden of proof (article 10) and victimisation (article 11)	179
5.4.4	Standing for interest groups (article 9(2))	183

5.5	Case law on sexual orientation discrimination	184
5.6	Concluding remarks	186
6	Overview of the state of implementation of the Directive	189
6.1	Introduction	189
6.2	The timeliness of implementation	190
6.3	The quality of implementation	191
6.3.1	Prohibition of different forms of sexual orientation discrimination in employment	192
6.3.2	Exceptions to the prohibition of discrimination	196
6.3.3	Enforcement of the prohibition of discrimination	197
6.4	Concluding remarks	199
7	Conclusions	203
7.1	Two decades of changing law	204
7.2	Discrimination prohibited at many levels	206
7.3	The complementarity of discrimination prohibitions	207
7.4	The complexity of equality law	208
7.5	A certain implementation of the Directive	209
7.6	Legal uncertainty	210
7.7	The specific character of sexual orientation	212
7.8	Real legal certainty?	214
7.9	Law-making at many levels – inspiration and guidance	217
Annex	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	221
	Bibliography	233
	European and international case law	243
	European Community legislation	247
	Index	251

List of tables

Table 1	The non-acceptance of homosexual people according to the European Values Study Surveys	62
Table 2	The acceptance of homosexuality according to the European Values Study Surveys	63
Table 3	The level of opposition against (sexual orientation) discrimination according to the 2002 Eurobarometer	64
Table 4	The extent of perceived sexual orientation discrimination according to the 2002 Eurobarometer	66
Table 5	Provisions on sexual orientation discrimination in employment	73
Table 6	Provisions on sexual orientation discrimination beyond employment	80
Table 7	Decriminalisation of homosexuality and legislative recognition of same-sex partners	83
Table 8	Major shortcomings in the implementation of the Directive	148

Abbreviations

appl.	application number(s)
COM	documents of the Commission of the European Communities
Directive (the)	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)
EC	European Community, European Communities, or Treaty Establishing the European Community
ECHR	Convention on the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights)
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU Charter	European Union Charter of Fundamental Rights
Euratom	European Atomic Energy Community
ILGA	International Lesbian and Gay Association
LGB	lesbian, gay and/or bisexual
OJ L	Official Journal of the European Communities (L Series)
OJ C	Official Journal of the European Communities (C Series)
para.	paragraph(s)