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

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Chapter 1

INTRODUCTION¹

Among the recent positive developments in European Union law with regard to the legal situation of lesbian, gay and bisexual persons, the clear prohibition of discrimination in employment and occupation contained in the Employment Equality Directive is the most important. Certainly, since 1999 article 13 of the EC Treaty, which forms the legal basis for this Directive, already mentions sexual orientation among the protected grounds, but this Treaty provision only enables the Council of the EC to adopt appropriate action against discrimination. This is precisely what happened on 27 November 2000, when the Council adopted *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (hereafter the Directive).² Prior to its enactment, eight of the then fifteen Member States, two of the current new Member States (the Czech Republic and Slovenia), and one of the current acceding countries (Romania) had legislation in place prohibiting sexual orientation discrimination in employment. However, these laws followed a variety of approaches, which were not always consistent with the Directive's requirements. All Member States were required to make some changes to their legislative framework in order to implement the provisions of the Directive with respect to discrimination based on sexual orientation (and with respect to discrimination based on any of the three other grounds covered by the Directive: religion or belief, disability, age).

After November 2000, a considerable amount of information concerning the steps taken at national level for ensuring implementation of the Directive has gradually become available. With respect to employment discrimination on the ground of sexual orientation, there is the independent study conducted by the European Group of Experts on Combating Sexual Orientation Discrimination, which was set up in 2002 by the Commission of the European Commission in order to monitor the process of implementation of the Directive.³ The group first reported to the Commission in 2003, and in 2004 it issued an updated version of its report. The report presented to the European Commission, and via

¹ This chapter is written by Matteo Bonini-Baraldi (mbonini@giuri.unibo.it), researcher, University of Bologna.

² The full text of the Directive is reproduced as an annex in this book.

³ For its members, see chapter 4, footnote 1.

its website to the general public,⁴ consists of a detailed and comparative analysis of what the fifteen 'old' Member States had done to ensure transposition of the Directive with respect to sexual orientation discrimination.

This book is largely based on that report and its basic approach: confronting national law with the provisions of the Directive, in order to assess if Member States have fully taken up the challenge of putting in place a legal framework which could go some way to ensuring that the sphere of employment and occupation is free from sexual orientation discrimination. This assessment of the conformity of national law with the provisions of the Directive is a difficult, though interesting exercise. It will also be one of the main tasks of the Court of Justice of the European Communities, when giving preliminary rulings on the interpretation of the Directive or when Member States are referred to it for non-compliance with the Directive. Thus far, proceedings by the Commission have only been launched for non-communication of implementation. In December 2004 Austria, Germany, Finland, Greece and Luxembourg have been referred to the Court for non-communication.⁵ The Court of Justice has so far condemned only one Member State: in *Commission v. Luxembourg* it has declared that by failing to adopt the laws, regulations and administrative provisions necessary to comply with the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations.⁶ A letter by the Commissioner for Employment, Social Affairs and Equal Opportunities confirms that infringement procedures for non-compliance are also to be expected in the future.⁷

While the report of the Group of Experts only dealt with the situation in the fifteen 'old' Member States, this book aims to cover all twenty-five Member States (and the two acceding countries set to join the European Union in 2007 or 2008). It is our hope that the inherent complexity is reflected and adequately discussed in this book. It should be noted however, that there is more in the Directive than there is in this book. We have chosen to focus on the crucial

⁴ The report, entitled *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States – Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (Leiden: Universiteit Leiden, 2004), was edited by the authors of this book and is also available at www.emmeijers.nl/experts (in English and in French). Summaries of the report have appeared in two books: Fabeni & Toniollo 2005, and Weyembergh & Cârstocea 2006.

⁵ Commission Press Release IP/04/1512, 20 December 2004, online at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lnfringe_en.htm. See 4.1 below.

⁶ ECJ 20 October 2005, Case C-70/05, *Commission v. Luxembourg*.

⁷ Letter of 7 June 2005, from Mr. Vladimír Špidla to Mr. Berman and Ms. Bozkurt, Members of the European Parliament, online at www.thijsberman.pvda.nl/download.do/id/100386450/cd/true/.

provisions requiring legislation, leaving aside provisions concerning dissemination of information (article 12 of the Directive), social dialogue (article 13), and dialogue with non-governmental organisations (article 14).

The Directive embodies a valuable set of provisions. Complementing article 14 of the European Convention on Human Rights, other international human rights instruments, and national constitutional norms, all of which are more general in character, the Directive sets a fairly high standard of protection against discrimination. It defines clearly and concisely concepts such as indirect discrimination and victimisation, and it specifies that adequate procedures and remedies need to be made available to those who have been discriminated against. However, the Directive is not always clear in terms of what exactly it requires from Member States.

Chapter two of this book tackles both the clear and the obscure areas of the Directive, as well as other aspects relevant at Community level, such as other Community law that has implications with respect to sexual orientation discrimination, and the case law of the European Court of Human Rights.

Due to space reasons and in order to offer better accessibility to the reader we have chosen to structure information about national law in the form of a comparative analysis, which can be found in chapters three to six.

In *chapter three*, this analysis covers not only employment legislation, but also a comparison between national constitutional equality provisions and other relevant factors useful for getting a better idea of the general social and legal situation of lesbian, gay and bisexual persons in each country. Some of this information is presented in the form of tables, for example on (changing) attitudes of the population towards homosexuality and towards discrimination, on laws on sexual orientation discrimination in fields other than employment, on the gradual decriminalisation of homosexuality, and on the growing recognition of same-sex couples in law.

Our *fourth chapter*, through an approach characterised by both a panoramic view and close attention to detail, discusses the many intricacies of the law of most of the 'old' fifteen Member States, and aims at providing an assessment of its provisions in light of the requirements of the Directive. Information about national law is drawn from the country reports written by national experts of the Group of Experts mentioned earlier.⁸ For several reasons, not all countries could be fully taken into account in that chapter, because in Luxembourg and Ger-

⁸ Like chapter two, chapter four is subdivided according to the same template as was used for the national chapters in the report *Combating sexual orientation discrimination in employment* 2004. This means that the paragraph numbering of these two chapters of this book corresponds to the paragraph numbering of the fifteen national chapters of the report.

many legislative proposals implementing the Directive are still being discussed, and because not much detailed information was available about the 2005 law implementing the Directive in Greece.

The law of the new Member States, and of the two acceding countries (Bulgaria and Romania), is in turn analysed in *chapter five*, which also aims at assessing compatibility with the Directive's requirements. As detailed information concerning laws against sexual orientation discrimination in these countries was not previously available, the overview provided in this chapter appears somewhat less analytical when compared with the approach adopted in chapter four. Information presented in chapter five was drawn mainly, though not completely, from summaries written at the request of the authors by legal experts in most countries.⁹ Both chapters also profited from the output of the European Network of Legal Experts in the Non-Discrimination Field, set up by the Commission in 2004 to cover five grounds of discrimination (race or ethnic origin, religion or belief, age, disability, and sexual orientation) and all twenty-five current Member States.¹⁰

Chapter six gives an overview of the main issues of implementation of the Directive in all twenty-seven countries. *Chapter seven*, finally, is devoted to some general conclusions, focussing on the particular relevance of increasing legal certainty when prohibiting sexual orientation discrimination at European and national level.

At the end of the book the reader will find an annex with the full text of the Directive, a bibliography (reports per title and literature per author), an index of European and international case law, an index of the European Community legislation, and a general index.

It goes without saying that despite our best efforts we cannot guarantee that our description of the law of twenty-seven countries (and of European law) is fully up to date and completely accurate. We have aimed to describe the legal situation as it was in the summer of 2005, although some more recent developments have been mentioned in the text.

⁹ For their names, see chapter 5, footnote 1. The majority of these summaries will become available online at www.emmeijers.nl/experts.

¹⁰ For its members, see http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/legnet_en.htm.