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

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# Chapter 2

## THE EMPLOYMENT EQUALITY DIRECTIVE AND OTHER ASPECTS OF EUROPEAN LAW<sup>1</sup>

### 2.1 GENERAL LEGAL SITUATION

#### 2.1.1 *Constitutional protection against discrimination*

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

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

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<sup>1</sup> This chapter is written by Matteo Bonini-Baraldi (mbonini@giuri.unibo.it), researcher, University of Bologna. It is based on chapter 2 of the report: *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States* 2004, online at [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts).

<sup>2</sup> See Bell 1999, 15: 'The references to improving living and working conditions and combating exclusion are particularly relevant as combating discrimination fulfils both these objectives'.

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

Historically, anti-discrimination measures specifically mentioned in the EC Treaty have been functional to the integration of the (Common) market, until the Court of Justice of the European Communities (hereafter ECJ) ruled that article 141 EC pursues both economic and social objectives and may be viewed as a guarantee for social progress, as mentioned in the Preamble of the Treaty.<sup>4</sup>

Only with the adoption of article 13 EC<sup>5</sup> does a less market-oriented approach to issues of equality seem to have been embodied into the Treaty, although it is still characterised by a lack of uniformity.<sup>6</sup> Article 13 EC forms the legal basis for Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, also known as the Employment Equality Directive.<sup>7</sup>

In contrast with articles 141 (sex discrimination) and 12 EC (nationality discrimination), article 13 EC has no direct effect but must be substantiated by secondary legislation. Its applicability is limited both by existing provisions of the Treaty and by the powers conferred by it to the Community,<sup>8</sup> limitations that cast doubts over the legality of Community action in borderline fields such as education, housing, and health care.<sup>9</sup> Its location in the Chapter on 'Principles' indicates its centrality, although the wording makes it clear that it is not intended to delineate a new, autonomous competence for the Community in the

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<sup>4</sup> ECJ 8 April 1976, Case 43/75, *Defrenne v. Sabena II* [1976] *ECR* 455, para. 8-11. See Blanpain 2002, 115; Bell 2002, 191; Tesauro 2003, 120-1; Mancini & O'Leary 1999, 331; Barnard 2000, 198.

<sup>5</sup> Article 13: '(1) Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. (2) By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.' Article 13 has been inserted into the EC Treaty by the 1997 Treaty of Amsterdam, which is in force since 1 May 1999.

<sup>6</sup> See Bell 2003(b), 91; and McCrudden 2003, 10. Fredman (2001, 149) argues that 'it was only with the acceptance of a convergence between economic goals, and goals of justice and fairness that a generalised power to legislate in the discrimination field was enacted'.

<sup>7</sup> Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* L 303, 2.12.2000, p. 16. The full text of this directive is reproduced as an annex to this book.

<sup>8</sup> In contrast with article 12 EC which, limited by other *special* provisions of the Treaty and by its *scope of application*, provides broader margins of application: see Bell 1999, 8 ff. See also Flynn 1999, 1132 ff.

<sup>9</sup> Bell 2002, 135.

field of anti-discrimination.<sup>10</sup> Article 13 EC has attracted criticism because of its vagueness as far as other important aspects are concerned: the article does not specify which measures may be taken within the meaning of 'appropriate action', nor the approach to be adopted *vis-à-vis* indirect or positive discrimination.<sup>11</sup> The risk of article 13 EC creating a *de facto* hierarchy among different grounds of discrimination has also been highlighted and connected to the political will of the Council;<sup>12</sup> several authors are of the opinion that measures taken under article 13 EC have in fact resulted in a *de facto* hierarchy.<sup>13</sup>

Nevertheless, article 13 EC clearly stands as an example of significant commitment by the Communities in the field of equality,<sup>14</sup> which has been seen as an important step in the construction of a new political space.<sup>15</sup> Articles 20,<sup>16</sup> 21,<sup>17</sup> and 23<sup>18</sup> of the European Union Charter of Fundamental Rights (hereafter EU Charter) further testify of this commitment, although reflecting different visions of equality,<sup>19</sup> often adapted to the specific relevance of the ground of discrimination considered. Therefore, if article 20 reflects the classical view of

<sup>10</sup> Directive 2000/43/EC of 29 June 2000, *OJ L* 180, 19.7.2000, p. 22 (hereafter Racial Equality Directive) is seen as an example of broad Community action *vis-à-vis* anti-discrimination because its scope encompasses additional realms (other than employment), and because it does not require a cross-border situation in order to be applicable (in contrast with article 12 EC). See Bell 2002, 136 ff.

<sup>11</sup> Flynn 1999, 1136.

<sup>12</sup> Idem, 1138.

<sup>13</sup> Waddington & Bell 2001, 610; Fredman 2001, 151; Waddington 1999, 3. The Opinion of the Economic and Social Committee on the Proposal for the Framework Directive, *OJ C* 204, 18.7.2000, p. 82 at 2.3, called on the Commission to 'consider enacting future legislation to protect all grounds [...] modelled on the principles proposed in the Directive against discrimination on racial or ethnic grounds'. For a more nuanced approach see also Bell & Waddington 2003, 349. See also Bell et al. 2004, 11 ff.

<sup>14</sup> In 1999 the Commission's action was described as driven by a 'relatively ambitious and broad vision', see Waddington 1999, 4.

<sup>15</sup> Borrillo 2003, 141.

<sup>16</sup> Article 20: 'Everyone is equal before the law.'

<sup>17</sup> Article 21:

(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

(2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.'

<sup>18</sup> Article 23: 'Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

<sup>19</sup> See 2.1.2 below.

equality before the law, article 21(1) embraces the concept of non-discrimination for a number of protected grounds, but treats nationality as a separate concern (article 21(2)) mirroring article 12 EC. The relationship between article 21 EU Charter, article 13 EC and the secondary legislation is manifold: firstly, since the Charter is part of the Constitution for Europe, article 21 of the Charter (unlike article 13 EC) will have binding force (if and when the process of ratification by Member States is completed), and as such, individuals and organisations will be able to request judicial review of legislative choices. Secondly, article 13 EC does not tackle the issue of justification of discrimination, whereas article 21 of the Charter must be read in conjunction with article 52(1) of the Charter<sup>20</sup> (which only allows for necessary and objective justification).

The Treaty establishing a Constitution for Europe, adopted by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council on 18 July 2003, and signed in Rome on 29 October 2004 (but not yet ratified by all Member States), clearly states in article I-2 that the Union is founded on the value of respect for equality, shared by societies characterised by 'pluralism and [...] non-discrimination'.<sup>21</sup> Article I-3, in listing the Union's objectives, embraces the fight against 'social exclusion and discrimination', and article I-9 reiterates the firm commitment to the need of respecting fundamental rights protected by both the EU Charter and the European Convention on Human Rights, including the right to non-discrimination.

The Constitution contains at least three specific norms related to sexual orientation. First of all, it incorporates, in Part II, the EU Charter of fundamental rights where, as seen, the prohibition of sexual orientation discrimination is clearly stated (see current article II-81).<sup>22</sup> Secondly, a new article III-124, located in

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<sup>20</sup> Article 52: Scope of guaranteed rights.

(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

(2) Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

(3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

<sup>21</sup> The whole text of the Constitution is online at [http://europa.eu.int/constitution/index\\_en.htm](http://europa.eu.int/constitution/index_en.htm).

<sup>22</sup> In the Treaty establishing a Constitution for Europe of 29 October 2004, the three provisions explicitly referring to sexual orientation are phrased as follows:

Title II (Non-discrimination and citizenship) of Part III (Policies and functioning of the Union), rephrases article 13 EC. Furthermore, article III-118 states that ‘in defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on [...] sexual orientation’.

In general, the European approach in the field of anti-discrimination legislation has been described as cautious<sup>23</sup> and as devoid of uniformity as well as a solid theoretical basis.<sup>24</sup> Article 13 EC only allows action within the limits of existing powers of the Community. Similarly article 51 of the EU Charter<sup>25</sup> reiterates the principle of subsidiarity, while avoiding conferring any new (constitutional) power on the Union as far as fundamental rights are concerned. The body of laws on equality that has grown considerably in recent years has adopted not one but a plurality of concepts of equality.

### 2.1.2 *General principles and concepts of equality*

The respect for fundamental rights is a general principle that Community law observes.<sup>26</sup> The Court of Justice of the European Communities considers that

Article II-81(1): ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’

Article III-118: ‘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.’

Article III-124:

‘(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.’

<sup>23</sup> Craig & De Búrca 2003, 357.

<sup>24</sup> McCrudden 2003, 1 ff.

<sup>25</sup> Article 51: Scope.

‘(1) The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

(2) This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’.

<sup>26</sup> See ECJ’s Opinion of 28 March 2004, C-2/94, on accession by the Community to the ECHR [1996] *ECR* I-1759.

the fundamental rights deriving from the constitutional tradition common to the Member States are binding on legislative and administrative acts of the European Communities.<sup>27</sup> The reference to rights inherent in common constitutional traditions and to the fundamental rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) has been subsequently codified in the Treaty on European Union (article 6), and several specific rights were later given more visibility by means of codification within the EU Charter.<sup>28</sup> The Court of Justice had initially been reluctant to subject EC law to national constitutions because of the detrimental effect on the validity and efficacy of Community measures.<sup>29</sup> However, despite incorporating respect for fundamental rights as a general principle into Community law the Court, when testing Community measures against fundamental rights, has rarely struck down such acts; instead deference to the legislature has prevailed.<sup>30</sup>

Fundamental rights include the right of non-discrimination.<sup>31</sup> In the field of social policy, the Community legislature, both in the Treaty and in secondary legislation, has gradually dedicated most of its attention to equal treatment between men and women. In turn the Court of Justice has, over time, conferred to the provision on equal pay between men and women (article 141 EC) a broader meaning than the literal one.<sup>32</sup> Some scholars argued that equal pay between

<sup>27</sup> ECJ 12 November 1969, Case 29/69, *Stauder v. Stadt Ulm* [1969] *ECR* 419; ECJ 14 May 1974, Case C-4/73 *Nold KG v. Commission* [1974] *ECR* 491; ECJ 28 October 1975, Case 36/75, *Rutili v. Ministre de l'intérieur* [1975] *ECR* 1219.

<sup>28</sup> See 2.1.1 above.

<sup>29</sup> See ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] *ECR* 1125. Craig & De Búrca (2003, 322) argue that the discourse on fundamental rights in the EU stems from and depends on the constitutional status of EC law *vis-à-vis* national law and the question of its supremacy. See also Bell 2002, 19; Tesauro 2003, 115.

<sup>30</sup> See Craig & De Búrca 2003, 331-2.

<sup>31</sup> See ECJ 19 October 1977, Case 117/76, *Ruckdeschel and others v. Hauptzollamt Hamburg-St. Annen* [1977] *ECR* 1753, para. 7: 'the second subparagraph of article 40(3) of the treaty provides that the common organisation of agricultural markets "shall exclude any discrimination between producers or consumers within the community". Whilst this wording undoubtedly prohibits any discrimination between producers of the same product it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified'. See also Bell 2002, 20.

<sup>32</sup> Starting from ECJ 15 June 1978, Case 149/77, *Defrenne v. Sabena* [1978] *ECR* 1365, para. 26-27: 'The court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of community law, the observance of which it has a duty to ensure. There

men and women has been interpreted by the Court so broadly that today it can be identified with a general principle of equality *in employment relations*,<sup>33</sup> whereas others, giving the case law a more generous interpretation, concluded that equal pay between men and women has been elevated 'from an element of labour law to the status of a fundamental norm of *Community law*'.<sup>34</sup>

In this context, some have explored the possibility of considering the principle of equal treatment not only as a market-unification tool or as a rule of administrative law but also – notwithstanding the lack of a written rule – as an individual right of a constitutional nature.<sup>35</sup> In fact, in *P v. S*<sup>36</sup> the Court interpreted a sex equality Directive as applicable to a case involving unequal treatment of a transsexual person, arguing that the measure was 'simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'; other Treaty provisions (such as articles 34(2) or 49) and Directives concerning equal treatment between men and women are considered by the Court as specific manifestations of an unwritten general principle which is binding on the Community.<sup>37</sup>

Such an unwritten general principle of equal treatment has been put into question when forms of discrimination allegedly different from sex discrimination were at stake, as in *Grant*<sup>38</sup> and *D and Sweden*.<sup>39</sup> However, despite the disappointment of a missed opportunity to 'articulate a broad principle of non-discrimination on *any* arbitrary ground', some have concluded that the general principle survived.<sup>40</sup> In one of the first judgements on the Directive, *Mangold v.*

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can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'. See also Blanpain 2002, 340.

<sup>33</sup> Tesauro 2003, 120.

<sup>34</sup> Whittle & Bell 2002, 688 (emphasis added). In general see also: More 1999, 540, and Mancini & O'Leary 1999, 331.

<sup>35</sup> See More 1999, 544.

<sup>36</sup> ECJ 30 April 1996, Case C-13/94, *P v. S and Cornwall County Council* [1996] *ECR I-2143*, para. 18 (see also the opinion of Advocate General Tesauro, para. 22). See also Craig & De Búrca 2003, 388.

<sup>37</sup> See ECJ 19 October 1977, *Ruckdeschel and others v. Hauptzollamt Hamburg-St. Annen* [1977] *ECR 1753*; ECJ 25 November 1986, Joined Cases 201 and 202/85, *Klensch v. Sécrétaire d'État* [1986] *ECR 3477*; ECJ 16 January 2003, Case C-388/01, *Commission v. Italy* [2003] *ECR I-721*, para. 13: 'It is also clear from the Court's Case-law [...] that the principle of equal treatment, of which Article 49 EC embodies a specific instance [...]'.

<sup>38</sup> ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] *ECR I-621*.

<sup>39</sup> ECJ 31 May 2001, Joined Cases C-122/99 and 125/99, *D and Sweden v. Council* [2001] *ECR I-4319*.

<sup>40</sup> Craig & De Búrca 2003, 388. Rather more sceptical is More 1999, 546-7. In *Grant* (para. 45) the ECJ argued that the respect for fundamental rights (referring to the International Covenant on Civil and Political Rights) 'cannot have the effect of extending the scope of the Treaty' with the effect of protecting grounds of discrimination not yet covered by it.

*Helm*,<sup>41</sup> the Court of Justice held that the source of the principle of equal treatment in the field of employment and occupation must be found in 'various international instruments and in the constitutional traditions common to the Member States' (para. 74). The Court stated that 'the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law' (para. 75), and concluded that 'it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired' (para. 78). It is rather evident that the above-mentioned conclusions are very promising for other grounds of discrimination too, and arguably even have repercussions that reach beyond the specific sector in which they have been affirmed.

Overall, the adoption of article 13 EC, the inclusion of several grounds, the quite decisive political steps taken by the Council (such as the annual human rights report), several Directives in the field of equal treatment, and thorough scholarly studies testify to a growing interest and involvement of several actors in the field of equality; some scholars, nevertheless, emphasise the ambiguous and cautious involvement of the European Union in social policy matters concerning anti-discrimination.<sup>42</sup>

In the employment sphere, equality between men and women historically had an economic objective rather than a social one: article 141 EC and subsequent measures were aimed at avoiding distortion of competition.<sup>43</sup> The object of European social policy has been the 'familiar market citizen', whereas only the most recent measures such as the Racial Equality Directive appear as an expression of policies based on a social citizenship model.<sup>44</sup>

In addition, the argument has been made that the Commission's choice to use article 13 EC (instead of article 137(2) EC) as a legal basis for the Employment Equality Directive contributes to the shift of anti-discrimination law from labour law to an element capable of strengthening the content of Union citizenship.<sup>45</sup> This, in addition to political objectives, has the effect of 'improv[ing] the status of the Directives before the Court of Justice'.<sup>46</sup>

<sup>41</sup> ECJ 22 November 2005, Case C-144/04, *Mangold v. Helm*.

<sup>42</sup> Bell 2002, 144: 'The dependency of Article 13 on the limits of the competences of the Community draws it back towards a market focus, because Community competences are strongest and most clear in those areas directly connected to the functioning of the internal market'.

<sup>43</sup> ECJ 15 May 1986, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] *ECR* 1651. See also Blanpain 2002, 339 and 2.1.1 above.

<sup>44</sup> See Bell 2002, 191-5.

<sup>45</sup> Whittle & Bell 2002, 688.

<sup>46</sup> *Idem*.

Recently in *Schröder*,<sup>47</sup> equality rights were given a dimension more closely related to the human being, rather than as instruments of economic integration. Thus the social aim of article 141 EC becomes paramount because it constitutes an expression of a fundamental human right that the Court has a duty to ensure.

The principle of non-discrimination as applied in Community law generally requires a similarly-situated test;<sup>48</sup> however, scholars, as well as the Court of Justice, have over time increasingly recognised the role of indirect and unintentional discrimination.<sup>49</sup> First defined in the 1997 Burden of proof Directive,<sup>50</sup> the notion of indirect discrimination has been subsequently revisited in the 2000 Racial Equality Directive and the Employment Equality Directive.<sup>51</sup> Today it is generally related to a more substantive approach to equality.<sup>52</sup> Furthermore, a less formal analytical approach has been adopted in a line of cases concerning refusal to hire a woman because of her pregnancy, where the Court held that the finding of discrimination 'depends on the reason for that refusal'.<sup>53</sup> Some have seen the emergence of a more substantive notion of equality also in article 141(4) EC, introduced by the Treaty of Amsterdam, where it aims at ensuring 'full equality in practice'.<sup>54</sup>

Article 14 of the ECHR prohibits discrimination which might affect the enjoyment of the rights set forth in the Convention.<sup>55</sup> Since 1 April 2005 the

<sup>47</sup> ECJ 10 February 2000, Case C-50/96, *Schröder* [2000] *ECR* I-743.

<sup>48</sup> ECJ 13 November 1984, 10 February 2000, Case 283/83, *Racke v. Hauptzollamt Mainz (Racke III)* [1984] *ECR* 3791.

<sup>49</sup> Craig & De Búrca 2003, 391; and Fredman 2001, 161. ECJ 12 February 1974, Case 152/73, *Sotgiu v. Deutsche Bundespost* [1974] *ECR* 153. In 1974 the Court held that 'the rules regarding equality of treatment, both in the Treaty and in article 7 of Regulation 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'; see also ECJ 8 May 1990, Case C-175/88, *Biehl v. Administration des contributions* [1990] *ECR* I-1779; and ECJ 13 May 1986, Case 170/84, *Bilka v. Weber von Hartz* [1986] *ECR* 1607.

<sup>50</sup> Directive 97/80/EC, *OJ L* 14, 20.1.1998, p. 6.

<sup>51</sup> See 2.2.4 below.

<sup>52</sup> Schiek 2002, 305-6: 'its inclusion in the principle of equal treatment under Community law is a consequence of the social purpose of the Equal Treatment Legislation'.

<sup>53</sup> ECJ 8 November 1990, Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen* [1990] *ECR* I-3941; see also ECJ 14 July 1990, Case C-32/93, *Webb v. EMO Air Cargo* [1994] *ECR* I-3567; ECJ 13 February 1996, Case C-342/93, *Gillespie and others* [1996] *ECR* I-475; ECJ 3 February 2000, Case C-207/98, *Mahlburg* [2000] *ECR* 3875. See also Schiek 2002, 306.

<sup>54</sup> Barnard 1998, 371.

<sup>55</sup> Article 14 reads 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Twelfth Protocol of the ECHR, which establishes a self-standing right to equal treatment, has entered into force for eleven Member States of the Council of Europe (Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, the Netherlands, San Marino, Macedonia, and Serbia and Montenegro).<sup>56</sup>

In the *Belgian Linguistic* case the European Court of Human Rights clarified what constitutes 'discrimination', ruling that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification; moreover, it held that 'the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies'. A difference of treatment must pursue a legitimate aim and must bear a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.<sup>57</sup>

In recent cases the Court has been willing to accept that discrimination occurs not only when people in similar situations are treated differently, but also when people in different situations are treated equally, i.e. when no exception to a (general) rule is made for people who find themselves in a situation that deserves separate consideration. In *Thlimmenos v. Greece*,<sup>58</sup> the Court found a violation of article 14 of the Convention in conjunction with article 9 (freedom of thought, conscience and religion) in the case of a Jehovah's Witness – previously convicted of insubordination for refusing to wear a military uniform – whose position had been eliminated from a public competition for recruitment of accountants on grounds of his previous criminal record. The Greek government maintained that the requirement of no previous criminal conviction for serious crimes was general and neutral *vis-à-vis* religion, because it would apply to Greek Orthodox or Catholic Christians had they also been convicted of a serious crime. The Court held that the exclusion from the competition was based on grounds of 'his status as a convicted person' and that such a difference of treatment does not generally come within the scope of article 14 in relation to the 'right to freedom of profession', a right not guaranteed by the Convention (para. 41). However, the complaint was not based on the differential treatment between convicted persons and others, but on the *lack of differential treatment* between certain offenders convicted because of their religious beliefs and other offenders.

<sup>56</sup> See <http://conventions.coe.int/Treaty/Commun/ListsTraites.asp?CM=8&CL=ENG>.

<sup>57</sup> ECtHR 23 July 1968, *Belgian Linguistic Cases, Series A*, nr. 6, para. 10; ECtHR 18 July 1994, *Karlheinz Schmidt v. Germany*, appl. 13580/88, *Series A*, nr. 291-B. See also Ovey & White 2002, 347 ff.; Van Dijk & Van Hoof 1998, 711 ff.; Arai-Takahashi 2002, 165 ff.

<sup>58</sup> ECtHR 6 April 2000, *Thlimmenos v. Greece*, appl. 34369/97, *Reports of Judgements and Decisions* 2000-IV.

The Court considered this to be discriminatory because the exclusion based on the complainant's previous criminal record could not be justified: his previous conviction did not imply 'dishonesty' or 'moral turpitude' of the offender, in contrast with other offenders (para. 47).

Thus the Court carried out a review of the *ratio legis* of the provision on which the conviction was based, found a difference in the position of the claimant in respect to other offenders, and concluded that 'the right not to be discriminated against [...] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (para. 44). This principle was reiterated in *Hoogendijk v. the Netherlands*,<sup>59</sup> which introduced the term indirect discrimination in the Strasbourg case law.

Linked to the reception of the concept of indirect discrimination is the problem of the nature of its evidence. It is true, as it has been argued, that the Court has only recently begun to alleviate the burden of proof that rests on alleged victims,<sup>60</sup> but the law in this field remains rather ambiguous as it is difficult to assess what exactly one has to prove. Initially, in *Hugh Jordan v. United Kingdom* the Court accepted that the problem of adverse consequences might fall under article 14,<sup>61</sup> but did not consider that statistics could in themselves disclose a practice which could be classified as discriminatory within the meaning of article 14.

This viewpoint did not persist for long. In *Nachova*, in fact, the First Section of the Court has held that, certain circumstances being shown, it is possible to 'draw negative inferences or shift the burden of proof to the respondent Government'.<sup>62</sup> The Grand Chamber has recently agreed in principle with this specific finding. It argued that 'in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death', and concluded that 'in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination'.<sup>63</sup>

<sup>59</sup> ECtHR 6 January 2005, *Hoogendijk v. the Netherlands*, appl. 58641/00 (admissibility decision).

<sup>60</sup> De Schutter 2005, 17 ff.

<sup>61</sup> 'Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group' (ECtHR 4 May 2001, *Hugh Jordan v. United Kingdom*, appl. 24746/94, para. 152).

<sup>62</sup> ECtHR 26 February 2004, *Nachova and others v. Bulgaria*, appl. 43577/98 and 43579/98.

<sup>63</sup> ECtHR 6 July 2005, *Nachova and others v. Bulgaria*, appl. 43577/98 and 43579/98 (Grand Chamber).

In addition, *Hoogendijk* clarifies that the shift of the burden of proof may be a consequence of statistical evidence being shown; regrettably it is only a decision on the (in)admissibility of a complaint. In this decision the Court began by recognising that ‘where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group’.<sup>64</sup> As far as evidence of such a ‘disproportionately prejudicial effect’ is concerned, the Court went on to state that ‘although statistics in themselves are not automatically sufficient for disclosing a practice which could be classified as discriminatory under Article 14 of the Convention [...] the Court cannot ignore that, according to the results of the research carried out [...] a group of about 5,100 persons lost their entitlement to [...] benefits [...] and that this group consisted of about 3,300 women and 1,800 men’. In this situation, it concluded that ‘where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination’.<sup>65</sup> Thus, to recapitulate, the inferences that can be drawn from statistical data pointing to higher exclusion of persons belonging to a certain group – even if such data cannot in themselves be regarded as sufficient proof – will only be invalidated if the defendant State is able to show that such situation descends from ‘objective factors unrelated to any discrimination’.<sup>66</sup>

The Court applied article 14 ECHR for the first time to a case concerning sexual orientation (in conjunction with article 8) in *Salgueiro da Silva Mouta v. Portugal*.<sup>67</sup> In *Karner v. Austria*,<sup>68</sup> which entailed a comparison between unmar-

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<sup>64</sup> ECtHR 6 January 2005, *Hoogendijk v. the Netherlands*, appl. 58641/00, at 21.

<sup>65</sup> Idem, p. 21-22.

<sup>66</sup> De Schutter (2005, 19) argues that this is not yet an established trend, because ‘the Court has shown it was unwilling to find that discrimination has occurred in the absence of material facts pointing strongly to that conclusion’. There is reference to two cases that concerned not the effects of a certain (apparently neutral) legal rule, but the behaviour of police officers or the practicalities of a particular policy. They were both decided before both *Nachova* (Grand Chamber) and *Hoogendijk*: ECtHR 20 July 2004, *Balogh v. Hungary*, appl. 47940/99, para. 79; ECtHR 9 November 2004, *Hasan Ilhan v. Turkey*, appl. 22494/93, para. 128-130.

<sup>67</sup> ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96, *Reports of Judgements and Decisions* 1999-IX. See also European Commission of Human Rights, 1 July 1997, *Sutherland v. UK*, appl. 25186/94.

ried different-sex and same-sex partners, the Court recalled that 'differences based on sexual orientation require *particularly serious reasons* by way of justification'.<sup>69</sup> In addition, the Court held that the rule which prevents the unmarried same-sex partner of the deceased tenant from succeeding to the tenancy (in contrast with the unmarried different-sex partner) must be shown to be *necessary* for the achievement of the legitimate aim sought. Interestingly, the Court stated that 'the *aim of protecting the family* in the traditional sense is *rather abstract* and a broad variety of concrete measures may be used to implement it [...]. The principle of proportionality does not merely require that the measure chosen is *in principle* suited for realising the aim sought'.<sup>70</sup> In conclusion, at least when the margin of appreciation afforded to Member States is narrow, as is the case of a difference in treatment based on sex or sexual orientation, a test of necessity was added to the analysis of article 14.<sup>71</sup>

### 2.1.3 *Provisions on sexual orientation discrimination in employment or occupation*

In the process of creating a common market, the Community could not avoid providing some degree of regulation of the production system and of industrial relations. Today, Community law deals with relations between employers and workers<sup>72</sup> and covers employment both in the private and the public sector.<sup>73</sup>

<sup>68</sup> ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX.

<sup>69</sup> Idem, para. 37 (emphasis added). For the heightened scrutiny of reasons forwarded in justification see ECtHR 27 September 1999, *Smith and Grady v. UK*, appl. 33985/96 and 33986/96, *Reports of Judgements and Decisions* 1999-VI, at para. 89 (citing ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76, *Series A*, nr. 45, at para. 52). Other cases finding a violation of article 14 (in conjunction with article 8) decided after *Salgueiro da Silva Mouta* were *S.L. v. Austria*, ECtHR 9 January 2003, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I and *L. & V. v. Austria*, ECtHR 9 January 2003, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I. See also ECtHR 10 February 2004, *B.B. v. UK*, appl. 53760/00; ECtHR 3 February 2005, *Ladner v. Austria*, appl. 18297/03; ECtHR 26 May 2005, *Wolfmeyer v. Austria*, appl. 5263/03; ECtHR 2 June 2005, *H.G. and G.B. v. Austria*, appl. 11084/02 and 15306/02; and ECtHR 19 January 2006, *R.H. v. Austria*, appl. 7336/03. See also both the majority and the two dissenting opinions in *Fretté v. France*, ECtHR 26 February 2002, appl. 36515/97, *Reports of Judgements and Decisions* 2002-I (four judges out of seven found article 14 applicable but split on the justification of its violation).

<sup>70</sup> See ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, para. 41 (emphasis added).

<sup>71</sup> Idem; see also, in general, Wintemute 1997; Wintemute 2001, 713; Ovey & White 2002, 24; Janis, Kay & Bradley 2000, 282.

<sup>72</sup> See 2.1.1 above.

<sup>73</sup> Blanpain 2002; Barnard 2000.

Apart from that, there is a whole set of rules and regulations concerning the position of employees of the European institutions.<sup>74</sup>

A 1984 European Parliament Resolution on sexual orientation discrimination at the workplace,<sup>75</sup> following the Squarcialupi report, first acknowledged the need to tackle the problems faced by lesbian and gay persons.

The 1991 Commission Recommendation<sup>76</sup> on the protection of the dignity of women and men at work first sought to recommend that unwanted sexual conduct (harassment) could constitute a violation of the principle of equal treatment. This has later been explicitly accepted in the Employment Equality Directive (article 2(3)) and in other measures.<sup>77</sup> The recommendation, accompanied by a 'Code of practice on measures to combat sexual harassment', was designed to expose the problems concerning all workers, and groups particularly vulnerable to sexual harassment. Harassment directed towards lesbians and gay men was specifically indicated as unacceptable conduct: 'it is undeniable that harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour'.<sup>78</sup>

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

The Staff Regulations for officials of the Communities<sup>79</sup> have been amended in 1998<sup>80</sup> in respect of equal treatment, through the inclusion of non-discrimination clauses (including articles 1a and 27(2)) which explicitly mention sexual orientation as a prohibited ground of discrimination. Similar non-discrimination clauses are applicable to other servants of the European Communities, including temporary staff.<sup>81</sup>

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<sup>74</sup> See below.

<sup>75</sup> European Parliament Resolution on sexual discrimination at the workplace, *OJ C* 104, 16.4.1984, p. 46.

<sup>76</sup> Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, *OJ L* 49, 24.2.1992, p. 1. Endorsed by the Council with Declaration 19 December 1991, *OJ C* 27, 4.2.1992, p. 1.

<sup>77</sup> See 2.2.5 below.

<sup>78</sup> Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, *OJ L* 49, 24.2.1992, p. 1.

<sup>79</sup> Council Regulation (EEC, ECSC, Euratom) 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, *OJ L* 56, 4.3.1968, p. 1.

<sup>80</sup> Council Regulation (EEC, ECSC, Euratom) 781/98 of 7 April 1998, *OJ L* 113, 15.4.1998, p. 4.

<sup>81</sup> See article 12(1).

However, at the time the Council expressly chose not to tackle the allocation of family benefits, because the clause laid down in article 1a applied ‘without prejudice to the relevant provisions [of the Staff Regulations] requiring a specific marital status’. The specific relevance of family allowances provided for by the Staff Regulations with respect to equal treatment for same-sex couples was already highlighted more than a decade ago.<sup>82</sup>

As of 1 May 2004, this exception has been removed by the recently adopted reform of the Staff Regulations.<sup>83</sup> The Commission’s proposals for reforming Staff Regulations claimed that the old text no longer reflected the changed social and legal attitudes towards family relationships. Article 1d (formerly article 1a) now provides that ‘For the purposes of these Staff Regulations, non-marital partnerships shall be treated as marriage provided that all the conditions listed in Article 1(2)(c) of Annex VII are fulfilled’. The new article 1(2) of Annex VII grants family allowances to a married official (point (a)) and to ‘an official who is registered as a stable non-marital partner’, provided that a few conditions are met (point (c)). After this recent reform, benefits provided for by the Regulations (household allowance, pension and sickness insurance, access to canteens and language courses) apply to a registered partnership between persons who are not allowed to marry ‘in a Member State’.

In addition, the reform provides a ‘reduced social package’ for unmarried officials who live in a *de facto* (unregistered) relationship, if it can be proved by a legal document.<sup>84</sup>

In accordance with article 27 of the Regulations, notices of open competitions often emphasise that the institutions are equal opportunities employers that prohibit any discrimination on the basis of sexual orientation.<sup>85</sup>

As far as same-sex marriage and spousal benefits are concerned, through a note dated 15 May 2001, the Director General of the Commission’s Directorate General for Personnel and Administration has clarified that, in light of article 1a of the Staff Regulations and of provisions of the European Charter of fundamen-

<sup>82</sup> Snyder 1993, 258 ff.

<sup>83</sup> Council Regulation (EC, Euratom) 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, *OJ L* 124, 27.4.2004, p. 1.

<sup>84</sup> See amendment 65 to article 72 of the Staff Regulations, and amendment 95(iii) to article 6 of Annex V of the Staff Regulations.

<sup>85</sup> See, e.g., European Parliament, Recruitment notice PE/75/S, *OJ C* 306 A, 10.12.2002, p. 1; Notice PE/22/D, *OJ C* 303 A, 6.12.2002, p. 38; Notice COM/B/2/02, *OJ C* 314 A, 17.12.2002, p. 12, where it is said that: ‘The Commission is an equal opportunities employer and accepts applications without distinction on the grounds of age, race, political, philosophical or religious convictions, sex or sexual orientation and regardless of disabilities, marital status or family situation’.

tal rights – which do not mention ‘man and woman’ when defining the right to marry – family benefits provided for under Staff regulations will apply to marriages between persons of the same-sex contracted in the Netherlands.<sup>86</sup> It is plausible that the same policy will now be followed for marriages contracted in Belgium or Spain.

A first proposal for a directive on working conditions for temporary workers, although mainly concerned with the principle of non-discrimination among temporary workers and full-time workers, defined ‘basic working and employment conditions’ as, *inter alia*, factors relating to ‘action taken to combat discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation’.<sup>87</sup> A second draft of the proposal states more clearly that ‘any action to combat any discrimination based on [...] sexual orientation must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provision’.<sup>88</sup>

In addition to the Community action programme to combat discrimination (2001 to 2006),<sup>89</sup> there are certain documents that seek to inject the meaning of article 13 EC in various Community policies that affect employment law, such as a communication by the Commission on the possibility for integrating social considerations into public procurement,<sup>90</sup> an Opinion of the Economic and Social Committee on corporate social responsibility (CSR),<sup>91</sup> and a Council Resolution on social inclusion through social dialogue and partnership.<sup>92</sup> It is interesting to remark that a recent Commission Recommendation on the European Charter for Researchers and on a Code of Conduct for the Recruitment of

<sup>86</sup> Letter of Director general of Directorate general personnel and administration Horst Reichenbach to Director of DG Admin/A and Director of DG Admin/B, of 15 May 2001, ADMIN.B.2(01)D/18009.

<sup>87</sup> Article 3(1)(d) of Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, COM(2002) 149 final, 2002/0072 (COD), *OJ C* 203 E, 27.08.2002, p. 1.

<sup>88</sup> Article 5 of Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, 28/11/2002, COM(2002) 701 final, 2002/72 (COD).

<sup>89</sup> Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), *OJ L* 303, 2.12.2000, p. 23.

<sup>90</sup> COM(2001) 566 final, of 15/10/2001, *OJ C* 333, 28.11.2001, p. 27.

<sup>91</sup> General comment 4.2 considers that ‘CSR is both about encouraging a spirit of communication and about willingness to keep learning. People who can communicate with each other and are open to new knowledge are also able to live together in a socially acceptable way, so that there is no room for intolerance and discrimination based on ethnicity, disability, sexual orientation or gender’. See Opinion of the Economic and Social Committee on the ‘Green paper: Promoting a European Framework for Corporate Social Responsibility’, *OJ C* 125, 27.5.2002, p. 44.

<sup>92</sup> Council Resolution of 6 February 2003, 2003/C 39/01, *OJ C* 38, 18.2.2003, p. 1.

Researchers places particular emphasis, when outlining the general principles and requirements applicable to employers and funding entities, on the need to abstain from discrimination based on, *inter alia*, sexual orientation.<sup>93</sup>

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

In *Grant v. South West Trains Ltd.*<sup>94</sup> the Court of Justice of the European Communities was asked to clarify whether article 141 EC (formerly article 119) and Directive 75/117 (on equal pay for men and women) could apply to the case of an employer who refused travel benefits to the unmarried same sex partner of an employee, while simultaneously providing such benefits to the unmarried different-sex partner. The employer's staff regulations defined 'spouse' as a married partner or a 'common law opposite sex spouse', having satisfied a two year time requirement. The Court held that Ms. Grant 'does not satisfy the conditions prescribed in those regulations' because she does not live with a 'spouse' of the opposite sex. On the ground that this condition is applied equally to men and women, the Court rejected the argument that the refusal could be regarded as direct discrimination based on sex (para. 26-28).

The Court indulged in discussing the issue of sexual orientation discrimination and concluded that only the legislature could tackle the problem (para. 36), because any intervention by the Court that would result in sexual orientation discrimination being covered by the meaning of article 141 EC, would be tantamount to extending its scope beyond Community competences (para. 45-47).

The ruling in *Grant* allows the articulation of two conclusions. First, it states that Community sex equality law does not cover sexual orientation discrimination. Second, it implies that the fact-situation does indeed constitute sexual orientation discrimination. Given the evolution of Community law, the latter conclusion stands as an important milestone: differential treatment among employees with regard to the sex of their unmarried partner must now be taken to fall within the meaning of sexual orientation discrimination. It seems likely that the Court will consider the Directive applicable to such facts as those present in *Grant*.<sup>95</sup>

In *D and Sweden v. Council*,<sup>96</sup> the Court of Justice heard an appeal against a decision of the Court of First Instance in a case concerning the refusal of the

<sup>93</sup> Commission Recommendation of 11 March 2005, *OJ L* 75, 22.3.2005, p. 67, at 72.

<sup>94</sup> ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] *ECR I-621*.

<sup>95</sup> See 2.3.3 below.

<sup>96</sup> ECJ 31 May 2001, Joined Cases C-122/99 and C-125/99, *D and Sweden v. Council* [2001] *ECR I-4319*.

Council to apply provisions of the Community's Staff Regulations on household allowance to the registered (same-sex) partner of an employee. The Court of First Instance had held that, following the decision of the Court of Justice in *Grant*, *unmarried cohabitation* may not be considered as equivalent to *marriage*. However, the Court of First Instance failed to see that *Grant* dealt only with a comparison between same-sex and different sex unmarried couples, whereas no separate issue arose involving marriage.

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

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

By the end of 2005 the Court of Justice of the EC had twice ruled in cases concerning the Directive, but neither case was specifically about sexual orientation. In *Commission v. Luxembourg* the Court 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.<sup>97</sup> And in the case of *Mangold v. Helm* the Court held that the source of the principle of equal treatment in the field of employment and occupation must be found in 'various international instruments and in the constitutional traditions common to the Member States' and that 'the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law'.<sup>98</sup>

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<sup>97</sup> ECJ 20 October 2005, Case C-70/05, *Commission v. Luxembourg*.

<sup>98</sup> ECJ 22 November 2005, Case C-144/04, *Mangold v. Helm*, para. 74-75. See 2.1.2 above.

In 1999 the European Court of Human Rights had the chance of deciding two cases concerning (military) employment, *Lustig-Prean and Beckett v. UK* and *Smith and Grady v. UK*.<sup>99</sup> In the context of article 8 of the Convention (right to respect for private life), the Court argued that the threat to national security, in itself a legitimate aim for the interference, was based 'solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation' (para. 89). Regulations which expressed those attitudes by excluding gay personnel from the armed forces, could not claim that their infringement upon a Convention right was justified, because 'they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority' (para. 90). Therefore, the Court ruled that the dismissal of members of the armed forces on grounds of homosexuality violates the right of respect for private life.

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

A number of Community measures are specifically designed to achieve equal treatment between men and women. Areas involved are equal pay,<sup>100</sup> access to employment, vocational training and promotion, and working conditions,<sup>101</sup> social security,<sup>102</sup> occupational social security schemes,<sup>103</sup> burden of proof in cases of discrimination based on sex,<sup>104</sup> and the safety and health at work of pregnant workers.<sup>105</sup>

The Racial Equality Directive<sup>106</sup> requires equal treatment irrespective of racial or ethnic origin, the main differences compared with the Employment Equality Directive in respect of employment discrimination are that the former requires Member States to designate a body or bodies for the promotion of equal treatment, that the latter contains exceptions not mentioned in the former (see article 2(5)), and that no 'loyalty' requirement (see article 4(2)) is foreseen in the former.

<sup>99</sup> ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96 and 32377/96; and ECtHR 27 September 1999, *Smith and Grady v. UK*, appl. 33985/96 and 33986/96, *Reports of Judgements and Decisions* 1999-VI. See also ECtHR 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535/99, 48536/99 and 48537/99.

<sup>100</sup> Article 141(1) EC and Directive 75/117/EEC of 10 February 1975, *OJL* 45, 19.2.1975, p. 19.

<sup>101</sup> Directive 76/207/EEC of 9 February 1976, *OJL* 39, 14.2.1976, p. 40; amended by Directive 2002/73/EC of 23 September 2002, *OJL* 269, 5.10.2002, p. 15.

<sup>102</sup> Directive 79/7/EEC of 19 December 1978, *OJL* 6, 10.2.1979, p. 24.

<sup>103</sup> Directive 96/97/EC of 20 December 1996, amending Directive 86/378/EEC of 24 July 1986, *OJL* 46, 17.2.1997, p. 20; corrected by *OJL* 151, 18.6.1999, p. 39.

<sup>104</sup> Directive 97/80/EC of 15 December 1997, *OJL* 14, 20.1.1998, p. 6.

<sup>105</sup> Directive 92/85/EEC of 19 October 1992, *OJL* 348, 28.11.1992, p. 1.

<sup>106</sup> Directive 2000/43/EC of 29 June 2000, *OJL* 180, 19.7.2000, p. 22, article 13.

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

The European Parliament's Resolution of 8 February 1994<sup>107</sup> calls upon the Commission and the Member States to act in the field of equal treatment of lesbians and gay men in the Community. Several Resolutions on the situation of fundamental rights in the European Union, in addition to the 1994 Resolution, subsequently called upon Member States to 'amend their legislation in order to recognise non-marital relationships between persons of the same or the opposite sex and assign them equal rights',<sup>108</sup> or to confer the same rights to unmarried couples (regardless of the sexes of those involved) as to married couples and, for the first time, to recognise the right to marry and to adopt children.<sup>109</sup>

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

Anti-discrimination clauses, for example, are included in codes of conduct for personnel of European institutions and agencies. One such code is the European Ombudsman's Code of Good Administrative Behaviour,<sup>110</sup> a text that all European institutions and bodies should respect in their relations with the public. Article 5 states that when dealing with requests from the public and taking decisions, the official shall ensure that the principle of equality of treatment is respected; members of the public who are in the same situation shall be treated in a similar manner. In particular, sexual orientation discrimination shall be avoided. Several other European institutions and bodies have adopted similar codes, which all forbid discrimination of members of the public based on sexual orientation; these institutions include the European Parliament,<sup>111</sup> the Council,<sup>112</sup> the Com-

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<sup>107</sup> European Parliament Resolution on equal rights for homosexuals and lesbians in the EC, *OJ C* 61, 28.2.1994, p. 40.

<sup>108</sup> European Parliament Resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI)), *OJ C* 65 E, 14.3.2002, p. 350, at 359.

<sup>109</sup> European Parliament Resolution on the situation as regards fundamental rights in the European Union (2002) (2002/2013(INI)), *P5\_TA(2003)0376*, of 4 September 2003, *OJ C* 76 E, 25.3.2004, p. 412.

<sup>110</sup> The Ombudsman's Code of Good Administrative Behaviour, approved on 6 September 2001 by European Parliament Resolution PE 290.602/DEF, is online at [www.euro-ombudsman.eu.int](http://www.euro-ombudsman.eu.int) (under 'legal basis').

<sup>111</sup> Guide to the obligations of official and other servants of the European Parliament, *OJ C* 97, 5.4.2000, p. 1, at 10.

<sup>112</sup> Decision of the Secretary-General of the Council of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council, *OJ C* 189, 5.7.2001, p. 1 (Annex, article 3, grounds not mentioned).

mission,<sup>113</sup> the European Investment Bank, the European Environment Agency,<sup>114</sup> the European Foundation for the Improvement of Living and Working Conditions,<sup>115</sup> and the Community Plant Variety Office.<sup>116</sup>

Recital 12 of the Council Framework Decision of 13 June 2002 on the European arrest warrant<sup>117</sup> holds that nothing in the Decision may be interpreted as prohibiting a refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the purpose of the warrant will be the prosecution or punishing of a person on several grounds, including his or her sexual orientation.

Furthermore, anti-discrimination clauses that specifically refer to sexual orientation appear in a number of (proposed) measures. One of the first was the proposal for amending Regulation 1612/68 on the freedom of movement of workers within the Community.<sup>118</sup> Legal change in this field is especially important for gay and lesbian people, because it governs the conditions for free movement and residence of workers and their 'family members' within the territory of the Member States. The original proposal would have inserted as a new article 1a, an anti-discrimination provision referring to all of the grounds mentioned in article 13 EC. In light of subsequent developments, free movement of workers has been inserted into a proposed directive concerning the right to move and reside freely in the Community for all citizens of the Union (and their family members).<sup>119</sup> Proposed article 4 contained an anti-discrimination clause that would encompass all grounds covered by article 21 of the EU Charter of fundamental rights (membership of a national minority becomes 'membership of an ethnic minority' in the proposal). The amended proposal of 15 April 2003 replicated the same clause, but with the addition of 'gender identity'.<sup>120</sup> However, the common position adopted by the Council on 5 December 2003 eliminated the reference to the clause,<sup>121</sup> which is now to be

<sup>113</sup> Commission Decision of 17 October 2000 amending its Rules of Procedure, 2000/633/EC, ECSC, Euratom, *OJ L* 267, 20.10.2000, p. 63 (Annex).

<sup>114</sup> Decision of 20 March 2000, *OJ L* 216, 26.8.2000, p. 15.

<sup>115</sup> Decision of 11 February 2000, *OJ L* 316, 15.12.2000, p. 69.

<sup>116</sup> Decision of 12 April 2000, *OJ C* 371, 23.12.2000, p. 14.

<sup>117</sup> (2002/584/JHA) *OJ L* 190, 18.7.2002, p. 1.

<sup>118</sup> COM(1998) 394 final – 98/229 (COD), *OJ C* 344, 12.11.1998, p. 9.

<sup>119</sup> COM(2001) 257 final – 01/111 (COD), *OJ C* 270, 25.9.2001, p. 150.

<sup>120</sup> COM(2003) 199 final – 2001/0111 (COD), online at <http://europa.eu.int/eur-lex>. However, it should be remarked that article 13 EC does not form a legal basis for the adoption of the Directive; this might explain why the definition of 'close family member' in article 2 does little to tackle the position of same-sex partners.

<sup>121</sup> Common position (EC) 6/2004 adopted by the Council on 5 December 2003, *OJ C* 54 E, 2.3.2004, p. 12.

found in recital 31 of the final version of Directive 2004/38/EC (gender identity deleted).<sup>122</sup>

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

- Council Directive of 27 January 2003 laying down minimum standards for the reception of asylum seekers:<sup>123</sup> it shows no trace of a non-discrimination clause (article 32 of the proposal<sup>124</sup>) that mirrored article 21 of the EU Charter of fundamental rights, although recital 6 mentions ‘instruments of international law [...] which prohibit discrimination’.
- Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national:<sup>125</sup> the final text does not contain the anti-discrimination clause of article 27 of the original proposal,<sup>126</sup> although recital 15 states that ‘the Regulation observes the fundamental rights and principles which

<sup>122</sup> Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, *OJ L* 158, 30.4.2004, p. 77.

<sup>123</sup> Directive 2003/9/EC of 27 January 2003, *OJ L* 31, 6.2.2003, p. 18.

<sup>124</sup> COM(2001) 181 final – 2001/91 (CNS), *OJ C* 213 E, 31.7.2001, p. 286.

<sup>125</sup> Council Regulation (EC) 343/2003 of 18 February 2003, *OJ L* 50, 25.2.2003, p. 1.

<sup>126</sup> COM(2001) 447 final – 2001/182 (CNS), *OJ C* 304 E, 30.10.2001, p. 192.

are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union'.

- Council Directive of 22 September 2003 on the right to family reunification:<sup>127</sup> recital 5 states that the Directive should be given effect without discrimination on the basis of, *inter alia*, sexual orientation.
- Council Directive of 25 November 2003 concerning the status of third-country nationals who are long-term residents:<sup>128</sup> the final text does not contain the anti-discrimination clause of article 4 of the original proposal,<sup>129</sup> which is now contained in recital 5.
- Council Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration:<sup>130</sup> article 5 of the proposal,<sup>131</sup> which stated that Member States shall apply the Directive without discrimination on the grounds of, *inter alia*, sexual orientation, has become recital 7.
- Council Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection:<sup>132</sup> the final text does not mention the anti-discrimination clause of article 35 of the proposal,<sup>133</sup> but reference is made in recital 11 to 'instruments of international law [...] which prohibit discrimination'.<sup>134</sup>

<sup>127</sup> Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ L* 251, 3.10.2003, p. 12. See also previous proposals: COM(1999) 638 final – 1999/258 (CNS), *OJ C* 116 E, 26.4.2000, p. 66; amended by COM(2000) 624 final – 1999/258 (CNS), *OJ C* 62 E, 27.2.2001, p. 99; further amended by COM(2002) 225 final – 1999/258(CNS), *OJ C* 203 E, 27.8.2002, p.136.

<sup>128</sup> Directive 2003/109/EC of 25 November 2003, *OJ L* 16, 23.01.2004, p. 44.

<sup>129</sup> COM(2001) 127 final – 2001/74 (CNS), *OJ C* 240 E, 28.8.2001, p. 79.

<sup>130</sup> Directive 2004/81/EC, of 29 April 2004, on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *OJ L* 261, 6.8.2004, p. 19.

<sup>131</sup> COM(2002) 71 final – 2002/43 (CNS), *OJ C* 126 E, 28.5.2002, p. 393.

<sup>132</sup> Directive 2004/83/EC, of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ L* 304, 30.9.2004, p. 12.

<sup>133</sup> COM(2001) 510 final – 2000/207(CNS), *OJ C* 51 E, 26.2.2002, p. 325.

<sup>134</sup> Note that article 10 of the Directive explicitly mentions sexual orientation as a possible 'reason for persecution', by stating that 'depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in ac-

- Proposal for a Directive on minimum standards on procedures for granting and withdrawing refugee status:<sup>135</sup> article 41 stated that the provisions of the Directive were to be applied without discrimination based on the six grounds mentioned by article 13 EC, and on the grounds of country of origin. A second draft of the whole proposal inserted into article 42 all of the grounds mentioned by article 21 of the EU Charter, plus membership of a particular social group, health, or country of origin.<sup>136</sup>
- Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities:<sup>137</sup> it contains an identical clause (article 32).

### 2.1.7 *Other aspects of the legal background*

On 18 January 2006 the European Parliament approved a 'Resolution on homophobia in Europe'<sup>138</sup> which sees such antisocial behaviour as contrary to international and European human rights obligations. Parliament 'strongly condemns any discrimination on the basis of sexual orientation', and calls on the Commission to ensure that it is prohibited 'in all sectors', in the same way as racial discrimination is prohibited by Directive 2000/43/EC. In addition, Parliament urges the Commission to 'ensure that all Member States have transposed and are correctly implementing Directive 2000/78/EC and to start infringement proceedings against those Member States that fail to do so'.

A case recently decided by the Court of Justice of the European Communities (*K.B. v. National Health Service Pensions Agency*<sup>139</sup>) gave the Court the opportunity to rule on the question of survivors' pensions for the transsexual (unmarried) partner of an employee.

The case concerned the right of a female-to-male transsexual to benefit from the pension of her female partner should she pre-decease him. The pension scheme of K.B.'s employer only allowed the payment of survivors' pensions to the legally married 'spouse'. K.B., the worker, claimed before the Court that the denial to pay the survivor's pension to her partner violated article 141 EC and Directive

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cordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article'.

<sup>135</sup> COM(2000) 578 final – 2000/238(CNS), *OJ C* 62 E, 27.2.2001, p. 231.

<sup>136</sup> COM(2002) 326 final/2 – 2000/238(CNS), *OJ C* 291 E, 26.11.2002, p. 143 (Corrigendum to proposal of 18.6.2002).

<sup>137</sup> COM(2001) 386 final – 2001/154 (CNS), *OJ C* 332 E, 27.11.2001, p. 248.

<sup>138</sup> European Parliament resolution on homophobia in Europe, 18 January 2006, P6\_TA-PROV(2006)0018, online at [www.europarl.eu.int](http://www.europarl.eu.int).

<sup>139</sup> ECJ 7 January 2004, Case C-117/01, *K.B. v. National Health Service Pensions Agency* [2004] *ECR I-541*.

75/117/EC on equal pay between men and women. On 10 June 2003 Advocate General Colomer delivered an opinion arguing that:

- (i) the national rule is contrary to Community law, because:
  - according to the rules and practices of thirteen out of fifteen Member States, transsexuals are allowed to marry;
  - according to the European Court of Human Rights in *Christine Goodwin v. UK*,<sup>140</sup> States enjoy a degree of discretion in cases of gender reassignment and marriage, but may not curtail altogether the right to marry of transsexual people;
- (ii) the dispute concerns a matter covered by the Treaty.

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

The Court has not completely clarified the principle that distinguishes *Grant*<sup>141</sup> from *P v. S*,<sup>142</sup> nor has it elaborated on the characters of the categories of discrimination at issue. The *ratio* expressed in *P v. S* (discrimination because of gender reassignment is sex discrimination) was not recalled, because for the purposes of awarding the survivor's pension what matters is the (married) status of the beneficiary, being irrelevant whether the claimant is a man or a woman. However, the Court accepted the reasoning of the Advocate General about sex discrimination, ruling that when inequality of treatment concerns not the right protected by Community law, but one of the conditions (the capacity to marry) for granting that right, article 141 EC is in principle violated.<sup>143</sup> British legislation preventing transsexuals from marrying seems to have been considered in-

<sup>140</sup> ECtHR 11 July 2002, *Christine Goodwin v. UK*, appl. 28957/95, *Reports of Judgements and Decisions* 2002-IV.

<sup>141</sup> See 2.1.4 above.

<sup>142</sup> See 2.1.2 above.

<sup>143</sup> For a discussion see Battaglia 2004, 599.

compatible with the EC Treaty principally because it was already declared in breach of article 12 of the Convention by the Strasbourg Court (see *Goodwin*). Finally, the Court held that ‘it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.’s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor’s pension’.

## 2.2 THE PROHIBITION OF DISCRIMINATION REQUIRED BY THE DIRECTIVE

### 2.2.1 *Instrument(s) used to implement the Directive*

According to article 249 EC, a directive ‘shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. The Treaty, thus, chose to accept a possible lack of uniformity among national implementing measures. However, this lack of uniform rules must not undermine the proper functioning of the Community system, which requires absence of discrimination based on nationality.<sup>144</sup> According to the Court of Justice of the European Communities, transposition of Community law (i.e. of a directive) into Member States’ legal orders must not put into question the equality of Member States before Community law, nor create discrimination at the expense of their citizens.<sup>145</sup>

In general, settled case law of the Court of Justice has established that ‘the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty’.<sup>146</sup> In addition, the Court held that ‘the principle of legal certainty requires appropriate publicity’<sup>147</sup> that ‘mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State’s obligations under the Treaty’,<sup>148</sup> and that ‘a Member State can

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<sup>144</sup> Tesauro 2003, 95.

<sup>145</sup> ECJ 7 February 1973, Case 39/72, *Commission v. Italy* [1973] *ECR* 101, at para. 24. See also 2.5.4 below.

<sup>146</sup> ECJ 17 May 2001, Case C-159/99, *Commission v. Italy* [2001] *ECR* I-4007, at para. 32; ECJ 27 February 2003, Case C-415/01, *Commission v. Belgium* [2003] *ECR* I-2081, at para. 21; ECJ 30 May 1991, Case C-59/89, *Commission v. Germany* [1991] *ECR* I-2607, at para. 24; ECJ 19 May 1999, Case C-225/97, *Commission v. France* [1999] *ECR* I-3011, at para. 37.

<sup>147</sup> ECJ 27 February 2003, Case C-415/01, *Commission v. Belgium* [2003] *ECR* I-2081, at para. 21.

<sup>148</sup> ECJ 17 May 2001, Case C-159/99, *Commission v. Italy* [2001] *ECR* I-4007, at para. 32; ECJ 15 December 1982, Case 160/82, *Commission v. Netherlands* [1982] *ECR* 4637, at para. 4;

not plead conditions existing within its own legal system in order to justify its failure to comply with obligations arising under Community law'<sup>149</sup> (the latter with respect to the plea that the matter fell under the competences of local or regional authorities). The question of breach of Member States' obligations 'must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion'.<sup>150</sup>

Moreover, the Court ruled that provisions of a constitution, even when directly applicable, do not supply an appropriate means of transposition, because 'the principles of legal certainty and the protection of individuals require an unequivocal wording'.<sup>151</sup>

Collective agreements that do not conform with Community law must be brought into line through supplementary State legislation. In addition, a lack of explicit implementing legislation may not be justified by arguing that, according to national practices, regulation of the matter is left to collective agreements. According to the principle stated by the Court in *Commission v. Denmark*,<sup>152</sup> Member States may leave the implementation of a directive in the first instance to representatives of management and labour. However, there remain cases in which collective agreements may not be regarded as a sufficient means of transposition, because they do not create general rules applicable to all workers, but only to those of a specific industrial sector, or because the workers in question are not union members. The Court ruled that, even if the collective agreement were in accordance with the principle of equal pay laid down by the Directive, it was far from certain that 'the same implementation of that principle is guaranteed for workers whose rights are not defined in such agreements'.<sup>153</sup> Therefore, State legislation must be unequivocal and cannot rely on existing interpretative solutions of social partners or courts for justifying the absence of thorough transposition.

The effectiveness of directives has also been promoted by the Court of Justice through the principle of harmonious (consistent) interpretation, which subjects national implementing legislation to an interpretation 'in light of the wording

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ECJ 2 December 1986, Case 239/85, *Commission v. Belgium* [1986] *ECR* 3645, at para. 7 (implementation through a circular); ECJ 11 November 1999, Case C-315/98, *Commission v. Italy* [1999] *ECR* I-8001, at para. 10 (implementation through circulars).

<sup>149</sup> ECJ 16 January 2003, Case C-388/01, *Commission v. Italy* [2003] *ECR* I-721; ECJ 15 December 1982, Case 160/82, *Commission v. Netherlands* [1982] *ECR* 4637, at para. 4.

<sup>150</sup> ECJ 16 January 2003, Case C-29/02, *Commission v. Spain* [2003] *ECR* I-811, at para. 9; ECJ 13 March 2003, Case C-436/01, *Commission v. Belgium* [2003] *ECR* I-2633, at para. 7.

<sup>151</sup> ECJ 28 October 1999, Case C-187/98, *Commission v. Greece* [1999] *ECR* I-7713, at para. 54.

<sup>152</sup> ECJ 30 January 1985, Case 143/83, *Commission v. Denmark* [1985] *ECR* 427.

<sup>153</sup> *Idem*, para. 9.

and the purpose of the directive'.<sup>154</sup> The same principle extends to national legislation which predates a directive and to situations which involve only private parties.<sup>155</sup>

### 2.2.2 Concept of sexual orientation (article 1)

The Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereafter the Directive),<sup>156</sup> does not define sexual orientation. The only comment on this aspect is to be found in the Commission's explanatory memorandum on article 1, which draws a distinction between 'sexual orientation, which is covered [...], and sexual behaviour, which is not'.<sup>157</sup>

The Commission's comment could be interpreted as taking into account the fears of some Member States that the Directive would prevent them from prohibiting certain forms of unwanted sexual behaviour.<sup>158</sup> In this sense, it has been judged as useless and misplaced (because nothing in the Directive affects criminal prohibitions), and as excessively broad (because it could exclude any behaviour, not just that deemed to be unlawful).<sup>159</sup> Criticism to this limitation may be found in the short justification of the Opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, part of the European Parliament's Report on the proposal for the Directive.<sup>160</sup>

Clearly, this limitation, which finds no corresponding provision within the Directive, could have severe implications on gays and lesbians, should some courts rely on it for finding differential treatment not discriminatory because it is based only on 'behaviour'. The same argument would scarcely be convincing if it were proposed in the context of discrimination on grounds of religion, because religious freedom also encompasses freedom to manifest one's own creed according to lawful rituals.<sup>161</sup> The explanatory comment would have been better crafted if

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<sup>154</sup> ECJ 10 April 1984, Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] *ECR* 1891, at para. 26.

<sup>155</sup> ECJ 13 November 1990, Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentación* [1990] *ECR I-4135*.

<sup>156</sup> The full text of the Directive is reproduced as an annex in this book.

<sup>157</sup> COM(1999) 565, 1999/0225 (CNS), *OJ C* 177 E, 27.6.2000, p. 42.

<sup>158</sup> See also 2.4.2 below.

<sup>159</sup> Bell 2001, 655.

<sup>160</sup> European Parliament, 21 September 2000, A5-0264/2000. At p. 51 the rapporteur states that the 'Commission and the Council should make it clear that this passage certainly does not mean that protection against discrimination on grounds of sexual orientation lapses as soon as it becomes apparent that people do not confine themselves to thoughts and fantasies but also act in a corresponding manner'.

<sup>161</sup> See 2.3.1 below.

it said that the Directive does not apply to (certain) behaviour other than the choice of the sex of a partner.

The restrictive interpretation would run contrary to the established case law of the Strasbourg Court, according to which (homo)sexual *conduct* is certainly a protected aspect of private life<sup>162</sup> and of the prohibition of sexual orientation discrimination.<sup>163</sup> Also, it could be especially troublesome for same-sex couples, but in light of *Grant* (Court of Justice of the EC)<sup>164</sup> and *Karner* (European Court of Human Rights)<sup>165</sup> the possibility of not regarding 'being in a same-sex couple' as an aspect of sexual 'orientation' appears remote.<sup>166</sup>

As far as the types of 'orientation' linked to the gender of the person are concerned, in light of the decision of the Court of Justice in *P v. S and Cornwall County Council*<sup>167</sup> it appears fair to say that discrimination on grounds of gender reassignment should be seen as a form of sex discrimination. For 'orientations' linked to sex as 'eroticism' it would be unreasonable to speculate that unlawful conduct falls within the meaning of the formulation, whilst it is doubtful that lawful forms of erotic conduct (e.g. some forms of sadomasochism) will be considered as protected by the prohibition of 'sexual orientation' discrimination.<sup>168</sup>

### 2.2.3 Direct discrimination (article 2(2)(a))

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

As far as sexual orientation is concerned, the distinction specifically relevant is the one between heterosexual and homosexual or bisexual identities, preferences and practices. Therefore, (when put in asymmetrical terms) direct sexual orientation discrimination finds its source in a treatment that places burdens on gay,

<sup>162</sup> ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76, *Series A*, nr. 45.

<sup>163</sup> ECtHR 9 January 2003, *L. & V. v. Austria*, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I; ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I. See also 2.3.1 below.

<sup>164</sup> ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] *ECR* I-621.

<sup>165</sup> ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX.

<sup>166</sup> See 2.1.4 above.

<sup>167</sup> ECJ 30 April 1996, Case C-13/94, *P v. S and Cornwall County Council* [1996] *ECR* I-2143.

<sup>168</sup> See also 4.2.2 below.

lesbian and bisexual persons that are not placed on heterosexual persons. These burdens (such as employment discrimination) are often a result of bias, stereotypes and prejudices associated with homosexuality. Given the specific features of sexual orientation, such as invisibility, the additional burden placed on lesbian, bisexual and gay people could be, and often is, that of the imposition of silence for fear of facing such prejudice and its cumbersome consequences. Silence and hiding, in turn, might have a negative impact on a person's self-perception as equally worthy of consideration and respect, and on the possibility of developing a fulfilling life in all of its social and relational dimensions. This frustrates one of the conceptual aims of equality, namely that of protecting human dignity.

#### 2.2.4 *Indirect discrimination (article 2(2)(b))*

The concept of indirect discrimination reflects a 'results-based principle of equality', which focuses on the effects that an apparently neutral treatment may have on an individual or on a group.<sup>169</sup> In contrast with the definition given by the Burden of Proof Directive,<sup>170</sup> article 2(2)(b) of the Directive does not refer to the need of the disadvantaged to be a 'substantially higher proportion' (compared with the non-disadvantaged), a wording that has led the Court of Justice to require quite stringent statistical evidence in the context of gender discrimination.<sup>171</sup>

Instead, the Commission preferred the definition carved out by the Court of Justice of the European Communities in cases concerning free movement of workers.<sup>172</sup> In the wording of the Directive indirect discrimination, thus, is taken to occur 'where an apparently neutral provision, criterion or practice would put persons having a particular sexual orientation at a particular disadvantage compared with other persons', unless this is justified.<sup>173</sup> The French, German and Italian versions of the Directive say that there is indirect discrimination when a neutral provision, criterion or practice 'can' put persons at a particular disadvan-

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<sup>169</sup> Fredman 2001, 161.

<sup>170</sup> Directive 97/80/EC of 15 December 1997, *OJ L* 14, 20.1.1998, p. 6, article 2.

<sup>171</sup> See Schiek 2002, 296; Fredman 2001, 162.

<sup>172</sup> ECJ 23 May 1996, Case C-237/94, *O'Flynn v. Adjudication Officer* [1996] *ECR* 2417. See p. 8 of the Explanatory Memorandum to the first proposal, COM(1999) 565, 1999/0225 (CNS), *OJ C* 177 E, 27.6.2000, p. 42, where it is said that 'the "liability test" may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned'.

<sup>173</sup> See 2.4.1 below.

tage, and this wording suggests that the mere possibility, and not an actual likelihood, of particular disadvantage is sufficient.

Therefore, lesbians, gays and bisexuals need not show statistical data. Such a requirement would constitute an almost invincible burden because principles of privacy/confidentiality forbid a 'head-count' of lesbian and gay employees. As highlighted by recital 15 of the Directive, indirect discrimination may be inferred from a variety of factors 'in accordance with rules of national law or practice' (or by 'common knowledge or qualitative rather than quantitative sociological studies'<sup>174</sup>), and this is a point that calls for future close observation of evidence required by national courts because of the severe discrepancies that could arise.<sup>175</sup>

### 2.2.5 *Prohibition and concept of harassment (article 2(3))*

Harassment related to (*inter alia*) sexual orientation is deemed to be a form of discrimination. According to article 2(3), the unwanted conduct must have the purpose *or* effect of violating the dignity of a person *and* of creating an intimidating, hostile, degrading, humiliating or offensive environment. The definition of harassment as a form of discrimination is quite a novel concept for a number of Member States and has led some scholars to call for a new directive for the forms of harassment not covered by it.<sup>176</sup>

The definition of harassment in the Directive is not limited to *sexual* harassment and is identical to that of harassment on grounds of sex found in the Amended Equal Treatment Directive (article 2(2)).<sup>177</sup> However, the latter also defines 'sexual harassment' as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature'. It has been argued, a point which the 1991 Commission Recommendation on the protection of the dignity of women and men at work supports,<sup>178</sup> that harassment and sexual harassment against lesbians and gay men – 'on grounds of their deviance of traditional gender roles'<sup>179</sup> – would indeed constitute gender discrimination. This could sometimes lead to the application of the Amended Equal Treatment Directive, which does not leave open to Member States the possibility of defining harassment in accordance with national laws and practice. The latter possibility in the Directive has been criticised as a way to undermine its effectiveness.<sup>180</sup>

<sup>174</sup> Schiek 2002, 296.

<sup>175</sup> See also De Schutter 2003, 23 ff.

<sup>176</sup> Driessen-Reilly & Driessen 2003, 493.

<sup>177</sup> Directive 2002/73/EC of 23 September 2002, *OJ L* 269, 5.10.2002, p. 15.

<sup>178</sup> Adopted on 27 November 1991, *OJ L* 49, 24.02.1992, p. 1. Endorsed by the Council with Declaration 19 December 1991, *OJ C* 27, 4.2.1992, p. 1.

<sup>179</sup> Schiek 2002, 297.

<sup>180</sup> Bell 2001, 662.

### 2.2.6 *Instruction to discriminate (article 2(4))*

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

### 2.2.7 *Material scope of the applicability of the prohibition (article 3)*

According to article 3 of the Directive, within the limits of the areas of competence conferred on the Community, the Directive applies in relation to a number of areas related to employment and occupation, specifically:

- ‘(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.’

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

Furthermore, it should be remarked that ‘employment’ and ‘working’ conditions are considered as separate aspects. The Directive may have chosen to mention explicitly the two types of ‘conditions’ in order to provide that its material scope also embraces harassment, which is clearly not covered by employment conditions but by working conditions. Article 31(1) of the EU Charter also speaks of ‘working conditions’ respecting the worker’s health, safety and dignity.

The concept of ‘pay’ has been interpreted extensively by the Court of Justice, and it has already been remarked that ‘the full variety of benefits which employers may provide in respect of employees’ partners fall within the scope of the Directive’<sup>181</sup> (including contributory pensions that qualify as ‘consideration received by the worker from the employer in respect of his employment’<sup>182</sup>). The

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<sup>181</sup> *Idem*, 656.

<sup>182</sup> ECJ 13 May 1986, Case 170/84, *Bilka v. Weber von Hartz* [1986] *ECR* 1607, para. 20-22; see also ECJ 17 May 1990, Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] *ECR* I-1889, para. 25-28.

broad interpretation of pay as encompassing benefits provided for an employee's partner could clash with a number of non-binding statements, including recital 22 and the Commission's Explanatory memorandum,<sup>183</sup> all of which are aimed at pointing out that the Directive does not affect marital status and the benefits afforded to married couples. Given the existing jurisprudence of the Court (*Grant*<sup>184</sup>) there seems to be little room for refusing to accept that denial of benefits to couples because of the combination of the sexes is a form of (direct) sexual orientation discrimination. When the distinction occurs because of the legal tie existing between the partners, however, civil status comes into play.<sup>185</sup>

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

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

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

Linked to this is the problem of considering the contractual employer (whether a natural or a legal person) liable for acts of third parties; for example, in the case of corporations, the question arises whether the legal person will be held responsible for discriminatory conduct of the boss/manager, especially when criminal sanctions should be applied. It could be noted that article 2(2)(b)(ii) of the Directive specifically mentions '*any person or organisation* to whom this Directive

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<sup>183</sup> Recital 22 holds that 'This Directive is without prejudice to marital status and the benefits dependent thereon'. The Explanatory memorandum, under article 1, held that 'it should be underlined that this proposal does not affect marital status and therefore it does not impinge upon entitlements to benefits for married couples' (see COM(1999) 565 final, 1999/0225 (CNS), p. 8).

<sup>184</sup> ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] ECR I-621.

<sup>185</sup> See 2.3.3 below.

applies', leaving less doubt that legal persons are subject to its provisions. Whether it is a natural or legal person, it is realistic to argue that both the wording of article 3(1) and the spirit of the Directive impose a duty of care on the employer, at least when the issue is sufficiently under his/her/its control.

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

## 2.3 WHAT FORMS OF CONDUCT IN THE FIELD OF EMPLOYMENT ARE PROHIBITED AS SEXUAL ORIENTATION DISCRIMINATION?

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

The difference between preference and behaviour may be exemplified by the European Court of Human Rights decision in *Lustig-Prean and Beckett*, where the Court held that a blanket policy excluding all homosexuals from the armed forces, irrespective of any concrete conduct, is a violation of article 8 of the Convention (right to respect of private life). The UK Government contended that in the context of the armed forces stricter rules applied, capable of curtailing individual rights in a manner that would not apply to civil society. This statement was based on existing case law of the Court, such as *Kalaç*.<sup>186</sup> However, in *Lustig-Prean* the Court distinguished the facts from *Kalaç* because the former had been dismissed 'on grounds of his [religious] conduct while the applicants were discharged on grounds of their innate personal characteristics'.<sup>187</sup>

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

The first sexual orientation case positively decided by the Court on the basis of article 8 of the Convention, *Dudgeon*,<sup>188</sup> concerned in fact (sexual) 'conduct'. The Court held that such an aspect is covered by the right to respect of private

<sup>186</sup> ECtHR 1 July 1997, *Kalaç v. Turkey*, appl. 20704/92, *Reports of Judgements and Decisions* 1997-IV.

<sup>187</sup> ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96 and 32377/96 (para. 86, emphasis added).

<sup>188</sup> ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76, *Series A*, nr. 45.

life. With its decision in *Lustig-Prean*, it added that the same right also covers sexual orientation as a 'personal characteristic', regardless of whether any specific behaviour is put in place. In two recent cases concerning a claim against the maintenance in force in Austrian legislation of a provision which penalised only homosexual *acts* of adult men with consenting adolescents between fourteen and eighteen years of age, the Court concluded that the impugned article 209 of the Penal Code violated article 14 of the Convention in conjunction with article 8.<sup>189</sup> Thus, the prohibition of sexual orientation discrimination guaranteed by the Convention forbids discrimination on grounds of homosexual behaviour.

Some statements related to the Directive seem to hold that sexual behaviour alone should not be covered.<sup>190</sup> However, in *Grant* the Court of Justice has indicated that unequal treatment because of behaviour (in the form of having a same-sex relationship), may constitute sexual orientation discrimination.<sup>191</sup> That the Directive's concept of 'sexual orientation' (or indeed 'religion or belief') incorporates behaviour can also be argued on the basis of article 2(5) of the Directive, a provision which would appear of little or no use if the meaning of these grounds was limited to attraction/faith intended as an internal characteristic of one's identity: in fact, in that limited sense the protected grounds could hardly be seen as a potential harm to public security, public order, rights of others, etc.

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

A negative answer is offered by the short justification of the Opinion of the European Parliament Committee on Citizens Freedoms and Rights, Justice and Home Affairs, which is part of the Parliament's Report on the Commission's initial proposal for a Directive.<sup>192</sup>

The Directive does not tackle the issue in an explicit way. The definition of direct discrimination in article 2(2) of at least the English and French versions

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<sup>189</sup> ECtHR 9 January 2003, *L. and V. v. Austria*, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I; ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I.

<sup>190</sup> See 2.2.2 above and 2.4.2 below.

<sup>191</sup> See 2.1.4 above.

<sup>192</sup> European Parliament, 21 September 2000, A5-0264/2000. At p. 51 the rapporteur makes the point that after all, 'outlawing discrimination means not allowing one person to treat another differently on the basis of a characteristic or feature which the former attributes to the latter. In principle it is irrelevant whether the latter person genuinely possesses that characteristic or feature'.

does not refer to 'his or her' sexual orientation. Therefore, the expression 'on grounds of sexual orientation' can and should be interpreted as prohibiting unequal treatment of those victims who are not (or do not identify themselves as) gays and lesbians, when the ground for unequal treatment is (assumed) homosexuality.<sup>193</sup>

It should not matter whether discrimination occurs because the victim actually identifies as lesbian, gay or bisexual, because of a characteristic that is generally taken to pertain to them, or because of a mere mistake: the broad wording of article 2(1) of the Directive must be interpreted as also prohibiting discrimination based on a mistaken assumption about a person's sexual orientation.<sup>194</sup>

If discrimination based on a mistaken assumption were not covered, then a question of proof concerning the victim's sexual orientation would arise.<sup>195</sup>

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

Sometimes employers will not object to gay, lesbian, bisexual preference, behaviour or relationships of their employees, but will not accept expression or manifestation (verbally or non-verbally) of it to others, such as colleagues or the public. Differential treatment as a result of coming-out is likely to be considered a case of direct sexual orientation discrimination, because it would amount to less favourable treatment on grounds of expression or manifestation of sexual orientation, which is a protected personal characteristic.<sup>196</sup> If only coming out as lesbian, gay or bisexual persons would be hindered, it would then be a case of direct discrimination; the comparison with a person coming out as heterosexual would only be hypothetical, but article 2(2)(a) does not exclude this possibility. If also coming out as heterosexual was forbidden, then gay, lesbian and bisexual persons could argue that this constitutes indirect sexual orientation discrimination, because they have a greater need to be clear about their feelings in order to avoid being taken – automatically and almost unconsciously – to be heterosexual.

There might be cases in which an employer reacts negatively to other statements by the employee, only indirectly linked with sexual orientation. In

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<sup>193</sup> Interestingly, the Italian version of the Racial Equality Directive speaks of 'on grounds of his/her race or ethnic origin' (many thanks to Mark Bell for pointing this out), whereas the French version of the same Directive speaks of 'pour des raisons de race ou d'origine ethnique'. The English version speaks of 'on the grounds of racial or ethnic origin'.

<sup>194</sup> Bell 2002, 115.

<sup>195</sup> See 2.5.9 below.

<sup>196</sup> On the non-use of pronouns see 2.3.1 above.

*Morissens*,<sup>197</sup> a dated case decided under the ECHR, the ground for dismissal was, in fact, breach of confidentiality. The case concerned termination of employment because of public allegations by a lesbian employee of a lack of transparency in promotion procedures, and because of her voicing rumours that she had not been appointed because of her sexual orientation. The European Commission of Human Rights placed a duty of self-restraint on employees – broader for members of the public service – with respect to their criticism of the management. In the opinion of the Commission article 10 of the Convention (freedom of expression) had not been violated because of (i) the specific nature of the public service, which entails a particular duty of restraint (*devoir de réserve*), and (ii) the means through which expression took place.

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

In the case of unmarried cohabitants, we have already seen that differential treatment between same-sex and different-sex couples has not been found in breach of Community sex equality law.<sup>198</sup> However, in the same case the Court of Justice of the European Communities deemed such a fact-situation to be a case of sexual orientation discrimination, which was not yet forbidden by Community law at the time the decision was taken.<sup>199</sup> The European Court of Human Rights has confirmed that it should be seen as a form of sexual orientation discrimination.<sup>200</sup>

This fact-situation may be described as an example of direct (sex or sexual orientation) discrimination, because the only relevant criterion that upholds differential treatment is the combination of the sexes in the couple. Today, it seems reasonable to infer from *Grant* that differential treatment between same-sex partners and different-sex partners is covered by the Directive; this holds especially true in light of article 3(1)(c), which specifies that the scope of the Directive encompasses items such as 'pay', of which partner benefits are a component. Therefore, when an employer provides spousal benefits for unmarried opposite-sex partners, it should equally provide those benefits to unmarried same-sex partners. As it has been remarked, this interpretation of the Directive could have a shifting practical relevance – more pronounced when employers already recognise

<sup>197</sup> European Commission of Human Rights, 3 May 1988, *Morissens v. Belgium*, appl. 11389/85, [1988] 56 *Decisions and Reports* 127.

<sup>198</sup> See ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] *ECR I-621*. See also 2.1.4 above.

<sup>199</sup> *Idem*, para. 47.

<sup>200</sup> ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX.

unmarried different-sex partners, but irrelevant when they do not recognise them at all – but it amounts to a significant preparation for further adjustments.<sup>201</sup> For example it would also apply to differential treatment between registered same-sex and registered different-sex partners. This case could arise in France, the Netherlands, Belgium, Luxembourg and certain Spanish autonomous communities, where partnership registration is open to same-sex and different-sex couples.

As far as differential treatment between married and unmarried partners is concerned, the basis for distinction is clearly civil status, because only married spouses are afforded benefits. As already mentioned, the Explanatory memorandum and recital 22 both claim that the Directive leaves marital status and the benefits that descend from it untouched. Some have discussed the possibility of regarding this form of differential treatment as a case of direct discrimination based on sexual orientation; the argument would be that marriage is a heterosexual-specific institution (because it requires a difference in sex), therefore the choice for marriage as a criterion for the distribution of benefits draws a distinction based on sexual orientation (except when marriage between persons of the same-sex is allowed).<sup>202</sup> An analogy has been drawn with pregnancy discrimination, treated as direct sex discrimination because the reason for differential treatment is based on a characteristic that belongs to only one sex.<sup>203</sup> However, it has more frequently been argued that differential treatment between married spouses and unmarried same-sex partners amounts to a form of indirect sexual orientation discrimination, because the requirement of marriage is an apparently neutral criterion that puts lesbians and gays at a particular disadvantage, since they cannot marry a person of their choice.<sup>204</sup> Unlike the non-binding recital 22, the Directive itself does not contain anything that places this form of indirect discrimination outside its prohibitions. Recital 22 however, gives a powerful indicator that some indirect discrimination on grounds of sexual orientation may not be covered by the principle of equal treatment. Does it allow one to conclude that indirect sexual orientation discrimination resulting from marital status should always be treated as objectively justified? Who should perform the justification test? The courts? Or do Member States enjoy the option of introducing legislation that excludes all such differential treatment from the reach of the prohibition?

Content-wise, under the Directive, justification for indirect discrimination must be assessed according to the *appropriateness* and *necessity* of means used to

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<sup>201</sup> Waaldijk 2001, 645.

<sup>202</sup> Bell 2001, 668.

<sup>203</sup> *Idem*.

<sup>204</sup> *Idem*; Waaldijk 2001, 645; Waaldijk 1999, 41.

obtain a *legitimate* aim. At least the first two elements of this general test involve questions of fact. In theory, the task of determining whether the exclusion of unmarried partners is a criterion that fits within this justification system is left to the case-by-case judgement of national courts, as in any other case of indirect discrimination. In case of uncertainty, a national court could make a reference to the Court of Justice of the European Communities raising the question of whether the Directive requires an employer to provide benefits to both married (opposite-sex) spouses and unmarried same-sex partners. In *Bilka* the Court indicated that, when indirect discrimination is at stake, ‘it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker’s sex but in fact affects more women than men may be regarded as objectively justified economic grounds’,<sup>205</sup> or, as held in *Rinner-Kühn*<sup>206</sup> and in *Hill*,<sup>207</sup> to determine whether the practice ‘is justified by reasons which are objective and unrelated to any discrimination on grounds of sex’.

In light of this case law it seems possible that, in the case of a reference for a preliminary ruling on whether an instance of differential treatment put in practice (even unintentionally) by employers between married and same-sex unmarried partners constitutes justified indirect sexual orientation discrimination, the Court would refer the question back to the national courts, because the answer involves findings of fact. It remains to be seen whether the Court of Justice is also saying that *only* national courts are entrusted with the assessment of objective justification, which would presumably exclude national parliaments. This interpretation seems to be supported by recital 15, which holds the view that ‘the appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies’.

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

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<sup>205</sup> ECJ 13 May 1986, Case 170/84, *Bilka v. Weber von Hartz* [1986] *ECR* 1607.

<sup>206</sup> ECJ 13 July 1989, Case 171/88, *Rinner-Kühn v. FWW Spezial-Gebäudereinigung* [1989] *ECR* 2743, para. 15.

<sup>207</sup> ECJ 17 June 1998, Case C-243/95, *Hill and Stapleton v. The Revenue Commissioners and Department of Finance* [1998] *ECR* I-3739, para. 35.

In *Karner*, a case of direct discrimination between unmarried different-sex and same-sex partners, the European Court of Human Rights made clear that (when assessing whether differential treatment was justified) the analytical test must take into account the concrete circumstances of the case: ‘The Court can accept that protection of the family in the traditional sense is, *in principle*, a weighty and legitimate reason which *might* justify a difference in treatment [...]. It remains to be *ascertained* whether, *in the circumstances of the case*, the principle of proportionality has been respected’.<sup>208</sup> A similar perspective is shared by the views of the UN Human Rights Committee in *Young v. Australia*,<sup>209</sup> a dispute concerning the entitlement of the same-sex partner of a war veteran to a pension upon the death of his partner. After being denied the pension, Mr. Young claimed that section 5E(2) of the Veteran’s Entitlement Act, which states that ‘member of a couple’ encompasses only the legally married spouse or the opposite-sex unmarried partner, was contrary to article 26 (equality before the law and equal protection of the law) of the International Covenant on Civil and Political Rights. The Committee upheld the claim, finding that the Australian government had shown no objective and reasonable justification for the distinction between unmarried opposite-sex and same-sex couples. Again, the issue of justification of differential treatment appears crucial.

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

As far as differential treatment between married and registered partners is concerned, the fact-situation coincides with the one in *D and Sweden v. Council*,<sup>210</sup> where a household allowance was only granted to married spouses, with the exclusion of registered (and unmarried) partners. This kind of differential treatment would only be possible with regard to workers that have registered their partnership; if the legal scheme is considered completely equivalent to marriage, the only difference being that the former is entirely homosexual-specific and the latter is entirely heterosexual-specific, then any differential treatment between the two would constitute a form of direct discrimination based on sexual orientation.

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<sup>208</sup> ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX, para. 40 (emphasis added).

<sup>209</sup> UN Human Rights Committee, 29 August 2003, *Young v. Australia*, Communication 941/2000.

<sup>210</sup> See 2.1.4 above.

However, especially when registered partnership is considered to be a form of registration that does not affect the civil status of the parties involved (who would then be taken to remain, in fact, single, as in France, Luxembourg or Belgium), the fact-situation can be treated in the same way as the previous one (indirect sexual orientation discrimination), because same-sex partners cannot marry each other, and as a form of differentiation based on civil status.<sup>211</sup>

### 2.3.4 *Discrimination on grounds of a person's association with LGB individuals, events or organisations*

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

### 2.3.5 *Discrimination against groups, organisations, events or information offered/on LGB individuals*

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

In a decision under article 11 of the European Convention (freedom of association) that has attracted critiques of various sorts, the European Court of Human Rights found that the condition for registration of a gay and lesbian association, requiring that minors be excluded from membership, pursued the legitimate aims of the protection of morals and the rights and freedoms of others, therefore registration could be lawfully denied.<sup>212</sup> A similar fact-situation

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<sup>211</sup> Idem.

<sup>212</sup> ECtHR 12 May 2000, *Szivárvány társulás a melegek jogaiért v. Hungary*, appl. 35419/97 (unpublished); see Farkas 2001, 573.

seems unlikely in the field of employment; apart from that, there is no reason to exclude groups and organisations from the scope of the Directive.

In the same way as for the case of coming out,<sup>213</sup> the comparison with a group of heterosexual people would be merely hypothetical, but this is not excluded by the wording of article 2(2) of the Directive. Discrimination could be direct (if only homosexual groups were targeted) or indirect (when all activities or events dealing with sexuality or discrimination were forbidden).

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

In *Lustig-Prean* the European Court of Human Rights held that investigations on the applicants' sexual orientation were not justified and infringed article 8 of the Convention (right to respect of private life).<sup>214</sup> Therefore, it is clear that questioning an employee about his or her sexual orientation is unacceptable conduct. However, from the Court's decision it is not clear whether a retaliatory measure against a refusal to answer a question will be regarded as contrary to the principle of equal treatment. On this issue, the Court of Justice of the European Communities has given a (less than clear) answer as far as disclosing sickness through consenting to pre-recruitment medical testing is concerned. The Court of Justice held (in a staff case) that the right to respect for private life ex article 8 of the European Convention on Human Rights had been violated by HIV-testing carried out without the consent of the applicant.<sup>215</sup> However, it also held that following the withholding of consent for an HIV-test considered necessary for proper medical assessment, 'the institutions cannot be obliged to take the risk of recruiting'. Thus, this conclusion does not assist in striking the balance between duty to disclose and right to privacy. It goes without saying that sexual orientation, unlike physical condition, may never be regarded as a ground for unfitness to work, except when it falls within the limits of the article 4(1) exception.

In a case concerning the discriminatory dismissal of a woman who had not informed the prospective employer of her pregnancy prior to the contract, which

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<sup>213</sup> See 2.3.2 above.

<sup>214</sup> ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96 and 32377/96, para. 103-104.

<sup>215</sup> ECJ 5 October 1994, Case C-404/92, *Xv. Commission* [1994] *ECR I-4737*. The Court of First Instance had rejected the claims: 18 September 1992, Joined Cases T-121/89 and T-13/90, *X v. Commission* [1992] *ECR II-2195*; 24 June 1992, Case T-11/90, *H. S. v. Council* [1992] *ECR II-1869*; and 14 April 1994, Case T-10/93, *A v. Commission* [1994] *ECR II-179*; see Craig & De Búrca 2003, 367.

was for a fixed term of six months only, the Court of Justice did not consider the failure to inform as a circumstance which could undermine the unlawful nature of the dismissal on grounds of pregnancy.<sup>216</sup>

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

Some countries used to subject to criminal prohibition homosexual activity between consenting adults, to consider homosexuality as an aggravating factor for certain offences, to define in a more restrictive way concepts of public scandal and the like when homosexuality played a role, or to fix different ages of consent with regard to heterosexual and homosexual relations. These prohibitions did not apply to the same acts when committed between persons of different sex and, often, only applied when sexual activity between male people was at issue.

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

By way of illustration, the case of *Thlimmenos v. Greece* could be cited, where the European Court of Human Rights ruled that the failure to distinguish those convicted for religious reasons from all other convicted persons constitutes a violation of article 14 of the European Convention.<sup>217</sup> This ruling might have far-reaching consequences in many fields (within and beyond the employment realm) where sexual orientation discrimination takes place. Under the Directive a case like this can be construed as one of indirect discrimination.<sup>218</sup>

### 2.3.8 *Harassment*

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

The scope of the concept adopted in the Directive seems able to encompass expressions of homophobia, which entails contempt and ridicule directed towards lesbians, gay men and bisexuals, both by the employer and by co-workers or clients.<sup>219</sup> Derogatory language, when it is a display of homophobia, violates

<sup>216</sup> ECJ 4 October 2001, Case C-109/00, *Tele Danmark* [2001] *ECR I-6993*.

<sup>217</sup> ECtHR 6 April 2000, *Thlimmenos v. Greece*, appl. 34369/97, *Reports of Judgements and Decisions* 2000-IV.

<sup>218</sup> See 2.2.4 above.

<sup>219</sup> Bell 2001, 661.

the dignity of the victim and creates an intimidating, hostile, degrading, humiliating or offensive environment, giving rise to harassment on grounds of sexual orientation within the meaning of article 2(3). The Explanatory memorandum maintains that harassment may take different forms, 'from spoken words and gestures to the production, display or circulation of written words, pictures or other material',<sup>220</sup> as long as it is of a serious nature. This provides persuasive evidence that the legislature meant to introduce a broad notion of what ought to be considered unacceptable.

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

## 2.4 EXCEPTIONS TO THE PROHIBITION OF DISCRIMINATION

### 2.4.1 *Objectively justified indirect disadvantages (article 2(2)(b)(i))*

There is no unlawful (indirect) disadvantage when the apparently neutral provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>221</sup>

The point has been made that the possibility of justifying (indirect) disadvantage is likely to tilt the balance in favour of considering marital status discrimination as indirect rather than direct.<sup>222</sup> This invites close observation on the different solutions that courts could potentially adopt.

### 2.4.2 *Measures necessary for public security, for the protection of rights of others, etc. (article 2(5))*

Article 2(5) lists a number of State objectives that take precedence over equal treatment as intended by the Directive, but subject to a test of necessity. Measures that would *prima facie* infringe the prohibition of discrimination will be saved when they are *necessary* for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. With regard to sexual orientation, some have argued that this provision is meant to preserve the State's

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<sup>220</sup> Explanatory Memorandum COM(1999) 565 final, 1999/0225 (CNS), p. 9.

<sup>221</sup> See also 2.2.4 above.

<sup>222</sup> See 2.3.3 above. The presence of the justification test – absent as far as direct discrimination is concerned – allows greater flexibility in controlling indirect disadvantage. Bell 2001, 668.

criminal provisions in cases of paedophilia or other sexual conduct.<sup>223</sup> However, there may be a risk that – in contrast with case law of the European Court of Human Rights making it clear that homosexual conduct *per se* cannot be criminalised<sup>224</sup> – it will be relied upon to place particular limitations in sensitive areas, such as the armed forces.<sup>225</sup>

#### 2.4.3 *Social security and similar payments (article 3(3))*

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

#### 2.4.4 *Occupational requirements (article 4(1))*

Member States may provide that a difference of treatment, which would otherwise be prohibited, shall not constitute discrimination where ‘by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out’, a characteristic related to one of the forbidden grounds constitutes ‘a genuine and determining occupational requirement’. However, the objective must be legitimate and the requirement must be proportionate.

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

It is very difficult to imagine certain jobs where a particular sexual orientation is needed. Recital 18 holds the view that the Directive is not aimed at requiring ‘the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the capacity to carry out the range of functions that they may be called upon to perform’. That is a valid argument, it should be remarked, within certain limits: it is so because ‘capacity to carry out

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<sup>223</sup> Bell 2002, 115.

<sup>224</sup> ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76, Series A, nr. 45.

<sup>225</sup> Skidmore 2001, 130. See also ECtHR 27 September 1999, *Lustig-Prean and Beckett v. UK*, appl. 31417/96 and 32377/96; ECtHR 27 September 1999, *Smith and Grady v. UK*, appl. 33985/96 and 33986/96, *Reports of Judgements and Decisions* 1999-VI; and ECtHR 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535/99, 48536/99 and 48537/99.

the functions' is not a protected ground, and might be affected by other characteristics than sexual orientation (such as, for example, physical ability).

The formula used in article 4(1) is very broad. It has been highlighted that Member States are likely to transpose it without significant changes, thus placing on the judiciary the task of delineating concrete exceptions.<sup>226</sup> The Commission has held that 'whether or not a particular difference of treatment meets the conditions of Article 4(1) will depend on the nature of the specific post or job in question'.<sup>227</sup>

One would hope that Member States exercise the highest degree of caution both in introducing specific rules and in giving courts discretionary powers that expand this exception in a way that would run contrary to the Directive.<sup>228</sup>

#### 2.4.5 *Loyalty to the organisation's ethos based on religion or belief (article 4(2))*

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

The second paragraph of article 4(2) concludes from the first part that the Directive does not prejudice the right of churches (and of 'organisations the ethos of which is based on religion or belief') to require individuals working for them to 'act in good faith and with loyalty to the organisation's ethos'. This formulation is considerably more vague than the first part, and because of the word 'thus' ('donc' in the French version) it must be interpreted as a specification of it. Therefore, it may not be taken to allow any discrimination on grounds of sexual orientation. One of the possible interpretations of this second part is that different treatment *on grounds of religion or belief* may be justified when the loyalty requirement restricts the freedom to express (certain opinions about) a particular sexual orientation.<sup>229</sup> In some instances, this form of differential treatment may

<sup>226</sup> Schiek 2002, 298.

<sup>227</sup> Answer given by Mrs. Diamantopoulou on behalf of the Commission, 28 July 2003, *OJ C* 11 E, 15.1.2004, p. 250.

<sup>228</sup> See 4.4.4 and 5.3.3 below.

<sup>229</sup> In any case, the conditions of the first part of article 4(2) must be respected ('a genuine, legitimate and justified occupational requirement').

lead to discrimination on grounds of sexual orientation, which is clearly not permitted. Furthermore, it is also specified that other provisions of the Directive should be complied with, and that the organisations should act ‘in conformity with national constitutions and laws’. It appears that the meaning of the loyalty requirement will be left to the sensitivity of the judiciary. This, in turn, could be a source of significant discrepancies from State to State and an area where some litigation might be expected.

#### 2.4.6 *Positive action (article 7(1))*

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

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

It may certainly be the case that employers take action by tackling specific issues concerning sexual orientation at the workplace, such as confidentiality, visibility, coming out and personal safety. Such action could hardly be seen as discrimination on grounds of heterosexual orientation.<sup>230</sup>

### 2.5 REMEDIES AND ENFORCEMENT

#### 2.5.1 *Basic structure of enforcement of employment law*

The Court of Justice of the European Communities may issue preliminary rulings, when requested by national courts, on the interpretation of Community law. Procedures and sanctions for the application of the obligations arising from the Directive are left to Member States, subject to the principle of equivalence.<sup>231</sup>

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<sup>230</sup> Many thanks to Hans Ytterberg for pointing this out.

<sup>231</sup> See also 2.5.4 below.

### 2.5.2 *Specific and/or general enforcement bodies*

In contrast with the Racial Equality Directive and with the Amended Equal Treatment Directive, this Directive does not require Member States to set up a body specialised in dealing with cases of discrimination or to promote equality. Nevertheless, the establishment of such a body for sexual orientation discrimination may help a State in fulfilling the requirements of articles 9 and 17.

### 2.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (article 9(1))*

The requirement of judicial control or review is considered a general principle of Community law.<sup>232</sup> The defence of rights foreseen by article 9(1) is therefore an expression of this principle, with which Member States have to comply. The formulation of article 9(1) ('available to all persons') suggests that the availability of only penal procedures is not enough. See also the next paragraph.

### 2.5.4 *Civil, penal and/or administrative sanctions (article 17)*

The choice of sanctions is left to national legislatures, but according to article 17 of the Directive they must in any case be *effective, proportionate* and *dissuasive*. As it has been highlighted, it is normally necessary that Member States provide remedies that benefit the victim of discrimination directly (such as the offer of a post, reinstatement, compensation, etc.); other (ancillary) measures, such as fines, punitive damages and the like, may supplement the remedial system, but cannot be regarded *per se* as sufficient guarantees of the right to an effective and proportionate remedy.<sup>233</sup>

Whilst EC law is rather vague, the Court of Justice has given various concrete examples that have helped in clarifying what kind of remedies could (or should) be made available at the national level for the enforcement of a right conferred upon individuals by Community law.<sup>234</sup>

Particularly in the employment context, the Court ruled in *Von Colson* that full implementation of Directive 76/207 (vaguer in its terms than article 17) entails sanctions capable of guaranteeing 'real and effective judicial protection';

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<sup>232</sup> ECJ 15 May 1986, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] *ECR* 1651. See Craig & De Búrca 2003, 339; Tobler 2005, 8.

<sup>233</sup> Tobler 2005, 10-11.

<sup>234</sup> See ECJ 19 June 1990, Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte FactorTame (FactorTame I)* [1990] *ECR* I-2433; ECJ 13 March 1991, Case C-377/89, *Cotter and others v. Minister for Social Welfare* [1991] *ECR* I-1155; ECJ 25 July 1991, Case C-208/90, *Emmott v. Minister for Social Welfare and Attorney General* [1991] *ECR* I-4269.

therefore, compensation for discriminatory conduct must amount to more than purely nominal compensation ‘such as, for example, the reimbursement of only the expenses incurred in connection with the application’.<sup>235</sup> This principle has been subsequently upheld in *Dekker*,<sup>236</sup> where the Court concluded that national rules chosen by the Member States to govern cases of discrimination (i.e. civil liability) must be disregarded when the practical effect of the principle of equal treatment would be weakened, i.e. by rules on the proof of fault or by the possibility of invoking grounds of exemption. In *Marshall II*,<sup>237</sup> the Court held that the guarantee to real and effective judicial protection established in *Von Colson* entailed that the fixing of an upper limit to financial compensation could not constitute proper implementation of article 6 of Directive 76/207, and that the award of interest must be regarded as ‘an essential component of compensation’. It also ruled that, in cases of discriminatory dismissal, adequate sanctions must encompass either reinstatement or financial compensation.

In *Draehmpaehl*<sup>238</sup> the Court applied the principle of equivalence, ruling that the fixing of an upper ceiling to compensation only in cases of discrimination violating Community law, but not in cases of ‘similar nature and importance’ which constitute infringements of domestic law, does not fulfil the requirement that sanctions for breach of Community law be analogous to those supplied for breach of domestic law. However, the case law of the Court of Justice also upheld limitations of various kinds existing in national law.<sup>239</sup>

The latest amendments to the Equal Treatment Directive 76/207/EEC<sup>240</sup> provide that compensation due in cases of discriminatory conduct may be restricted by the fixing of a prior upper limit only in exceptional circumstances specifically mentioned.<sup>241</sup>

<sup>235</sup> ECJ 10 April 1984, Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] *ECR* 1891. See also ECJ 15 May 1986, Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] *ECR* 1651; ECJ 11 July 1991, Joined Cases C-87/90, C-88/90 and C-89/90, *Verhoven and others v. Sociale Verzekeringsbank Amsterdam* [1991] *ECR* I-3757 (on national rules on standing); ECJ 15 October 1987, Case 222/86 *UNECTEF v. Heylens* [1987] *ECR* 4097; ECJ 22 September 1998, Case C-185/97, *Coote v. Granada Hospitality* [1998] *ECR* I-9285 (on the right of access to court).

<sup>236</sup> ECJ 8 November 1990, Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen* [1990] *ECR* I-3941.

<sup>237</sup> ECJ 2 August 1993, Case C-271/91, *Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] *ECR* I-4367.

<sup>238</sup> ECJ 22 April 1997, Case C-180/95, *Draehmpaehl v. Urania Immobilienservice OHG* [1997] *ECR* I-2195.

<sup>239</sup> See Craig & De Búrca 2003, 244 ff.

<sup>240</sup> Directive 76/207/EEC of 9 February 1976, *OJ L* 39, 14.2.1976, p. 40.

<sup>241</sup> Directive 2002/73/EC, of 23 September 2002, of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of

Finally, a breach of Community law by the State, for example in the form of the mis-implementation of directives, may give rise to its liability under the conditions specified in *Francovich*<sup>242</sup> and *Brasserie du pêcheur/Factortame III*.<sup>243</sup>

### 2.5.5 *Natural and legal persons to whom sanctions may be applied*

The Directive does not specify who is the person, natural and/or legal, that will be affected by sanctions, however article 3(1) makes it clear that the Directive 'shall apply to all persons'.<sup>244</sup>

### 2.5.6 *Awareness among law enforcers of sexual orientation issues*

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

### 2.5.7 *Standing for interest groups (article 9(2))*

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

It is unclear whether the choice foreseen by article 9(2) is left to the legislature or must be made available to the associations or other legal entities.<sup>245</sup> While acting 'in support' of a party is a possibility generally recognised under the existing law of procedure, in some instances the possibility of acting 'on behalf' of the victim challenges existing concepts in various Member States. This formula must

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equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L* 269, 5.10.2002, p. 15.

<sup>242</sup> ECJ 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* [1991] *ECR I-5357*.

<sup>243</sup> ECJ 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur v. Bundesrepublik Deutschland*, and *The Queen v. Secretary of State for Transport, ex parte Factortame and others* [1996] *ECR I-1029*.

<sup>244</sup> See also 2.2.8 above.

<sup>245</sup> See also 4.5.7 below.

be taken to mean more than just acting as legal counsel in Court, because this intrinsically requires approval (or even instruction) by the claimant. Since the Directive says ‘with his or her approval’, acting ‘on behalf’ seems to refer to the possibility of non-governmental organisations, for example, to bring complaints on their own, subject to approval of the aggrieved person, as opposed to only providing legal representation.

#### 2.5.8 *Burden of proof of discrimination (article 10)*

Once the victim has established ‘facts from which it may be presumed that there has been direct or indirect discrimination’ (article 10(1)), the Directive – like previous measures in the field of sex equality law<sup>246</sup> – places on the respondent the burden of proving that no breach of the principle of equal treatment has occurred. Indeed, this is a vital part of any anti-discrimination measure and is aimed at tackling the difficult issues concerning evidence that often characterise claims of discrimination. It should be remarked that according to article 10(3) the shift of the burden of proof does not apply to criminal procedures and, according to article 10(4), it ‘need not to apply [...] to proceedings in which it is for the court or competent body to investigate the facts of the case’.

#### 2.5.9 *Burden of proof of sexual orientation*

In order to establish discrimination, it must be found that less favourable treatment or a particular disadvantage is based on one of the prohibited grounds. As seen in paragraph 2.3.1 above, this test may be particularly problematic for sexual orientation, but only when discriminatory conduct on the basis of a mistaken assumption about the sexual orientation of the victim is considered as *not* being prohibited. The additional burden is not dealt with in the body of the Directive. However, recital 31 holds that ‘it is not for the respondent to prove that the plaintiff [...] has a particular sexual orientation’. According to its wording, the recital seems to create an extra burden, placed on the victim of differential treatment, to prove his or her particular sexual orientation. This would clash with the respect for privacy rights, as it would force a person to publicly disclose most intimate aspects of his or her life. In addition, courts or administrative agencies entrusted with enforcement would be ill equipped for making such a determination. Finally, it would deter victims to bring forward their claims, for fear of further exclusion.<sup>247</sup>

<sup>246</sup> Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *OJ L* 14, 20.1.1998, p. 6.

<sup>247</sup> Bell 2002, 115.

### 2.5.10 *Victimisation (article 11)*

The choice of measures to combat victimisation is left to the discretion of Member States which, nonetheless, may not refrain from adopting them. There is nothing in the Directive that suggests that only victims of discrimination should be protected from retaliatory measures whilst witnesses or other people collaborating in the case should be excluded. Moreover, nothing suggests that only retaliatory dismissal should be covered by the provision on protection from victimisation.

## 2.6 REFORM OF EXISTING DISCRIMINATORY LAWS AND PROVISIONS

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

- ‘(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers’ and employers’ organisations are, or may be, declared null and void or are amended’.

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

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

Secondly, an interpretation of article 16 consonant with the purpose of the Directive outlined in article 1 would advise to limit the force of article 16 only to

those discriminatory laws and other measures that concern employment or occupation, although this is not said explicitly. This interpretation, therefore, would leave unaffected those measures that might still discriminate on grounds of sexual orientation in the field of criminal law or family law, though it could be argued that, should these measures be deemed to be indirectly discriminatory in light of article 2 of the Directive (subject to all the exceptions and justifications of articles 2 to 8), they would fall within the provision of article 16.

Finally, there are discriminatory measures that, although technically covered by the provision of article 16, would be saved by article 2(5) of the Directive; this would only happen when necessary for the attainment of predominant public interests.<sup>248</sup>

### *2.6.1 Abolition of discriminatory laws and administrative provisions (article 16(a))*

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

Those rules might also be observed from a different angle: specifically, as acts which embody the will of the public administration considered as (any other) employer. Therefore, it is obvious that they would be considered unlawful (as the acts of any other employer) also in light of the provisions of articles 2 and 3 of the Directive.

### *2.6.2 Measures to ensure amendment or nullity of other discriminatory provisions (article 16(b))*

A considerable part of the rules governing industrial relations is likely to find its source in collective agreements. Although, as seen above,<sup>249</sup> implementation only through collective agreements might not be sufficient, article 16 aims to ensure that also such agreements are brought in line with the Directive. The same rectification must occur for individual contracts and other sources of rules regarding employment and occupation.

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<sup>248</sup> See 2.4.2 above.

<sup>249</sup> See 2.2.1 above.

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

- discriminatory provisions *are* declared null and void;
- discriminatory provisions *may be* declared null and void;
- discriminatory provisions are amended.

The expression ‘are or may be declared’ seems open to at least two interpretations. In a first sense it could be taken as a rule on remedies: nullity would, thus, be one option (‘provisions [...] are [...] declared null and void’), regardless of whether it is automatic or judicially declared; and voidability would be another option (‘may be declared’, although in this case the provision is usually not ‘declared’ but ‘made’ void). In a second sense, the same expression may be taken to indicate the organs from which the only one remedy foreseen (nullity) is supposed to descend. Nullity may be a direct and automatic consequence of some normative statement coming from the legislature (‘are declared void’), or a consequence of a judicial decision (‘may be declared void’).

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

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

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

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

## 2.7 CONCLUDING REMARKS

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

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

This chapter has attempted to analyse the concepts and instruments of which the Directive makes use, from the point of view of the protection of gay, lesbian and bisexual workers or prospective workers. Whilst the prohibition of sexual orientation discrimination is today a reality, there are aspects of the Directive that – by attempting to strike the right balance among different interests – call for closer attention as far as their concrete application is concerned, especially in the areas of partner benefits and loyalty to the religious ethos of some employers.