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

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Chapter 3

GENERAL SITUATION WITH RESPECT TO SEXUAL ORIENTATION DISCRIMINATION AT NATIONAL LEVEL¹

3.1 THE SOCIAL SITUATION

The European Community's requirement, contained in *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (hereafter the Directive),² to prohibit sexual orientation discrimination in employment, did not arrive in a vacuum. In each of the current and future Member States there were already all kinds of laws – and social attitudes – about sexual orientation and about discrimination. With respect to both topics the Member States have many things in common, while simultaneously showing a great deal of diversity.

As regards sexual orientation, considerable changes have taken place over the last decades in all European countries. Nevertheless, both socially and legally there are still great differences between them. The *European Values Study* gives us some idea of how the populations of the different countries think and thought about homosexuals (see table 1) and homosexuality (see table 2).

The figures in table 1 confirm that in the way people think about lesbian and gay individuals there is a great variation between the populations of the Member States. The variation between these countries is hardly smaller with respect to the way people think about 'homosexuality' as such, as can be seen in table 2.

In spite of these great differences between the countries, the figures in tables 1 and 2 also show that there has been a considerable increase over the last decades in the level of acceptance of homosexuals and homosexuality. And that is true for almost all countries that were surveyed. It seems reasonable to expect that this trend will continue, even in those countries where the values of a large part of the population are not yet very positive towards lesbian, gay and bisexual persons.

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

Table 1: The non-acceptance of homosexual people according to the European Values Study Surveys

| | Percentage of the sample that answered that they would <i>not</i> like to have <i>homosexuals</i> as neighbours ³ | |
|------------------------------------|--|-----------|
| | 1991/1993 | 1999/2000 |
| Sweden | 18 | 6 |
| Netherlands | 11 | 6 |
| Denmark | 12 | 8 |
| Germany (east/west) | 34/34 | 13 |
| France | 24 | 16 |
| Spain | 29 | 16 |
| Belgium | 24 | 18 |
| Luxembourg | — | 19 |
| Czech Republic | — ⁴ | 20 |
| Finland | 25 | 21 |
| UK: Great Britain/Northern Ireland | 33/48 | 24/35 |
| Portugal | 52 | 25 |
| Austria | 43 | 25 |
| Ireland | 33 | 27 |
| Italy | 37 | 29 |
| Malta | — | 40 |
| Greece | — | 42 |
| Slovakia | — ⁵ | 44 |
| Slovenia | 43 | 44 |
| Latvia | 78 | 46 |
| Estonia | 73 | 46 |
| Bulgaria | 68 | 54 |
| Poland | — | 55 |
| Romania | 75 | 65 |
| Lithuania | 87 | 68 |
| Hungary | 75 | 84 |

Seen from that perspective, the social developments around homosexuality are fairly similar in the Member States. This is further evident from the fact that in each of these countries a socially and politically active lesbian and gay movement

³ For the 1999/2000 survey, see Halman 2001, 42. For the 1991/1993 survey, see www.europeanvalues.nl. The surveys did not cover Cyprus. In this table the countries are listed according to the figures for 1999/2000.

⁴ For Czechoslovakia the figure for 1991/1993 was 59.

⁵ *Idem.*

Table 2: *The acceptance of homosexuality according to the European Values Study Surveys*

| | Mean answer to question whether <i>homosexuality</i> can always be justified, never, or something in between (10 = always, 0 = never) ⁶ | | |
|------------------------------------|--|----------------|-----------|
| | 1981/1984 | 1991/1993 | 1999/2000 |
| Netherlands | 5.9 | 7.3 | 7.8 |
| Sweden | 4.4 | 4.5 | 7.7 |
| Denmark | 5.5 | 4.7 | 6.6 |
| Luxembourg | — | — | 5.9 |
| Germany (east/west) | — /3.8 | 3.9/4.5 | 5.7 |
| Spain | 2.9 | 3.9 | 5.5 |
| Czech Republic | — | — ⁷ | 5.5 |
| Austria | 3.8 | 3.3 | 5.4 |
| France | 3.4 | 3.9 | 5.3 |
| Belgium | 3.1 | 3.8 | 5.2 |
| Finland | 3.5 | 4.4 | 4.9 |
| Slovakia | — | — ⁸ | 4.9 |
| UK: Great Britain/Northern Ireland | 3.7/2.0 | 3.4/2.4 | 4.9/4.0 |
| Italy | 2.7 | 3.9 | 4.8 |
| Slovenia | | 3.1 | 4.6 |
| Ireland | 2.8 | 3.2 | 4.4 |
| Greece | — | — | 3.4 |
| Portugal | — | 2.2 | 3.2 |
| Estonia | — | 2.0 | 3.0 |
| Poland | — | 1.8 | 2.9 |
| Bulgaria | — | 1.8 | 2.6 |
| Malta | — | — | 2.6 |
| Romania | — | 1.5 | 1.9 |
| Latvia | — | 1.8 | 1.9 |
| Lithuania | — | 1.4 | 1.9 |
| Hungary | — | 2.7 | 1.5 |

has been establishing itself. Organisations from these movements have often been quite influential in accelerating social – and legal – change. Simultaneously, the numbers of women and men deciding to come out as lesbian, gay or bisexual (to

⁶ For the 1999/2000 surveys, see Halman 2001, 223. For the 1981/1984 and 1991/1993 surveys, see www.europeanvalues.nl. See also Halman, Luijkx & Van Zundert 2005, 108-109. The surveys did not cover Cyprus. In this table the countries are listed according to the figures for 1999/2000.

⁷ For Czechoslovakia the figure for 1991/1993 was 5.0.

⁸ Idem.

their family, neighbours, colleagues, employer, etc.) have also been rising noticeably throughout the European Union, although in many places it still is a difficult and sometimes risky step for the individual to take. Also the availability of information about homosexuality (in books, films, television, internet, etc.) has been growing considerably.

Table 3: The level of opposition against (sexual orientation) discrimination according to the 2002 Eurobarometer⁹

| | Opposition to discrimination on grounds of sexual orientation ¹⁰ | Opposition to discrimination on all grounds ¹¹ | Perceived opposition of others to discrimination on grounds of sexual orientation ¹² | Perceived opposition of others to discrimination on all grounds ¹³ |
|---------------------|---|---|---|---|
| Sweden | 92 | 86 | 75 | 73 |
| Denmark | 91 | 87 | 75 | 72 |
| Spain | 90 | 89 | 72 | 72 |
| Netherlands | 90 | 84 | 77 | 72 |
| Luxembourg | 89 | 88 | 75 | 75 |
| United Kingdom | 88 | 87 | 76 | 76 |
| France | 87 | 85 | 73 | 72 |
| Italy | 86 | 85 | 65 | 67 |
| Belgium | 85 | 81 | 74 | 70 |
| Ireland | 84 | 82 | 76 | 75 |
| Portugal | 83 | 85 | 72 | 75 |
| Finland | 82 | 83 | 68 | 70 |
| Austria | 78 | 78 | 64 | 65 |
| Greece | 77 | 82 | 64 | 69 |
| Germany (east/west) | 71/69 | 71/68 | 65/60 | 65/61 |

⁹ Marsh & Sahin-Dikmen (Report A) 2002. In this table the countries are listed according to the results of the first question. For the first two columns a score of 100 means that all persons in the sample think that discrimination on the particular ground(s) is 'wrong' in all circumstances. For the last two columns a score of 100 means that all persons in the sample think that 'in general people consider it wrong' to discriminate on the particular ground(s). The scores are the combined results of questions relating to four domains of discrimination: seeking work or training, promotion at work, seeking accommodation or housing, and public services (restaurants, banks and so on). See Marsh & Sahin-Dikmen (Report B) 2002, 27.

¹⁰ Chart 78 of Report A of Marsh & Sahin-Dikmen 2002.

¹¹ Chart 79 of Report A of Marsh & Sahin-Dikmen 2002. 'All grounds' includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

¹² Chart 78 of Report A of Marsh & Sahin-Dikmen 2002.

¹³ Chart 79 of Report A of Marsh & Sahin-Dikmen 2002. 'All grounds' includes race or ethnicity, religion or beliefs, physical disability, mental impairment, age, and sexual orientation.

These and various related social developments have led many citizens (of any sexual orientation, and obviously including politicians, judges, etc.) to conclude that discrimination because of sexual orientation should be combated just as much as discrimination on other grounds. Table 3, with data from the *57th Eurobarometer*, carried out in spring 2002 in the then fifteen Member States, gives some indication of attitudes of European citizens about discrimination on several grounds.

The considerable – and presumably still growing – popular opposition against sexual orientation discrimination evidenced by table 3 has contributed to many political decisions:

- to abolish forms of sexual orientation discrimination that could be found *in legislation* (mainly in criminal law and in family law),¹⁴ and
- to combat – often *through legislation* – forms of sexual orientation discrimination that are taking place in employment and other areas of society.¹⁵

It seems probable that both this decrease in legal discrimination and this increase in legal protection against social discrimination, are in turn reinforcing the social developments just mentioned. Consequently one could expect a further rise in the number of women and men who feel free to come out as lesbian, gay or bisexual.

Nevertheless, other data from the same Eurobarometer indicate that actual sexual orientation discrimination is indeed taking place in each of the fifteen surveyed 'old' Member States (see table 4).

The fact that on average less than 1% of the respondents in all countries experienced sexual orientation discrimination (i.e. 81 persons among a total of around 16,000 respondents),¹⁶ should be read in combination with the assumption that only around 5% of adults identify as gay or lesbian, and that a lesser percentage come out as such. It is noteworthy that the percentage of respondents reporting having experienced discrimination on grounds of race or ethnicity (3%), religion or beliefs (2%), physical disability (2%), learning difficulties or mental illness (2%), or age (5%) are only a little higher.¹⁷ It should also be noted that these figures do not necessarily give an accurate picture of the full extent of actual

¹⁴ See 3.7 below, where a table can be found showing the years when the Member States have taken major legislative steps to decriminalise homosexual sexual acts and to recognise same-sex partners.

¹⁵ See 3.3 and 3.6 below, where many anti-discrimination measures covering sexual orientation are listed.

¹⁶ See Marsh & Sahin-Dikmen (Report B) 2002, 13.

¹⁷ See Marsh & Sahin-Dikmen (Report A) 2002, chart 1.

Table 4: The extent of perceived sexual orientation discrimination according to the 2002 Eurobarometer¹⁸

| | Percentage of respondents that reported having <i>experienced</i> discrimination or harassment on grounds of sexual orientation ¹⁹ | Percentage of respondents that reported having <i>witnessed</i> discrimination or harassment on grounds of sexual orientation ²⁰ | Percentage of respondents that answered that they think 'a homosexual (a gay or lesbian person)' with the same skills or qualification would have <i>less chance</i> than anyone else of getting a job, training or promotion ²¹ |
|---------------------|---|---|---|
| Ireland | < 0,5 | 2 | 22 |
| Netherlands | > 1,0 and < 1,5 | 11 | 24 |
| Denmark | < 0,5 | 4 | 26 |
| Belgium | > 0,5 and < 1,0 | 5 | 26 |
| United Kingdom | > 0,5 and < 1,0 | 6 | 28 |
| France | > 0,5 and < 1,0 | 6 | 33 |
| Austria | < 0,5 | 5 | 34 |
| Luxembourg | > 0,5 and < 1,0 | 8 | 37 |
| Germany (east/west) | > 0,5 and < 1,0 | 5/6 | 32/39 |
| Italy | < 0,5 | 3 | 39 |
| Sweden | < 0,5 | 10 | 43 |
| Portugal | < 0,5 | 3 | 44 |
| Spain | < 0,5 | 3 | 45 |
| Greece | > 0,5 and < 1,0 | 4 | 54 |
| Finland | < 0,5 | 9 | 56 |

¹⁸ In this table the countries are listed according to the results of the third question. The scores in the first two columns are the combined results of questions relating to seven domains of discrimination: at work, while looking for a job, in primary school, in secondary school, at university, in obtaining housing, and in accessing public and commercial services. See Marsh & Sahin-Dikmen (Report B) 2002, 10 and 17. See also table 3, footnote 9, above.

¹⁹ See Marsh & Sahin-Dikmen (Report A) 2002, chart 7. In their Report B (2002, 14) they write: 'In all countries except Netherlands, less than 1 per cent of respondents reported discrimination on grounds of sexual orientation. The differences between countries are too small to allow a meaningful comparison, but it is interesting to note that the Netherlands has the highest number of respondents who reported discrimination because of sexual orientation. It is possible that this higher rate of discrimination is more of a reflection of a cultural openness about the issue than it is an indication of comparatively higher actual incidence rates.' One might also add, that the higher rate of coming out among gay men and lesbian women in countries like the Netherlands than in several other countries, may also make them more likely to be confronted with discrimination because of their orientation.

²⁰ See Marsh & Sahin-Dikmen (Report A) 2002, chart 39. See their Report B, 2002, 17-21.

²¹ See Marsh & Sahin-Dikmen (Report A) 2002, chart 71. See their Report B, 2002, 25.

discrimination taking place. The responses to the second and especially the third question in table 4 indicate that sexual orientation discrimination may be rather more widespread than suggested by the responses to the first question.

The mutually reinforcing social and legal developments indicated above are not only occurring in the Member States, but also at the European level. The inclusion of sexual orientation in article 13 of the EC Treaty in 1999 and in the Employment Equality Directive (2000/78/EC) can be seen as a product of this. For most of the old Member States,²² and for a few new Member States,²³ this Directive has meant that additions had to be made to already existing legislation prohibiting sexual orientation discrimination in employment. For the other Member States,²⁴ the Directive has meant that for the first time sexual orientation discrimination in employment needed to be made the object of national legislation.

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

3.2 CONSTITUTIONAL PROTECTION AGAINST DISCRIMINATION

Some 20 years before article 13 of the EC Treaty was adopted, the existence of a general principle of non-discrimination was recognised by the Court of Justice of the EC.²⁵ Later, in its first judgement interpreting the Directive, the Court of Justice recognised that this principle also applies to sexual orientation. In 2005 it has held that the principle of non-discrimination on grounds of age (or religion, belief, disability or sexual orientation) can be found 'in various international

²² Namely: Denmark, Finland, France, Ireland, Luxembourg, Netherlands, Spain and Sweden.

²³ Slovenia had already prohibited sexual orientation discrimination in 1995 and the Czech Republic (and Romania) had done so in 2000; see 5.1 below.

²⁴ Namely: Austria, Belgium, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia and the United Kingdom; the same was true for Bulgaria.

²⁵ See 2.1.2 above.

instruments and in the constitutional traditions common to the Member States [...] and therefore must be regarded as a general principle of Community law'.²⁶

The written law of the European Union, on the other hand, so far does not provide any real constitutional protection in this matter: article 13 of the EC Treaty lacks direct effect, and it remains to be seen what the legal status of the non-discrimination provision of article 21(1) of the EU Charter of Fundamental Rights will be. Nevertheless, the explicit inclusion of sexual orientation in both article 13 of the EC Treaty and article 21 of the EU Charter helps to strengthen the notion that sexual orientation discrimination should be considered as unconstitutional. This has been made even more evident by the inclusion of these two provisions into the agreed text for the European Constitution,²⁷ and by the insertion in that text of a new article, stating the aim of combating discrimination in European Union policies.²⁸

However, more concrete constitutional protection against sexual orientation discrimination can be found at two other levels. The European Convention on Human Rights, as interpreted by the European Court of Human Rights, implies that all citizens of the European Union enjoy some constitutional protection against sexual orientation discrimination in employment, at least in *public* employment. As a forbidden ground for discrimination, sexual orientation is only spelled out in the constitution of one Member State: that of Portugal. In most

²⁶ ECJ 22 November 2005, Case C-144/04, *Mangold v. Helm*.

²⁷ See 2.1.1 above. In the Treaty establishing a Constitution for Europe of 29 October 2004 (online at www.europa.eu.int/constitution/constitution_en.htm) the provisions are numbered and phrased as follows:

Article II-81(1) (former II-21, based on article 21 EU Charter): '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-124 (former III-8, based on article 13 EC):

(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.'

²⁸ Article III-118 (former III-3): 'In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

other Member States constitutional protection can be derived from more general words in their national constitution.

In Portugal a constitutional amendment adding 'sexual orientation' to the prohibition of discrimination in article 13 of the Portuguese Constitution came into force on 31 July 2004.²⁹

As far as the other national constitutions are concerned,³⁰ the words 'sexual orientation' so far can only be found in one of the constitutional instruments of Sweden. However, Sweden is one of the few countries without a general constitutional prohibition of discrimination. The Swedish provision (which is not legally binding) merely obliges Parliament, Government and other public bodies to take action against discrimination on several grounds, including sexual orientation.³¹ An instruction to combat discrimination in general, can also be found in some other constitutions (Italy, Portugal and Spain).³²

In the Member States that do have a constitutional prohibition of discrimination on many grounds,³³ that prohibition is (most probably) at least binding on the legislature and on public employers.³⁴ In two countries this constitutional prohibition does not cover sexual orientation: Bulgaria³⁵ and Malta.³⁶ In several other countries it is not yet clear whether sexual orientation is covered (Germany, France, Greece, Ireland, Lithuania, Slovakia and Poland). But in most countries there is enough authority (in case law, in the doctrine, or in the *travaux préparatoires*) to consider sexual orientation implicitly covered as a constitutionally prohibited ground for discrimination.³⁷

²⁹ Constitutional Law 1/2004. On Madeira and the Azores this amendment came into force on 10 August 2004. See Freitas 2004, para. 14.1.0.

³⁰ Sexual orientation is mentioned explicitly in anti-discrimination provisions in the regional constitutions of a few *Länder* in Germany; see Baer 2004, para. 8.1.1, and Baer 2004/2005, para. 1.

³¹ See Ytterberg 2004, para. 16.1.1.

³² See the paragraphs 1.1 of the relevant national chapters in the report *Combating sexual orientation discrimination in employment* 2004, and paragraph 1 in each of the relevant chapters of the *Report on measures to combat discrimination* 2004/2005.

³³ This is the case in all Member States except Denmark, Luxembourg, Sweden and the United Kingdom. Bulgaria and Romania also have such a constitutional prohibition (see Ionescu 2005 and Preslavská 2005).

³⁴ In the Netherlands with the restriction that parliamentary acts cannot be declared unconstitutional by the Dutch courts (Waaldijk 2004, para. 13.1.1).

³⁵ See Preslavská 2005.

³⁶ See Attard 2005.

³⁷ This is the case in Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, Hungary, Italy, Latvia, Netherlands, Romania, Slovenia and Spain. See paragraph 1.1 in each of the relevant national chapters in the report *Combating sexual orientation discrimination in employment* 2004, and paragraphs 1 of the relevant chapters of the *Report on measures to combat discrimination* 2004/2005. See also Ionescu 2005.

For the countries where national constitutional protection against sexual orientation discrimination is unclear or absent, it is especially relevant to see if this is made good by any direct applicability of the European Convention on Human Rights. By 2004, the Convention had indeed become directly applicable in all twenty five Member States of the European Union, although in the courts of some of them the Convention does not take precedence over parliamentary legislation (Germany, Ireland, United Kingdom and possibly Italy).³⁸

The European Convention on Human Rights binds its State Parties, and therefore all legislatures, and all public employers. This has been recognised in the case law of the European Court of Human Rights, for example very clearly in the cases where it ruled that the ban of the United Kingdom on gays and lesbians in the armed forces violated article 8 of the Convention (respect for private life).³⁹ Article 14 of the Convention prohibits discrimination on many grounds with respect to the enjoyment of the other rights and freedoms it guarantees.⁴⁰ Sexual orientation discrimination in employment will almost always fall within the ambit of one of these other rights, especially the right to respect for private life. This is so because the European Court of Human Rights considers at least three of the main aspects of sexual orientation as (very intimate) aspects of private life: sexual conduct,⁴¹ sexual preference,⁴² and relationships.⁴³ Whether the Court will con-

³⁸ See paragraph 1.1 in each of the relevant national chapters in the report *Combating sexual orientation discrimination in employment 2004*, and paragraph 1 in each of the relevant chapters of the *Report on measures to combat discrimination 2004/2005*. The last of the fifteen old Member States to make the Convention directly applicable, was Ireland (in 2003); see Bell 2004, para. 10.1.1.

³⁹ 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; ECtHR 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535/99, 48536/99 and 48537/99.

⁴⁰ A more general and independent prohibition of discrimination can be found in the Twelfth Protocol to the Convention. By the end of 2005 this Protocol has entered into force (on 1 April 2005) for eleven Member States of the Council of Europe, including three Member States of the European Union: Cyprus, Finland and the Netherlands. See 2.1.1 above.

⁴¹ ECtHR 22 October 1981, *Dudgeon v. UK*, appl. 7525/76, *Series A*, nr. 45; ECtHR 26 October 1988, *Norris v. Ireland*, appl. 10581/83, *Series A*, nr. 142; ECtHR 22 April 1993, *Modinos v. Cyprus*, appl. 15070/89, *Series A*, nr. 259; ECtHR 31 July 2000, *A.D.T. v. UK*, appl. 35765/97; ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I; ECtHR 9 January 2003, *L. & V. v. Austria*, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I; 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.

⁴² 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*

sider *coming out* as an aspect of private life, remains to be seen, but this could at least be considered as falling in the ambit of the freedom of expression (article 10).⁴⁴ Some cases of discrimination will fall within the ambit of the right to property (article 1 of the First Protocol to the Convention). So far the European Court of Human Rights has found unlawful sexual orientation discrimination on nine occasions.⁴⁵ In the only cases of alleged employment discrimination on that ground, the Court has chosen to reach its conclusion directly on the basis of article 8.⁴⁶

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

Invoking a generally worded provision of a national constitution or in the European Convention on Human Rights is not easy for an ordinary victim of employment discrimination (nor for his ordinary lawyer). Therefore more specific legislation is necessary,⁴⁷ especially in private employment where constitutional protection is very limited. But there is also another reason why whatever constitutional protection that may exist, is not enough to meet the requirements of the Directive: the principles and concepts of equality used in constitutional law are often vague and capable of different applications, and allowing for rather more justifications than are acceptable under the Directive.

The European Court of Human Rights in 1968 had its first chance to elaborate on the prohibition of discrimination contained in article 14 of the European Convention on Human Rights. Since then the Court considers a distinction to be discriminatory if it lacks an objective and reasonable justification.⁴⁸ With respect to 'suspect' grounds like sexual orientation, it has specified that such a

⁴³ *of Judgements and Decisions* 1999-VI; ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96, *Reports of Judgements and Decisions* 1999-IX; ECtHR 26 February 2002, *Fretté v. France*, appl. 36515/97, *Reports of Judgements and Decisions* 2002-I; ECtHR 22 October 2002, *Beck, Copp and Bazeley v. UK*, appl. 48535/99, 48536/99 and 48537/99.

⁴⁴ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX.

⁴⁵ See European Commission of Human Rights, 3 May 1988, *Morissens v. Belgium*, appl. 11389/85, [1988] 56 *Decisions and Reports* 127.

⁴⁶ In the cases of *Salgueiro da Silva Mouta, S.L., L. & V. Karner, B.B., Ladner, Wolfmeyer, H.G. and G.B.*, and *R.H.* (see the previous notes).

⁴⁷ In the cases of *Lustig-Prean and Beckett, Smith and Grady*, and *Beck, Copp and Bazeley* (see the previous notes).

⁴⁸ See 3.3 below.

⁴⁹ See 2.1.2 above.

justification requires particularly serious reasons, and that the distinction must be shown to be proportionate in relation to the legitimate aim sought, and necessary for achieving that aim.⁴⁹

Most national constitutional provisions on equality have been given more or less similar interpretations, or other interpretations consisting of tests that are only the starting point of any discussion about the question as to whether a particular distinction is justified. It can therefore be said that the Directive, and the implementing legislation inspired by it, also operate to give more legal certainty to those who would otherwise have to rely on a very generally worded constitutional, or even unwritten, principle of non-discrimination.⁵⁰

3.3 PROVISIONS ON SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT

Since the 1980s, legislative and other steps have been gradually taken by the Member States and the institutions of the EC to *explicitly* combat sexual orientation discrimination *in employment*. The non-exhaustive listing in table 5 demonstrates both the increasing speed of this process, and the accelerating role that the EC institutions seem to have played in it.⁵¹ There appears to be some correlation between the timing of the legal data in this listing and the data on values and attitudes given in tables 1, 2 and 3 above.

Legislative proposals to (further) implement the Directive have been introduced in the parliaments of the Czech Republic, Germany, Latvia and Luxembourg, but by the end of 2005 these had not been enacted yet.⁵²

The degree to which all the listed legislation can be said to fully implement the Directive, will be critically considered in chapters 4 and 5 below.

It should be noted that several Member States also explicitly prohibit employment discrimination on one or more related grounds, such as gender reassignment (United Kingdom),⁵³ civil status (Netherlands, Belgium and Portugal),⁵⁴

⁴⁹ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX (see previous paragraph, and further 2.1.2 above).

⁵⁰ See chapter 7 below.

⁵¹ See chapter 2 above.

⁵² See 4.1 and 5.1 below.

⁵³ In all Member States discrimination on grounds of gender reassignment or transsexuality is covered by the prohibition of sex discrimination. This follows from ECJ 30 April 1996, Case C-13/94, *P v. S and Cornwall County Council* [1996] *ECR* I-2143.

⁵⁴ In some other countries discrimination on grounds of 'marital status' is prohibited (Czech Republic, Estonia, Ireland, Latvia, Malta, Slovakia, Spain and the United Kingdom), but in most of them that prohibition will only protect heterosexually married people, not unmarried people. The same might be true for some of the prohibitions of discrimination on grounds of family

Table 5: *Provisions on sexual orientation discrimination in employment*⁵⁵

| | | |
|------|-------------------------------------|--|
| 1984 | European Parliament | Resolution on sexual orientation discrimination at the workplace ⁵⁶ |
| 1985 | France | Penal Code (using 'moeurs' to cover sexual orientation) |
| 1986 | France | Labour Code (also using the term 'moeurs') |
| 1987 | - | - |
| 1988 | - | - |
| 1989 | - | - |
| 1990 | - | - |
| 1991 | Commission of the EC | Recommendation on the protection of the dignity of women and men at work (including a 'Code of practice on measures to combat sexual harassment') ⁵⁷ Declaration endorsing that Recommendation ⁵⁸ |
| 1992 | Council of the EC Netherlands | Penal Code |
| 1993 | Ireland | Unfair Dismissals Act 1977 |
| 1994 | European Parliament | Resolution on equal rights for homosexuals and lesbians in the EC ⁵⁹ |
| 1994 | Netherlands | General Equal Treatment Act |
| 1995 | Slovenia | Penal Code |
| | Spain | Penal Code |
| | Finland | Penal Code |
| 1996 | Denmark | Act against Discrimination in the Labour Market |
| 1997 | Luxembourg | Penal Code |
| 1998 | Council of the EC | Staff Regulations of officials of the EC (article 1a, among others) ⁶⁰ Conditions of Employment of other servants of the EC (article 83, among others) ⁶¹ |
| | Ireland | Employment Equality Act 1998 |
| 1999 | Member States of the European Union | Article 13 EC (inserted into the EC Treaty on 1 May 1999 by the Treaty of Amsterdam of 2 February 1997) |
| | Sweden | Sexual Orientation Discrimination Act |
| | Belgium | Collective agreement (made binding by Royal Decree) |
| 2000 | Czech Republic | Act 1/1991 on Employment, as amended by Act 167/1999 |

status, family situation, family relations or family related duties (which can be found in Czech Republic, Estonia, Finland, France, Hungary, Ireland, Luxembourg, Portugal, Slovakia and Spain).

⁵⁵ For national legislation the years of entry into force are given. For a more detailed overview of the legislation used to implement the Directive, see 4.2.1 and 5.1 below. For a brief overview of laws against sexual orientation discrimination in fields other than employment, see 3.6 below.

⁵⁶ *OJ C* 104, 16.4.1984, p. 46; see 2.1.3 above.

⁵⁷ *OJ L* 49, 24.2.1992, p. 1.

⁵⁸ *OJ C* 27, 4.2.1992, p. 1.

⁵⁹ *OJ C* 61, 28.2.1994, p. 40.

⁶⁰ See 2.1.3 above.

⁶¹ *Idem*.

Table 5: Cont.

| | | |
|------|-------------------|---|
| 2000 | Romania | Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination |
| | Council of the EC | <i>Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation</i> |
| 2001 | Czech Republic | Act 155/2000, amending the Labour Code, the Act on Members of the Police Force and the Act on Members of the Armed Forces |
| | France | amendment of Law 83-634 governing the Rights and Obligations of Civil Servants |
| | Finland | Employment Contracts Act |
| | France | inclusion of the words ' <i>orientation sexuelle</i> ' in the provisions of Penal Code and Labour Code |
| | Germany | Industrial Relations Act |
| | Germany | Personnel Representation Act |
| 2002 | Sweden | Equal Treatment of Students at Universities Act |
| | Romania | Law 48/2002, amending Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination |
| | Latvia | Labour Law (sexual orientation is not explicitly mentioned, but discrimination on 'other grounds' is) |
| | Malta | Employment and Industrial Relations Act |
| 2003 | Belgium | Law of 25 February 2003 on combating discrimination |
| | Sweden | Discrimination Prohibition Act |
| | Sweden | amendment of Sexual Orientation Discrimination Act 1999 |
| | Sweden | amendment of Equal Treatment of Students at Universities Act 2002 |
| | Malta | Employment and Industrial Relations Interpretation Order 279/2003 (reading 'sexual orientation' into Employment and Industrial Relations Act 2002) |
| | Romania | Labour Code |
| | Slovenia | Employment Relations Act |
| | Poland | Act on Employment and Counteracting Unemployment |
| | Lithuania | Penal Code |
| | Lithuania | Labour Code |
| | Italy | Legislative Decree implementing the Directive |
| | United Kingdom | Employment Equality (Sexual Orientation) Regulations 2003 |
| | United Kingdom | Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 |
| 2004 | Portugal | Labour Law Code |
| | Spain | Act 62/2003 (also amending the Workers' Statute, and Act 45/1999 concerning the relocation of workers in the framework of a trans-national contractual work relation) |
| | Finland | Equality Act 21/2004 (also amending the Employment Contracts Act and the Act on Holders of Municipal Office) |
| | United Kingdom | Equal Opportunities Ordinance, 2004 (Gibraltar) |
| | Netherlands | amendment of the General Equal Treatment Act 1994 |

Table 5: *Cont.*

| | | |
|------|---------------------|--|
| 2004 | Denmark | amendment of the Act against Discrimination in the Labour Market 1996 |
| | Council of the EC | Staff Regulations of officials of the EC (article 1d, among others) ⁶² Conditions of Employment of other servants of the EC (article 124, among others) ⁶³ |
| | Austria | Equal Treatment Act |
| | Austria | Federal Act on the Equal Treatment Commission and the Office of the Ombudspersons for Equal Treatment |
| | Austria | Federal Equal Treatment Act |
| | Czech Republic | Labour Code |
| | Czech Republic | Act 435/2004 on Employment |
| | Hungary | Equal Treatment Act |
| | Bulgaria | Law on Protection against Discrimination |
| | Poland | Labour Code |
| | Poland | Act on the Promotion of Employment and the Institutions of the Labour Market |
| | Slovakia | Act 365/2004 on Equal Treatment in Certain Areas and Protection against Discrimination (also amending various existing laws, including the Labour Code, the Act on Civil Service, and the Act on Military Service) |
| | Estonia | Law on Employment Contracts |
| | Slovenia | Implementation of the Principle of Equal Treatment Act |
| | Cyprus | Equal Treatment in Employment and Occupation Law |
| | Malta | Equal Treatment in Employment Regulations |
| | Latvia | amendment of Labour Law 2002 (sexual orientation still not explicitly mentioned, but discrimination on 'other grounds' is) |
| | Romania | Law 27/2004, amending Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination |
| | Portugal | Law 35/2004 containing supplementary provisions to Labour Law Code |
| 2005 | Ireland | Equality Act 2004, amending the Employment Equality Act 1998 |
| | Ireland | Pensions Act 1990 and 2004, as amended by Social Welfare (Miscellaneous Provisions) Act 2004 |
| | France | Law 2004-1486 of 30 December 2004 creating the High Authority to Fight against Discriminations and for Equality |
| 2006 | Lithuania | Law on Equal Treatment |
| | Greece | Act 3304 of 27 January 2005 on the Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or Belief, Disability, Age or Sexual Orientation |
| 2006 | European Parliament | Resolution on Homophobia in Europe ⁶⁴ |

⁶² See 2.1.3 above.⁶³ Idem.⁶⁴ See 2.1.7 above.

and *moeurs* (France and Luxembourg; the term may be translated as ‘morals, manners, customs, ways’). Furthermore, in several countries discrimination on any ground whatsoever is prohibited.⁶⁵

3.4 CASE LAW PRECEDENTS ON SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT

Even before there was explicit legislation banning such discrimination, some national courts, and also the main European courts, have had to rule on cases of alleged sexual orientation discrimination in employment. Sometimes they accepted the claim, other times they rejected it.

Among the ‘important case law’ identified in the fifteen national chapters of the report of the European Group of Experts on Combating Sexual Orientation Discrimination, less than ten cases (on sexual orientation discrimination in employment) can be counted in which the claimant was successful.⁶⁶ For most Member States a complete lack of reported case law was indicated.

The first decision by a superior court finding that there had indeed been unlawful sexual orientation discrimination came in 1982, when in the Netherlands the highest court for public employment cases found that a man had been unlawfully dismissed from his job in the armed forces on the sole fact of his homosexual orientation.⁶⁷ More recently the European Court of Human Rights in 1999 ruled against the British ban on the employment of homosexuals in the armed forces.⁶⁸ Additionally, in 2002 the German Federal Administrative Court ruled that the military is not allowed to differentiate on the basis of sexual orientation.⁶⁹

From the Dutch case it may be concluded that such discrimination was already unlawful in the Netherlands (at least in the armed forces, and *a fortiori* in other sectors of public employment) in 1982, i.e. ten years before the first explicit anti-discrimination legislation. Similarly, the German case of 2002 indicates that such discrimination in public employment is also already unlawful in

⁶⁵ This is the case in Finland, Hungary, Latvia, Poland, Slovakia, and Slovenia, and because of a judgement of the Belgian Court of Arbitration of 6 October 2004 (see De Schutter 2004/2005, para. 0.2 and 0.3) in Belgium also.

⁶⁶ See the paragraphs 1.6 of the relevant national chapters in the report *Combating sexual orientation discrimination in employment* 2004. See also 5.5 below.

⁶⁷ See Waaldijk 2004, para. 13.1.6.

⁶⁸ 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.

⁶⁹ See Baer 2004, para. 8.1.6.

Germany, even before the first explicit anti-discrimination legislation that should be expected in 2006. However, the judgements of the European Court of Human Rights in 1999 allow for a wider conclusion, certainly since the Court subsequently ruled that 'sexual orientation'⁷⁰ – including three of its main aspects preference,⁷¹ conduct⁷² and relationships⁷³ – is indeed covered by the prohibition of discrimination in article 14 of the European Convention. Now it can be maintained that, since 1999, sexual orientation discrimination with respect to *military and other public employment* is unlawful in all State Parties to the European Convention on Human Rights, and therefore throughout the European Union.

With respect to *private employment*, there is very little case law, especially at the European level. The European Court of Human Rights cannot pronounce directly on discrimination by private employers, because the European Convention only binds the State Parties.⁷⁴ The Court of Justice of the EC so far has had only one case on sexual orientation discrimination in private employment, *Grant v. South West Trains Ltd.*, and it decided to leave it to the Member States and the Council to legislate on such discrimination.⁷⁵

Also, even though the Directive has been implemented in most Member States, the number of cases about sexual orientation discrimination in employment that made it to court still seems to remain low.⁷⁶ But that could still change.

The lack of case law does not mean that there are no cases. Especially in countries where anti-discrimination legislation is already in force, cases can be settled before going to court. The fact that many cases do not make it to court, can also be deduced from the more substantial figures of the specialised bodies set up in three countries to deal with cases of sexual orientation discrimination:

⁷⁰ ECtHR 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, appl. 33290/96, *Reports of Judgements and Decisions* 1999-IX.

⁷¹ Idem.

⁷² ECtHR 9 January 2003, *S.L. v. Austria*, appl. 45330/99, *Reports of Judgements and Decisions* 2003-I; ECtHR 9 January 2003, *L. & V. v. Austria*, appl. 39392/98 and 39829/98, *Reports of Judgements and Decisions* 2003-I; 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.

⁷³ ECtHR 24 July 2003, *Karner v. Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX.

⁷⁴ See 3.1 above.

⁷⁵ ECJ 17 February 1998, Case C-249/96, *Grant v. South West Trains Ltd.* [1998] ECRI-621; see 2.1.4 above.

⁷⁶ See 5.5 below, and the 2005 and forthcoming issues of the *European Anti-Discrimination Law Review*.

- In Ireland in the four years from 2000 the *Equality Tribunal* received 15 complaints about sexual orientation discrimination in employment, and in the two years from 2001 the *Equality Authority* has been working on a total of 17 cases of such discrimination.⁷⁷
- In Sweden in the five years from 1999 the *Ombudsman against Discrimination on grounds of Sexual Orientation* has had to deal with over 60 employment related complaints.⁷⁸
- And in the Netherlands in the nine years from 1995 the *Equal Treatment Commission* has given 29 opinions about alleged sexual orientation discrimination in employment. In addition to that, staff of this Commission answers questions about sexual orientation discrimination by telephone: 18 times in the year 2002.⁷⁹

Finally, it should be pointed out that in several countries there have been many cases about the denial to gay or lesbian employees of certain spousal benefits because of their not being married to their partner. The second sexual orientation case to come to the Court of Justice of the EC, *D and Sweden v. Council*,⁸⁰ also falls in this category. The Court chose to treat the distinction between (same-sex) registered partnership and (different-sex) marriage as one involving civil status, and rejected the claim for a household allowance for the registered partner of a Swedish employee of the Council of the European Union.⁸¹

3.5 PROVISIONS ON DISCRIMINATION IN EMPLOYMENT THAT DO NOT COVER SEXUAL ORIENTATION

For several decades already, employment discrimination on grounds of race and sex has been the object of more international and European rules than discrimination on grounds of sexual orientation. Hence, it is not surprising that most Member States have older and wider national rules on employment discrimination on these other grounds. However, it should be borne in mind that (apart from specific topics such as social security, pregnancy and enforcement bodies) the actual level of protection required by the Directive with respect to sexual orientation discrimination in employment, is hardly lower than the levels of pro-

⁷⁷ Bell 2004, para. 10.1.6.

⁷⁸ Ytterberg 2004, para. 16.1.6.

⁷⁹ Waaldijk 2004, para. 13.1.6.

⁸⁰ ECJ 31 May 2001, Joined Cases C-122/99 and C-125/99, *D and Sweden v. Council* [2001] *ECR I-4319*.

⁸¹ For a discussion on whether a similar case involving a private or public employer in a Member State would or could be decided differently, see 4.3.3 below.

tection required by the Racial Equality Directive and the various directives on the equal treatment of men and women.⁸²

Also, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the matter, it is mostly undesirable to choose different contents and/or different words for rules with respect to different grounds. Whether different grounds of discrimination are to be tackled in (the same articles of) the same laws, is a matter of national discretion. But, surely, it is a topic for the Commission of the EC to consider, whether any differences between the rules on sexual orientation and the rules on other grounds are unacceptable in light of the relevant directives, and whether they are needlessly confusing for all concerned. Therefore, it would make sense to carry out detailed comparisons between the national rules on the different discrimination grounds in the field of employment.

3.6 PROVISIONS ON SEXUAL ORIENTATION DISCRIMINATION IN FIELDS OTHER THAN EMPLOYMENT

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

- Firstly, the borderline between employment and other fields is not always clear cut. This is particularly true for the areas of vocational training, vocational guidance, self-employment and benefits provided for by organisations of workers, employers, or professionals (all covered by article 3(1) of the Directive). Each of these areas overlaps with that of goods and services. Therefore it is fortunate that the provision of services is subject to a prohibition of sexual orientation discrimination in most Member States.⁸³
- Secondly, for reasons of legal clarity, and for reasons of promoting the understanding and acceptance of anti-discrimination law among the general population and among lawyers and others called upon to give advice on the

⁸² See 2.1.5 above.

⁸³ These include Belgium, Denmark, Finland, France, Hungary, Ireland, Lithuania, Luxembourg, Netherlands, Slovenia, Spain and Sweden (plus Bulgaria and Romania). See the paragraphs 1.6 of the relevant national chapters in the report *Combating sexual orientation discrimination in employment 2004*, the relevant national chapters of the *Report on measures to combat discrimination 2004/2005*, and Preslavská 2005 and Ionescu 2005.

matter, it can be helpful if the anti-discrimination norm is a *general* norm, and not just one applicable in certain carefully delineated areas.

- Thirdly, the perception of what areas (employment, goods and services, partnership, incitement) are central to the problem of sexual orientation discrimination varies from country to country.

The chronological (though not complete) list of measures in table 6 indicates the increasing prevalence of national explicit prohibitions of sexual orientation discrimination beyond the field of employment.⁸⁴

*Table 6: Provisions on sexual orientation discrimination beyond employment*⁸⁵

| | | | |
|------|-------------|--|---|
| 1985 | France | Penal Code | provision of goods and services |
| 1986 | Netherlands | Act on Benefits for Victims of Persecution 1940-1945 | — |
| 1987 | Denmark | Penal Code | incitement of hatred |
| | Denmark | Act on Race Discrimination | amended so as to also cover sexual orientation, with respect to the provision of goods and services |
| | Sweden | Penal Code | provision of goods and services |
| 1988 | Netherlands | Data Registration Act | — |
| 1989 | — | — | — |
| 1990 | — | — | — |
| 1991 | — | — | — |
| 1992 | Netherlands | Penal Code | discrimination by a business, by a professional or by a public official; incitement of hatred by anyone |
| 1993 | Austria | Code of conduct for police officers | — |
| 1994 | Netherlands | General Equal Treatment Act | provision of goods and services |
| 1995 | Slovenia | Penal Code | discrimination in any human right |
| | Finland | Penal Code | provision of services |
| | Spain | Penal Code | provision of services; incitement of hatred |
| 1996 | — | — | — |
| 1997 | Luxembourg | Penal Code | provision of goods and services; incitement of hatred |

⁸⁴ See also 3.3 above and 3.7 below.

⁸⁵ The first European country to explicitly prohibit sexual orientation discrimination was Norway, in 1981. See Wintemute & Andenaes 2001, 782-788, where a list of such anti-discrimination legislation throughout the world can be found (see also the updated version of that list at www.ilga.org/files.asp, under World Legal Survey).

Table 6: *Cont.*

| | | | |
|------|--------------------------------|---|---|
| 1997 | Hungary Netherlands | Health Care Act Royal Decree on the training of medical doctors | — |
| 1998 | United Kingdom | Northern Ireland Act 1998 | duty to promote equality |
| 1999 | United Kingdom | Greater London Authority Act | duty to promote equality |
| 2000 | Austria Ireland Romania | Data Protection Act Equal Status Act 2000 Ordinance 137/2000 | provision of goods and services provision of goods and services |
| 2001 | — | — | — |
| 2002 | Sweden Sweden | Equal Treatment of Students at Universities Act Penal Code | — sexual orientation as an aggravating motive for crimes |
| | France Spain | Law 2002-73 Law on Political Parties | rental housing — |
| 2003 | Lithuania Belgium Sweden | Penal Code Law of 25 February on combating discrimination Instrument of Government | exclusion from political, economic, social, cultural or other activities; incitement of hatred provision of goods and services duty to take action against discrimination |
| | Sweden France | Discrimination Prohibition Act Penal Code Penal Code | provision of goods and services incitement of hatred sexual orientation as an aggravating motive for crimes |
| 2004 | Bulgaria Hungary France | Law on Protection against Discrimination Equal Treatment Act Penal Code | provision of services provision of goods and services sexual orientation as an aggravating motive for more crimes |
| | Portugal | Constitution | sexual orientation inserted into nondiscrimination article |
| | United Kingdom | Public Order (Northern Ireland) Order 1987, as amended by Criminal Justice No. 2 (Northern Ireland) Order 2004 | incitement of hatred |
| 2005 | Lithuania France | Law on Equal Treatment Law 2004-1486 of 30 December 2004 creating the High Authority to Fight against Discriminations and for Equality | provision of goods and services — |

Table 6: *Cont.*

| | | | |
|------|------------------|--|---|
| 2005 | France Sweden | Law on the Freedom of Press of 29 July 1881, as amended by Law 2004- 1486 amendment of Discrimination Prohibition Act 2003 | incitement of hatred extension to social services, social security, unemployment, benefits and health care |
|------|------------------|--|---|

3.7 OTHER ASPECTS OF THE LEGAL BACKGROUND

Although the Directive does not require any legislation outside the field of employment discrimination, it seems appropriate to include table 7, which briefly indicates the legal situation of homosexuality in each Member State in two of the most relevant other areas of law: criminal law and family law. Developments in these areas are bound to have an impact on the adoption, interpretation and application of anti-discrimination legislation with respect to sexual orientation. Occasionally, the effects of criminal law or family law can also be felt in the field of employment.⁸⁶

⁸⁶ See 4.3.3 and 4.3.7 below.

⁸⁷ Years given are the years in which national legislation came into force. In this table the countries are listed according to the combined progress made in the fields of criminal law and family law.

⁸⁸ See Graupner 1997 and 2000.

⁸⁹ Idem.

⁹⁰ See the report *More or less together* 2005.

⁹¹ Idem, and Curry-Sumner 2005.

⁹² See the report *More or less together* 2005.

⁹³ Idem.

⁹⁴ Unregistered cohabitation (both for same-sex and different-sex couples) was first recognised in Dutch legislation in a Law of 21 June 1979 (amending article 7A:1623h of the Civil Code, with respect to rent law), followed by a Law of 17 December 1980 on inheritance tax due by the surviving partner from a 'joint household'. Since then many more laws have been amended so as to recognise cohabitation for a multitude of purposes, including social security, tax, citizenship, and parental authority.

⁹⁵ Although the formal age limits for heterosexual and homosexual acts were equalised at the time of decriminalisation of homosexual acts in 1822, in practice homosexual acts with minors continued to be penalised until 1988 under a general provision against 'serious scandal and indecency' (see Graupner 1997, 665-666).

⁹⁶ Law on Urban Housing of 24 November 1994.

⁹⁷ Partnership legislation has so far been enacted in most autonomous regions: Catalonia (1998), Aragon (1999), Navarra (2000), Valencia (2001), Balearic Islands (2002), Asturia (2002), Madrid (2002), Andalucia (2002), Canary Islands (2003), Extremadura (2003) and the Basque

Table 7: Decriminalisation of homosexuality and legislative recognition of same-sex partners⁸⁷

| | Decriminalisation of sexual acts between adult men (and adult women) ⁸⁸ | Equalisation of age limits in sex offences law ⁸⁹ | First legislative recognition of not-registered same-sex cohabitation ⁹⁰ | Introduction of a form of registered partnership ⁹¹ | Joint or second-parent adoption by same-sex partner(s) allowed ⁹² | Opening up of civil marriage to same-sex couples ⁹³ |
|----------------|--|--|---|--|--|--|
| Netherlands | 1811 | 1971 | 1979 ⁹⁴ | 1998 | 2001 | 2001 |
| Spain | 1822 ⁹⁵ | 1822 | 1994 ⁹⁶ | 2005 ⁹⁸ | 2005 ⁹⁹ | 2005 ⁹⁹ |
| Belgium | 1792 | 1885 | 1996 | 2000 | 2003 ¹⁰⁰ | 2003 ¹⁰⁰ |
| Sweden | 1944 | 1978 | 1988 | 1995 | 2003 | being considered |
| Denmark | 1930 | 1976 | 1986 ¹⁰¹ | 1989 | 1999 | – |
| Germany | 1968, 1969 ¹⁰² | 1989, 1994 | 2001 | 2001 | 2005 ¹⁰³ | – |
| United Kingdom | 1967, 1980, 1982 ¹⁰⁴ | 2001 | 2000 ¹⁰⁵ | 2005 ¹⁰⁶ | 2005 ¹⁰⁷ | – |
| France | 1791 | 1982 | 1993 | 1999 | – | – |
| Finland | 1971 | 1998 | before 2002 | 2002 | – | – |
| Luxembourg | 1792 | 1992 | – | 2004 ¹⁰⁸ | – | – |
| Hungary | 1961 | 2002 ¹⁰⁹ | 1996 | announced | – | – |
| Slovenia | 1977 | 1977 | – | adopted ¹¹⁰ | – | – |
| Czech Republic | 1961 | 1990 | – | adopted ¹¹⁰ | – | – |
| Austria | 1971 | 2002 ¹¹¹ | 1998 ¹¹² | – | – | – |
| Portugal | 1945 | proposed ¹¹³ | 2001 ¹¹⁴ | – | – | – |
| Ireland | 1993 | – ¹¹⁵ | 1995 ¹¹⁶ | – | – | – |
| Italy | 1889 ¹¹⁷ | 1889 | – | – | – | – |
| Poland | 1932 | 1932 | – | – | – | – |
| Malta | 1973 | 1973 | – | – | – | – |
| Slovakia | 1961 | 1990 | – | – | – | – |
| Latvia | 1992 | 1998/2000 ¹¹⁸ | – | – | – | – |
| Romania | 1996 | 2001 ¹¹⁹ | – | – | – | – |
| Estonia | 1992 | 2002 ¹²⁰ | – | – | – | – |
| Lithuania | 1993 | 2003 ¹²¹ | – | – | – | – |
| Bulgaria | 1968 | 2004 ¹²² | – | – | – | – |
| Greece | 1950 | – ¹²³ | – | – | – | – |
| Cyprus | 1998 | – ¹²⁴ | – | – | – | – |

Country (2003). See Rubio-Marín 2004, para. 15.3.3. Not all of these legislative schemes involve a form of *registered* partnership: some only provide for the recognition of *de facto* cohabitation.

⁹⁸ In Navarra (2000; see Pérez Cánovas 2001, 503), the Basque Country (2003), Aragon (2004) and Catalonia (2005) adoption had already been permitted before the opening up of marriage in July 2005.

⁹⁹ Law 13/2005 of 2 July 2005, see *2 European Anti-Discrimination Law Review* (2005) 73.

¹⁰⁰ The Belgian law opening up marriage to persons of the same sex of 13 February 2003 (*Moniteur Belge*, 28 February 2003, Ed. 3, 9880) entered into force on 1 June 2003.

¹⁰¹ Surviving same-sex partner pays the same inheritance tax as surviving married spouse (Law of 4 June 1986, nr. 339, repealed by Law on Registered Partnership of 7 June 1989, nr. 372).

¹⁰² In the former German Democratic Republic (East Germany), homosexual acts between men were decriminalised in 1968, and the age limits were equalised in 1989. In the Federal Republic of Germany (West Germany before the unification), the dates were 1969 and 1994. See Graupner 1997, 407-410.

¹⁰³ As of January 2005 the number of legal consequences of registered partnership has been increased. See www.lsvd.de.

¹⁰⁴ Decriminalisation of most sexual activities between two men over 21 took place in England and Wales in 1967, in Scotland in 1980 and in Northern Ireland in 1982 (see Graupner 1997, 711, 727 and 739).

¹⁰⁵ In 1997 the government introduced a 'concession outside the *Immigration Rules*' allowing unmarried long-term cohabiting partners who could not marry each other (for example because they are of the same sex), to apply for leave to enter/remain in the United Kingdom; in 2000 this concession was incorporated into the *Immigration Rules* (paragraphs 295A-295O). The first piece of parliamentary legislation recognising same-sex partners was enacted in 2000 by the Scottish Parliament: *Adults with Incapacity (Scotland) Act 2000* (section 87(2)). In 1999 and 2004 some older legislation has been interpreted so as to also cover same-sex cohabitants. See the judgements of the House of Lords of 28 October 1999, *Fitzpatrick v. Sterling Housing Association* [1999] 4 *All England Law Reports* 707, and of 21 June 2004, *Ghaidan v. Godin-Mendoza* [2004] 3 *All England Law Reports* 411.

¹⁰⁶ The *Civil Partnership Act 2004* entered into force on 5 December 2005. See Harper et al. 2005.

¹⁰⁷ The *Adoption and Children Act 2002* allowing for joint and second-parent adoption by same-sex partners came into force on 30 December 2005.

¹⁰⁸ Law of 9 July 2004 ('relating to the legal effects of certain partnerships'), published in *Mémorial A*, nr. 143, 6 August 2004, entry into force on 1 November 2004.

¹⁰⁹ Until the Constitutional Court declared this distinction unconstitutional in 2002, article 199 of the Penal Code set an age limit of 18 for homosexual acts, and of 14 for heterosexual acts; see Sandor 2002.

¹¹⁰ The *Registration of Same-Sex Partnership Act* was adopted in June 2005 (see the report *Opinion on the situation of homosexuals in Slovenia* 2005, 6-8). It will probably come into force in 2006.

¹¹¹ See Graupner 2004, para. 3.1.0.

¹¹² Several partner-related aspects of criminal law, including the right to refuse testimony against your partner in a criminal court (see Graupner 2001, 557-559).

¹¹³ Between 1945 and 1995 the age limits were equal (see Graupner 1997, 597-598). In 2004 a bill was introduced in Parliament to equalise the ages again. And in a judgement of 10 May 2005, the Portuguese Constitutional Court has held that the provision of the Penal Code that sets a higher minimum age for homosexual acts than for heterosexual acts, violates the constitutional equality principle (see *2 European Anti-Discrimination Law Review* (2005) 69-70).

¹¹⁴ See Freitas 2004, para. 14.3.3.

¹¹⁵ The age limit for any sexual act between men is higher (17) than for an oral or non-penetrative sexual act between a man and a woman, vaginal intercourse of a woman with a boy, or any sexual act between women (all: 15). However, the age limit for anal sex between a man and a woman, and for vaginal intercourse of a man with a girl is also set at 17. See Graupner, 1997, 481 and 487.

¹¹⁶ Domestic Violence Act, 1995, and Powers of Attorney Act, 1995 (see Flynn 2001, 596).

¹¹⁷ In several parts of Italy sex between men was decriminalised (and in some parts then re-criminalised) before the general decriminalisation of 1889. See Graupner 1997, 505, and Leroy-Forgeot 1997, 66.

¹¹⁸ The age limits were equalised by the Latvian Criminal Law of 1998. In 2000 the text was further clarified so as to make clear that for all sexual acts the minimum age is the same (16 if the other is over 18); between 1998 and 2000 it had been argued that the minimum age of 16 applied only to vaginal heterosexual acts, and that a minimum age of 14 applied to all other acts. See Lavrikovs, 2001, 4.

¹¹⁹ See Weber 2003, 6, Ionescu 2005, and Cârstocea 2006, 202. Helmut Graupner, in an email to the authors, adds that the equalisation of the age limits was effected in 2001 by the Government (Ordinance 89/2001), which was afterwards approved by Parliament (Act 61/2002).

¹²⁰ Information provided by Helmut Graupner.

¹²¹ The new Penal Code, that was adopted in 2000 and came into force in 2003, abolished the higher age of consent of 18 years for sexual acts between men (for heterosexual and lesbian acts the age limit is 14 years). Information provided by Helmut Graupner.

¹²² Information provided by Helmut Graupner.

¹²³ In the case of 'seduction', the age limit for sex between men is higher (17) than for lesbian or heterosexual sex (15). See Graupner 1997, 466.

¹²⁴ In Cyprus there is a minimum age of 17 for vaginal and anal intercourse, but this minimum does not apply in case a woman has intercourse with a man younger than 17. Information provided by Helmut Graupner.