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

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Chapter 4

Comparative analysis of legislation implementing the Directive in the fifteen old Member States[1]

4.1 Introduction

According to the case law of the Court of Justice of the EC, the provisions of a directive must be implemented with 'the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'.[2] This means that all elements of the Employment Equality Directive must be explicitly implemented, if they are not already explicitly covered in existing law. And although several of the 'old' Member States already had legislation against sexual orientation discrimination in place before 2000, the adoption of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereafter the Directive) has meant that all of them had to adopt (further) legislation.[3] Almost all of them have indeed adopted some implementing legislation.

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[1] This chapter is written by Kees Waaldijk (c.waaldijk@law.leidenuniv.nl), senior lecturer at the E.M. Meijers Institute of Legal Studies of the Universiteit Leiden (www.emmeijers.nl/waaldijk). It is based on the second part of chapter 19 of the report *Combating sexual orientation discrimination in employment: legislation in fifteen EU Member States* 2004, online at www.emmeijers.nl/experts. The author is grateful to the authors of the fifteen national chapters in that report, on the basis of which this chapter has been written to a large extent. The paragraph numbering of this chapter and those chapters is identical. This means that most references to the national chapters have been omitted, as any mention of a particular country in a specific paragraph of this chapter means that the information about that country is based on what is written in the corresponding paragraph of the relevant national chapter of the report. Detailed references to national legislation, case law, etc. can also be found in those online national chapters, which are written by Helmut Graupner (Austria), Olivier De Schutter (Belgium), Søren Baatrup (Denmark), Rainer Hiltunen (Finland), Daniel Borrillo (France), Susanne Baer (Germany), Matthaios Peponas (Greece), Mark Bell (Ireland), Stefano Fabeni (Italy), Anne Weyembergh (Luxembourg), Kees Waaldijk (Netherlands), Miguel Freitas (Portugal), Ruth Rubio-Marín (Spain), Hans Ytterberg (Sweden) and Robert Wintemute (United Kingdom). This chapter also profited from information made available by the European Commission through the ongoing work of its European Network of Legal Experts in the Non-Discrimination Field, especially the Network's country reports in the *Report on measures to combat discrimination* 2004/2005.

[2] See case law cited in 2.2.1 above.

[3] The full text of the Directive is reproduced as an annex in this book.

This chapter provides a critical analysis of the legislation passed in twelve of the fifteen 'old' Member States, and assesses whether the laws now in force fully meet all the requirements of the Directive with respect to sexual orientation. The three countries that are not covered in detail here are Greece, Germany and Luxembourg:

- After a few previous attempts at implementing the Directive had failed, Greece adopted Act 3304/2005 on the Implementation of the principle of equal treatment regardless of racial or ethnic origin, religion or belief, disability, age or sexual orientation.[4] Not much detailed information is available about the content of this law.[5] The law has been criticised for only offering a general framework, and not enough specific rules, while often copying and pasting provisions from the Directive.[6] With respect to harassment the law seems to depart from the requirements of the Directive: it provides that the concept of harassment shall be defined in accordance with 'trade usages'.[7] It is unclear whether the law would make discrimination between same-sex and different-sex unmarried partners unlawful.[8] The law includes exceptions for genuine and determining occupational requirements, for positive action, and for measures necessary for the protection of the rights and freedoms of others; these exceptions are more or less identical to articles 2(5), 4(1) and 7(1) of the Directive.[9] The exception for employers with an ethos based on religion or belief does not seem in conformity with article 4(2).[10] With respect to the ground of sexual orientation, the law only deals with discrimination in employment and occupation.[11] As far as sexual orientation discrimination in employment is concerned, the enforcement of the law is not only entrusted to the courts: for the public sector, the Ombudsperson foreseen in the Constitution is competent to investigate complaints about discrimination; and for the private sector the

[4] This law of 27 January 2005 has been published in Law Gazette A'16.

[5] See 2 *European Anti-Discrimination Law Review* (2005) 60-61 and Gavalas 2004/2005. For a critical discussion of two previous drafts which were similar to the text finally adopted, see Peponas 2004.

[6] See Gavalas 2004/2005, 18.

[7] Idem, 20.

[8] Idem, 33.

[9] Idem, 36, 31 and 26.

[10] The summary of this clause given by Gavalas (2004/2005, 31-32) does not make it clear that this exception for the grounds of religion or belief should not be used to justify discrimination on grounds of sexual orientation.

[11] Idem, 30-31.

Work Inspectorate can impose fines in case of a violation of the law, but can also act as a conciliator between employer and employee.[12]

- In Luxembourg sexual orientation discrimination in employment has been a criminal offence since 1997 (articles 454 to 457 of the Penal Code).[13] In November 2003 the Government has submitted a proposal to Parliament to implement the Directive (Bill 5249, introduced together with Bill 5248 aimed at implementing Directive 2000/43/EC with respect to racial discrimination). By the summer of 2005 the proposal had not been adopted yet. Recently the Government has announced that it will amend and merge the two bills.[14] In an opinion of Luxembourg's Council of State of December 2004 the proposal had been severely criticised on several points, including the failure to cover self-employment and public sector employment.[15]
- In Germany so far the only national laws explicitly referring to sexual orientation discrimination in employment are the Industrial Relations Act (*Betriebsverfassungsgesetz*) and the Personnel Representation Act (*Bundespersonalvertretungsgesetz*).[16] Since 2001 both laws oblige most private and public employers and their workers councils to ensure that no worker is discriminated against on grounds of 'sexual identity'.[17] A proposal for an Anti-Discrimination Act (to implement several EC directives on equal treatment) was published late in 2004 and introduced in Parliament in January 2005.[18] The proposal covers both employment and – also with respect to sexual orientation – the provision of goods and services, with respect to sexual orientation. In other ways, too, the proposal goes beyond that which the Directive requires: the definitions of direct discrimination and harassment are less limited than those in the Directive, the term 'sexual

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[12] There also is an Equal Treatment Committee, but it seems to be only competent with respect to racial discrimination in regard to goods and services in the private sector; see Gavalas 2004/2005, 44-45.

[13] See Weyembergh 2004, para. 12.1.5.

[14] See 2 *European Anti-Discrimination Law Review* (2005) 68. For a critical discussion of the proposal see Weyembergh 2004. On 4 July 2002 another proposal (Bill 4979) was introduced to combat moral harassment; see Weyembergh 2004, para. 12.2.5.

[15] See Weyembergh 2004, para. 12.27 and 12.2.8; Moyse 2004/2005, para. 0.2; and 1 *European Anti-Discrimination Law Review* (2005) 59-60.

[16] Certain forms of sexual orientation discrimination in *public* employment have already been prohibited in some of the German *Länder* (Hamburg, Saxony-Anhalt, Lower Saxony, Saarland, Berlin, Bremen and Brandenburg). See Baer 2004, para. 8.1.5 and 8.1.8; see also www.lsvd.de.

[17] See Baer 2004, para. 8.1.5, and Baer 2004/2005, para. 0.1.

[18] The text of the German proposal can be found online at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lgms_en.htm, where the European Commission gives information about the implementing legislation in all Member States and candidate countries.

identity' is used so as to also cover people who are transsexual or intersex, and a Federal Anti-Discrimination Office (*Antidiskriminierungsstelle des Bundes*) is foreseen that can initiate mediation procedures with regard to all grounds of discrimination.[19] However, the proposal has 'died' as a result of the elections of September 2005. A new proposal will have to be introduced in the new Parliament.[20]

In the following analysis, the national legislation of these three countries is not covered.

The analysis also does not cover regional legislation. Regional measures are required for the implementation of the Directive in some countries: for example in Austria primarily with respect to public employees and agricultural workers,[21] in Belgium with respect to public employment and vocational guidance and vocational training,[22] in Germany with respect to public employment,[23] and in Finland in the province formed by the islands of Åland. Regional measures have also been adopted in some other countries, including Italy.[24] Similarly, the legislation of the United Kingdom, with respect to Gibraltar is also left outside the analysis.

By the summer of 2005, the European Commission had started four infringement procedures based on the Directive.[25] Two of these are against Germany[26] and Luxembourg,[27] because of their failure so far to implement the Directive at all. The other two are against Finland[28] and Austria,[29] because of their failure to implement the Directive in certain regions. By the end of 2005, only the case against Luxembourg had been decided by the Court of Justice. Not surprisingly it found that Luxembourg had indeed failed to fulfil its obligations under the Directive.[30]

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[19] See Baer 2004/2005, para. 0.2, and 2 *European Anti-Discrimination Law Review* (2005) 58-59.

[20] Idem.

[21] See Graupner 2004, para. 3.1.3.

[22] See De Schutter 2004, para. 4.1.3.

[23] See Baer 2004, para. 8.1.3.

[24] In November 2004 the Regional Council of Tuscany adopted Act 63 against discrimination on grounds of sexual orientation and gender identity; see 2 *European Anti-Discrimination Law Review* (2005) 57.

[25] See 2 *European Anti-Discrimination Law Review* (2005) 40-41.

[26] Case C-43/05, *Commission* v. *Germany*, *OJ C* 82, 2.4.2005, p. 14.

[27] Case C-70/05, *Commission* v. *Luxembourg*, *OJ C* 83, 2.4.2005, p. 23 (see below).

[28] Case C-99/05, *Commission* v. *Finland*, *OJ C* 93, 16.4.2005, p. 21 (about the province formed by the islands of Åland).

[29] Case C-133/05, *Commission* v. *Austria*, *OJ C* 143, 11.6.2005, p. 20.

[30] ECJ 20 October 2005, Case C-70/05, *Commission* v. *Luxembourg*. The case against Germany is still pending.

No infringement procedures based on the quality of the implementation have been started so far. Such procedures should nevertheless be expected, because, as will be seen in the remainder of this chapter, many Member States on many points fall short of the substantive requirements of the Directive.

4.2 The prohibition of discrimination required by the Directive

4.2.1 *Instrument(s) used to implement the Directive*

By the end of 2004 the Directive of 27 November 2000 had been more or less fully implemented in twelve of the fifteen 'old' Member States. The most important instruments used are the following, with the countries listed in the chronological order of the entry into force of their main implementing law:[31]

France
- Penal Code (articles 225-1, 225-2 and 432-7), as amended in 1985, 2001 and 2002;
- Labour Code (articles L122-35, L122-45, L122-46, L122-47, L122-49, L122-52 and L122-54), as amended in 1986, 1992, 2001 and 2002;
- Law 83-634 of 13 July 1983 governing the rights and obligations of civil servants (article 6 and 6quinquiès), as amended in 2001 and 2002;[32]
- Law 2004-1486 of 30 December 2004 creating the High Authority to Fight against Discriminations and for Equality.[33]

Belgium
- Federal Law of 25 February 2003 on Combating Discrimination, in force since 27 March 2003;
- as far as the required implementation at regional level is concerned, legislation has been adopted in all three regions and in all three communities of Belgium.[34]

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[31] For a chronological overview, see 3.3 above.

[32] In both Codes, the Directive has been implemented first by law 2001-1066 of 16 November 2001 on combating discrimination, and then by law 2002-73 of 17 January 2002 on moral harassment; law 2001-1066 also introduced a prohibition of sexual orientation discrimination into law 83-634, into which law 2002-73 introduced a prohibition of moral harassment. See Borrillo 2004, para. 7.1.5 and 7.2.1.

[33] See Latraverse 2004/2005, 43-44.

[34] See De Schutter 2004, para. 4.2.1. The regional laws are the following:
Flemish Region and Community: Decree of 8 May 2002 on proportionate participation in the labour market (in force since June 2003);
Region of Brussels-Capital: Ordinance of 26 June 2003 on the mixed management of the labour market (in force since August 2003);

Sweden
- Penal Code (article 9(4) of chapter 16, on unlawful discrimination), as amended in 1987;
- Sexual Orientation Discrimination Act of 1999, as amended per 1 July 2003;
- Discrimination Prohibition Act of 2003, in force since 1 July 2003;
- Equal Treatment of Students at Universities Act of 2001, as amended per 1 July 2003.[35]

Italy
- Legislative Decree 216 of 9 July 2003, in force since 28 August 2003;
- Workers' Statute (article 15), as amended per 28 August 2003 by Legislative Decree of 9 July 2003;
- Legislative Decree 276 of 10 September 2003 (article 10, with respect to job agencies), in force since 24 October 2003.[36]

United Kingdom
- Employment Equality (Sexual Orientation) Regulations 2003, in force since 1 December 2003;
- Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, in force since 2 December 2003;
- Equal Opportunities Ordinance, 2004 (Gibraltar), in force since 11 March 2004.[37]

Portugal
- Labour Law Code (articles 22-24), in force since 1 December 2003;
- Law 35/2004 containing supplementary provisions to the Labour Law Code, in force since 29 August 2004.[38]

Spain
- Penal Code (article 314), as amended in 1995;
- Act 62/2003 on Fiscal, Administrative and Social Measures, in force since 1 January 2004;
- Workers' Statute (articles 4, 16 and 17), as amended per 1 January 2004 by Act 62/2003;

French-speaking Community: Decree of 19 May 2004 on the implementation of the principle of equal treatment (in force since June 2004);
Walloon Region: Decree of 27 May 2004 on equal treatment in employment and professional training (in force since July 2004);
German-speaking Community: Decree of 17 May 2004 on guaranteeing equal treatment in the labour market (in force since August 2004).

[35] See Ytterberg 2004, para. 16.1.5 and 16.2.1.
[36] See Fabeni 2004, para. 11.2.1.
[37] See Wintemute 2004, para. 17.1.5.
[38] See Freitas 2004, para. 14.2.1.

- Act 45/1999 (article 3) on the Relocation of Workers in the Framework of a Trans-national Contractual Work Relation, as amended per 1 January 2004 by Act 62/2003.[39]

Finland
- Penal Code (article 3 of chapter 47), as amended in 1995;
- Employment Contracts Act of 2001 (article 2 of chapter 2), as amended per 1 February 2004;
- Equality Act 21/2004, in force since 1 February 2004;
- Act on Holders of Municipal Office (article 12), as amended per 1 February 2004;
- Act on Civil Servants (article 11), as amended per 1 February 2004;
- Seamen's Act (article 15), as amended per 1 February 2004.[40]

Netherlands
- Penal Code (articles 90quater and 429quater), as amended in 1992;
- General Equal Treatment Act of 1994, as amended per 1 April 2004 by the Implementation Act of 21 February 2004.[41]

Denmark
- Act against Discrimination in the Labour Market of 1996, as amended per 8 April 2004 by Act 253 of 7 April 2004,[42] and published as Act 31 of 2005.[43]

Austria
- Equal Treatment Act (covering private employment), in force since 1 July 2004;
- Federal Equal Treatment Act (covering public employment), in force since 1 July 2004;
- Federal Act on the Equal Treatment Commission and the Office of the Ombudspersons for Equal Treatment, in force (under this name) since 1 July 2004;
- as far as the required implementation at regional level is concerned, legislation has so far been adopted in seven of the nine states of Austria.[44]

Ireland
- Unfair Dismissal Act 1977 (article 6(2)(e)), as amended in 1993;

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[39] See Rubio-Marín 2004, para. 15.1.5 and 15.2.1.
[40] See Hiltunen 2004, para. 6.1.5 and 6.2.1.
[41] See Waaldijk 2004, para. 13.2.1.
[42] See Baatrup 2004, para. 5.2.1.
[43] See Hansen 2004/2005, para. 2.1.
[44] See Graupner 2004, para. 3.0 and 3.2.1, and Schindlauer 2004/2005. The seven states that have enacted legislation are: Tyrol (April 2004), Vienna (September 2004), Lower Austria (September 2004 and April 2005), Styria (November 2004), Carinthia (January 2005), and Upper Austria and Vorarlberg (both June 2005). Legislation still needs to be adopted in Burgenland and Salzburg. See 2 *European Anti-Discrimination Law Review* (2005) 46.

- Employment Equality Act 1998, in force since 1999, as amended per 18 July 2004 by the Equality Act 2004;
- Pensions Act 1990 and 2004, as amended per 5 April 2004 by the Social Welfare (Miscellaneous Provisions) Act 2004.[45]

4.2.2 *Concept of sexual orientation (article 1)*

The twelve Member States, which are being compared here, all use explicit words in their employment anti-discrimination legislation to refer to sexual orientation. Most of them use more or less direct equivalents of the English words 'sexual orientation', but in some countries possessive pronouns are added in all or some legislation:

Italy	*orientamento sessuale*[46]
Portugal	*orientação sexual*
Spain	*orientación sexual* (Implementation Law of 2003)
	su orientación sexual (Penal Code)
United Kingdom	sexual orientation
Ireland	sexual orientation
Denmark	*seksuel orientering*
France	*son/leur orientation sexuelle*

In the other countries slightly different words are used in all or some legislation:

Austria	*sexuelle Orienterung* (federal laws)
	sexuelle Ausrichting (regional laws and proposals)[47]
Finland	*sukupuolinen suuntautuminen* (Penal Code and Act on Holders of Municipal Office)
	sukupuolinen suuntautuneisuus (Employment Contracts Act)[48]
	comparable reason (Act on Civil Servants and Seamen's Act)[49]
Netherlands	*hetero- of homoseksuele gerichtheid* (heterosexual or homosexual orientation) (General Equal Treatment Act)[50]
	hun hetero- of homoseksuele gerichtheid (their heterosexual or homosexual orientation) (Penal Code)

[45] See Bell 2004, para. 10.1.5 and 10.2.1.

[46] The Italian version of the Directive and of article 13 EC uses the inappropriate term *tendenze sessuali* (sexual tendencies; see Fabeni 2004, para. 11.2.2).

[47] The word 'Ausrichting' is also used in the German version of the Directive.

[48] See Hiltunen 2004, para. 6.2.2, for a discussion of the slight difference between the two terms. The Finnish version of the Directive and of article 13 EC uses the first term.

[49] See Hiltunen 2004, para. 6.1.5, 6.1.2 and 6.2.2.

[50] The Dutch version of the Directive and of article 13 EC uses the inappropriate term *seksuele geaardheid* (sexual inclination). The term *gerichtheid* seems a better translation of 'orientation' (see Waaldijk 2004, para. 13.2.2).

Belgium	*orientation sexuelle / seksuele geaardheid*[51] */ sexuelle Ausrichting*
Sweden	*sexuell läggning* (sexual disposition)

Some of these words chosen by the Member States to cover sexual orientation are problematic; some are even incompatible with the Directive.

In the first place, the absence in *Finland* in two of the five implementing laws of an explicit reference to sexual orientation is not compatible with the Directive and the requirements of 'specificity, precision and clarity'.[52] Perhaps the same criticism can be made of the federal legislation in *Belgium*, because on 6 October 2004 the (closed) list of grounds (including sexual orientation) in the Law of 25 February 2003 has been declared unconstitutional by the Court of Arbitration. The Court found that it was not reasonably justified to exclude the applicability of the civil provisions of the law to discrimination on grounds of language or political opinion (which were absent from the list). It remains to be seen how the legislative will respond to this judgement.[53]

Secondly, in *Sweden* the word *läggning* (like the unfortunate word *geaardheid* which is used in the Dutch version of the implementing legislation in Belgium, in the Dutch versions of the Directive and article 13 EC, and the similarly unfortunate word *tendenze* in the Italian versions of the Directive and article 13 EC) might give the impression that the behavioural aspects of sexual orientation are not covered, but that is not the case, as will be discussed below.[54]

Thirdly, the use of the possessive pronoun in front of 'sexual orientation' in the implementing legislation in *France* (and in the Penal Codes of Netherlands and Spain) does not seem to be in conformity with the Directive because its definition of direct discrimination is not limited to less favourable treatment on the ground of the *victim's own* sexual orientation. The possessive pronoun seems to exclude protection in cases where the discrimination is based on the sexual orientation of others,[55] or on a mistaken assumption about the victim's sexual orientation,[56] or on the concern of a group or event or piece of information connected with sexual orientation.[57]

Fourthly, the apparent restriction in the *Netherlands* of the protected grounds to heterosexual and homosexual orientations seems to exclude bisexual orientation. The Dutch Government, in the *travaux préparatoires*, has argued that bi-

[51] Idem.
[52] See 4.1 above.
[53] See De Schutter 2004/2005, para. 0.2 and 0.3.
[54] See 4.3.1 and 4.3.3 below.
[55] See 4.3.4 and 4.3.5 below.
[56] See 4.3.1 below.
[57] See 4.3.4 and 4.3.5 below.

sexuality is covered, because it consists of homosexual and heterosexual feelings, expressions and relationships.[58] It could be argued, however, that the implied Dutch prohibition of discrimination on grounds of bisexuality lacks the 'specificity, precision and clarity' required in the implementation of the Directive.[59]

In all other countries it seems clear that the words used in the legislation do (at least) cover homosexual orientation, bisexual orientation and heterosexual orientation. Only in Ireland, Sweden and the United Kingdom does this follow from a definition of the notion of sexual orientation in the implementing legislation, which limits it to these three orientations. A similar definition can also be found in the *travaux préparatoires* in Austria and Netherlands, and is considered the probable interpretation by experts from Belgium, Finland, France, Italy and Portugal.[60]

It is uncontested that in the Directive the words 'sexual orientation', although not explicitly defined in the Directive, nor fully or convincingly so in any of the public *travaux préparatoires*,[61] do indeed mean homosexual, bisexual or heterosexual orientation. This also follows from the following analysis of the words 'sexual orientation'.

Like the word 'sex', the word 'sexual' in general has at least two distinct meanings: on the one hand it refers to sex-as-gender (the sex you are), while on the other it refers to sex-as-eroticism (the sex you do). In the expression 'sexual orientation' – and indeed in the words 'homosexual', 'heterosexual' and 'bisexual' – it generally refers to both meanings simultaneously: it can be used to refer to (feelings, behaviour or relationships of) persons who (prefer to) have sex and other forms of intimacy with someone who is of the same sex, of the opposite sex, or of either sex. It seems probable that the Council, when adopting the Directive, was using the concept of 'sexual orientation' in the same way. If that interpretation is correct, as I believe it is, the Directive would only require the prohibition of discrimination that is based on homosexual, heterosexual or bisexual orientations. Such an interpretation would also be in conformity with the understanding of the notion of sexual orientation in most of the countries that have legislated on it.

However, sometimes the concept of 'sexual orientation' is given a wider meaning. For example, some people would also use these words to indicate other phenomena (than homosexuality, bisexuality and heterosexuality) that are related to

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[58] See Waaldijk 2004, para. 13.2.2.

[59] See 4.1 above.

[60] See De Schutter 2004, para. 4.2.2; Hiltunen 2004, para. 6.2.2; Borillo 2004, para. 7.2.2; Fabeni 2004, para. 11.2.2; and Freitas 2004, para. 14.2.2.

[61] See 2.2.2 above.

sex-as-gender, for example transsexuality or transvestism. While other people would also use the term 'sexual orientation' to indicate phenomena that do not relate to sex-as-gender but that do relate to sex-as-eroticism, for example paedophilia or sadomasochism.

It is very doubtful that the words 'sexual orientation' as used in the Directive should also be interpreted that broadly.

Obviously, Member States are free to give a wide interpretation to the concept of sexual orientation, or to accompany it with other concepts, so as to prohibit more forms of discrimination than actually required by the Directive. In *Denmark*, for example, the doctrine also considers other kinds of orientations to be covered by the concept of sexual orientation, including transvestism.[62] Furthermore, in some countries discrimination on certain related grounds is forbidden. For example, in *France* discrimination is also prohibited on the ground of *'moeurs'* (which can be translated as 'morals, manners, customs, ways').[63] This would cover discrimination based on other lawful sexual practices (such as sex between partners who are not married, partner-swapping, or most forms of sadomasochism).[64] Additionally, discrimination on grounds of civil status (including non-marital status) is prohibited in Belgium, Netherlands and Portugal.

In *P* v. *S and Cornwall County Council* the Court of Justice has chosen to classify discrimination on grounds of transsexuality and gender reassignment as a form of sex discrimination.[65] Therefore it would not be appropriate or necessary to include transsexuality in the concept of sexual orientation. Presumably, the Court of Justice would also classify as sex discrimination other forms of discrimination that are based on identities, preferences and practices that are primarily linked to sex-as-gender and not to sex-as-eroticism: intersexuality, transvestism and other forms of transgenderism. It is submitted here that the law would be more consistent if these potential grounds for discrimination were treated in the same way as transsexuality and gender reassignment.

That leaves forms of discrimination that are based on identities, preferences and practices that are primarily linked to sex-as-eroticism. It is difficult to imagine, and certainly unreasonable to expect, that the Court of Justice would extend the protection of the prohibition of sexual orientation discrimination in employment to cover (preferences for) unlawful sexual practices such as paedophilia.

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[62] See Baatrup 2004, para. 5.2.2.

[63] Between 1985 and 2001 in France the word *'moeurs'* was also used to cover sexual orientation, because the latter term was only inserted into the various anti-discrimination provisions in 2001.

[64] See Borrillo 2004, para. 7.2.0.

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

With respect to (preferences for) certain lawful sexual activities (non-criminal sadomasochism, for example) such an extension would be less unlikely, and not undesirable. However, for the moment it is difficult to claim that each Member State is required by the Directive to explicitly offer protection against discrimination based on other lawful sexual identities, preferences and practices than homosexuality, heterosexuality and bisexuality.

Any developments in the Member States with respect to other 'orientations' will have to be awaited.[66] There is some evidence that protection will be given under other headings, such as the prohibition of discrimination based on *moeurs* in *France*,[67] and general provisions on respect for the private life of employees and job applicants.

In *conclusion*, it could be said that the choice of words for 'sexual orientation' in France and the Netherlands, in two of the five laws in Finland, and perhaps in the federal law in Belgium as it stands after the intervention of the Court of Arbitration, means that the Directive is not being implemented correctly. In the other countries the chosen words clearly cover discriminations based on homosexual, heterosexual or bisexual orientation (whether or not that is the orientation of the victim of the discrimination), which is what the Directive requires. Some countries also cover other 'orientations', which is not required by the Directive.

The question to what degree (same-sex and different-sex) relationships and other forms of intimate behaviour are covered by the concept of sexual orientation, will be discussed further in paragraphs 4.3.1 to 4.3.3.

4.2.3 *Direct discrimination (article 2(2)(a))*

In all twelve countries being considered here, a distinction is made, as required by the Directive, between direct and indirect sexual orientation discrimination. However, not all countries use each of the three elements of the Directive's definition of direct sexual orientation discrimination:

- *one person is treated less favourably than another is or has been treated or would be treated*

In Spain the words 'would be' are absent, and in Portugal they are replaced with 'will be'. Both variations seem incompatible with the Directive.

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[66] There does not seem to be a consensus as to whether sadomasochism (etc.) could properly be called an 'orientation'.

[67] See Borrillo 2004, para. 7.2.0.

In Belgium the whole phrase is replaced with 'difference of treatment',[68] and in France and the Netherlands with 'distinction between persons', which seems acceptable. However, whether or not the distinction or difference may also be taken to include the hypothetical treatment of a (hypothetical) other person (indicated in the Directive with the words 'or would be treated') is less clear in these four countries. It is important that the phrases used here will get an interpretation in conformity with the Directive.

- *in a comparable situation*

This phrase is absent in Belgium, France and the Netherlands (which on occasion may make it less difficult to prove discrimination). The United Kingdom uses a similar phrase: 'the relevant circumstances in the one case are the same, or not materially different, in the other.' Both variations seem acceptable.

- *on grounds of sexual orientation*

In France a possessive pronoun is used in front of sexual orientation; this limitation to discrimination based on the victim's own sexual orientation, is not compatible with the Directive.[69]

In Sweden another phrase is used: 'linked to' sexual orientation. This variation on the Directive's definition is acceptable, and even welcome: sometimes it will be easier to prove that a treatment is *linked to* than that it was *based on* a particular ground.

For the operation of the law in practice, probably the most difficult element in most definitions of direct discrimination is the element *'on grounds of'*. It suggests that sexual orientation must have been a *reason* for the discriminator to treat the victim in a particular way, or a *criterion* in a discriminatory rule. The Directive does not allow the requirement that the victim prove that there was an intention to disadvantage. Proving that an actual or assumed sexual orientation of the victim, or of anyone else, was a reason will often be very difficult (unless that reason is stated in a written or recorded explanation to the decision, or is part of a written rule). Precisely for dealing with this difficulty, a shift in the burden of proof will often be very useful for the victim.[70] It is also important to note that the Directive's definition does not require that sexual orientation was *the only* reason, but only that sexual orientation played a role as *one of* the reasons

[68] The Belgian definition of direct discrimination also incorporates the exception for genuine occupational requirements (see 4.4.4 below, and De Schutter 2004, para. 4.2.3).

[69] See 4.2.2 above.

[70] See 4.5.8 below.

for the treatment. This has been recognised in the opinions of the Dutch Equal Treatment Commission,[71] and is made explicit in the Swedish use of the words *'linked to'* (see above).

The *conclusion* must be that the definitions of direct discrimination in the implementing legislation in Portugal and Spain fall short of the minimum requirements of the Directive.

4.2.4 *Indirect discrimination (article 2(2)(b))*

An explicit prohibition of indirect discrimination can be found in all countries that have enacted legislation on sexual orientation discrimination in employment. Only in *France* is there no legislative definition of the concept of indirect discrimination, which is not in conformity with the Directive.

The Directive's definition of indirect sexual orientation discrimination consists of several elements, not all of which are being used in all nine national definitions. Apart from the justification clause (article 2(2)(b)(i), see below), the Directive's definition consists of three cumulative elements:

- *an apparently neutral provision, criterion or practice*

This element is absent in the Netherlands (see below). It is worded differently in the United Kingdom ('a provision, criterion or practice which […] would apply equally to persons not of the same sexual orientation'), in Ireland (no mention of 'criterion or practice') and in Spain (limited to apparently neutral provisions, clauses, agreements and decisions). It is important that these alternative phrases will get an interpretation in conformity with the Directive.

- *would put persons having a particular sexual orientation at a particular disadvantage*

This element is absent in Netherlands and the United Kingdom (see below).

- *compared with other persons*

This element is absent in Belgium and the Netherlands. In Ireland it is specified that the comparison must be with 'other employees'.

At present, the following alternative and additional elements can be found in the national definitions of indirect sexual orientation discrimination:

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[71] See Waaldijk 2004, para. 13.2.3.

- *any distinction on grounds of other characteristics or behaviours than those referred to in [the prohibition of direct discrimination], that results in a distinction between persons on grounds of sexual orientation* (the Netherlands)

This is a more restrictive formulation than the one in the Directive. The Dutch definition excludes provisions and practices that do not make any distinction on any ground.[72] It seems fair to say that this is not permitted under the Directive.

- *the provision would put persons of the same sexual orientation [as the affected person] at a particular disadvantage and puts [the affected person] at that disadvantage* (the United Kingdom)

This narrowing down to persons of the same sexual orientation as the complainant, rules out complaints by persons who are unwilling or unable to disclose their homosexual orientation, or who are heterosexual.[73] This is not compatible with the Directive. It should also be noted that where the English version of the Directive uses 'would' in the definition of indirect discrimination, the German and French versions use words equivalent to 'can'.[74] This can be seen as an extra reason not to make this requirement too narrow.

The Directive's justification clause for indirect discrimination also consists of three cumulative elements, each of which can be found in all definitions except those in *Belgium* and the *United Kingdom*:

- *the provision, criterion or practice is objectively justified by a legitimate aim;*
- *the means of achieving that aim are appropriate;*
- *the means of achieving that aim are necessary*.

In two countries the wording of the justification clause is simpler, and thereby too wide:

- *the provision […] rests on an objective and reasonable justification* (Belgium)

This omits the Directive's tests of a *legitimate aim* and *necessary means*, and replaces the Directive's test of *appropriateness* with an even vaguer test of *reasonableness*. Given the complex and controversial character of indirect discrimination, the Belgian wording cannot be said to have 'the specificity, precision and clarity' needed for a correct implementation of the Directive.

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[72] See Waaldijk 2004, para. 13.2.4.
[73] See Wintemute 2004, para. 17.2.4.
[74] In German *'können'* and in French *'susceptible d'entraîner'*.

- *the provision […] can be shown to be a proportionate means of achieving a legitimate aim* (the United Kingdom)

Here the tests of *objective justification* and of *necessary means* seem to be omitted, although the British Government in its *travaux préparatoires* has argued that the latter is being implied by the word 'proportionate'.[75] It is unclear by what word the former is being implied. Therefore, and because of the difference between the concepts of proportionality and necessity in anti-discrimination law,[76] it seems fair to say that the British wording also falls short of the requirements of the Directive.

The *conclusion* must be that in France the Directive is not properly implemented because of the absence of a definition of indirect sexual orientation discrimination, and in Belgium, Netherlands and the United Kingdom because of the imperfect formulation of such a definition in the implementing legislation.[77]

4.2.5 *Prohibition and concept of harassment (article 2(3))*

Unlike some national legislation, the Directive does not distinguish between sexual and other forms of harassment. The Directive is concerned with what could be called *discriminatory harassment*, whether sexual in nature or not.

In some countries pre-existing prohibitions of 'sexual harassment' also (implicitly) cover sexual harassment related to sexual orientation (Belgium, France, Netherlands and Sweden, and possibly also in Austria,[78] Denmark, Italy[79] and Spain[80]). In a few countries there also is a prohibition of harassment in general (Belgium and Finland), or of so-called 'moral harassment' (Belgium, France and Italy).

Article 2(3) requires that harassment related to sexual orientation 'shall be deemed to be a form of [sexual orientation] discrimination'. This is already so in legislation in almost all twelve Member States,[81] but not in *France* and the *United Kingdom*.

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[75] See Wintemute 2004, para. 17.4.1.

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

[77] See also 4.3.3 below.

[78] See Graupner 2004, para. 3.1.7.

[79] See Fabeni 2004, para. 11.2.5.

[80] See Rubio-Marín 2004, para. 15.2.5.

[81] Namely: Austria, Belgium, Denmark, Finland, Ireland, Italy, Netherlands, Portugal, Spain and Sweden.

While leaving some scope for defining harassment 'in accordance with the national laws and practice of the Member States', the Directive defines harassment using the following five elements, which have been incorporated in the implementing legislation of most countries,[82] and some of which can be found in other existing legislation in France; all this with a few variations:

- *unwanted conduct*

In France the conduct needs to consist of *'agissements répétés'* (repeated practices), which means that a single act of unwanted conduct cannot qualify as prohibited harassment.[83] The definitions in Finland, Netherlands, Sweden and Gibraltar leave out the limitation and clarification implied by the word 'unwanted', which nonetheless seems acceptable in light of the Directive.

- *related to any of the grounds referred to in article 1 of the Directive*

Instead of 'related to', the United Kingdom legislation uses the somewhat stricter phrase 'on grounds of'. A relationship to a particular ground is so far not required in France.

- *with the purpose or effect*

The definitions in Austria and Sweden are a little more restrictive, by always requiring effect. In these countries 'purpose' without 'effect' is not enough.

- *of violating the dignity of a person*

In France the purpose or effect must either be affecting the rights and dignity of the victim, or his or her physical or mental health, or his or her professional future.[84]

- *and of creating an intimidating, hostile, degrading, humiliating or offensive environment*

This is not required in France, Sweden, Portugal and the United Kingdom. In the latter two the requirement of creating an intimidating etc. environment merely serves as an alternative to the requirement of violating the dignity of a person ('or' instead of 'and').

In *conclusion* it can be said that France and the United Kingdom are falling short of the Directive's requirement to prohibit harassment related to sexual orientation *as a form of discrimination*. Furthermore, four Member States have adopted

[82] Idem, plus the United Kingdom.
[83] See Borrillo 2004, para. 7.2.5.
[84] Idem.

a definition of harassment that in some respects is slightly more limited than that of the Directive (Austria, France, Sweden and the United Kingdom),[85] but it remains to be seen whether the Court of Justice of the EC would find these to be acceptable under the second sentence of article 2(3) of the Directive: 'in accordance with national laws and practice'.

4.2.6 *Instruction to discriminate (article 2(4))*

An explicit, general prohibition of the instruction to discriminate on grounds of sexual orientation in the field of employment has been enacted in most of the Member States.[86]

In *Portugal* there is a more limited prohibition, restricted to instructions 'with the purpose of disadvantaging' someone on grounds of sexual orientation; it seems that this phrase would not cover instructing someone to do something that amounts to indirect discrimination. In *Sweden* there are several specific prohibitions like that, but because they are limited to certain situations, instructors and instructees, several forms of instructions are not covered by the prohibition.[87] A prohibition on instructions to discriminate is absent in the implementing legislation of *France* and the *United Kingdom*.

The *conclusion* must be that the legislation of France, Portugal, Sweden and the United Kingdom is not in conformity with article 2(4) of the Directive.

4.2.7 *Material scope of the applicability of the prohibition (article 3)*

According to the opening words of article 3(1) of the Directive, the prohibition(s) of sexual orientation discrimination must cover not only all private sectors, but also all public sectors.[88]

It follows from the opening words of article 3(1), and from the full title of the Directive which refers to 'employment and occupation', that sectors of self-employment also need to be covered. This is made explicit in parts (a) and (d) of article 3(1), but the very general wording of parts (b) and (c) also appear to include self-employment (for example article 3(1)(c) talks about 'employment and working conditions', see below).

Self-employment is explicitly mentioned (though not always fully covered, see below) in most of the Member States.[89] It is also mentioned in the *Nether-*

[85] This is also the case in Greece, see 4.1 above.

[86] Namely: Austria, Belgium, Denmark, Finland, Ireland, Italy, Netherlands and Spain.

[87] See Ytterberg 2004, para. 16.2.6.

[88] The Directive specifies that this must include 'public bodies'.

[89] Namely: Austria, Belgium, Denmark, Finland, Ireland, Italy, Spain, and Sweden. In Sweden this has been the case since the entry into force of the 2003 Discrimination Prohibition Act; see Ytterberg 2004, para. 16.2.7.

lands (using the somewhat restrictive term 'liberal professions'),[90] and in the *United Kingdom* (only specific provisions with respect to the legal professions, to partners and prospective partners in firms, and to persons applying for or holding qualifications for a particular profession or trade).[91] In *France* self-employment appears to be partly covered by the general prohibition of discriminatory hindrance of any economic activity. Self-employment is not covered in *Portugal*.

From the text of the Directive, it does not become very clear what forms of *'occupation'* other than self-employment can be distinguished. It seems reasonable to assume that at least the following forms of occupation should also be covered by the prohibition of sexual orientation discrimination:

- compulsory military or alternative service (excluded, for example, in Finland, Sweden and Austria);
- contract workers (persons employed by a job agency or by any other employer than the organisation where and for whom they are actually working); they are explicitly covered in the United Kingdom,[92] but not fully in Sweden for example;
- job agencies (only explicitly covered in Austria, Italy, Netherlands, Spain, Sweden and the United Kingdom).

The words used in the English (*occupation*) and French (*travail*) versions of article 3(1)(a) suggest that access to (employment-like) voluntary work should also be covered, but the word used in the German (*Erwerbstätigkeit*) version suggests otherwise. The very general words used in the title of the Directive, and in the opening of article 3(1) and in articles 3(1)(b) and 3(1)(c) seem to imply that at least the employment and working conditions in voluntary work, and the possibilities for training and retraining in that sector, should be covered. If that interpretation is right, the legislation of several countries (including *France* and *Sweden*) where voluntary work is not covered, would fall short of the requirements of the Directive.

Article 3(1) also contains a long list of aspects of employment and occupation that need to be covered by the prohibition of sexual orientation discrimination (see the five bullets below). Several countries explicitly cover many aspects of this list. However, in some countries certain aspects are not, or not fully, or not explicitly mentioned. In the twelve countries the situation is problematic with respect to the following aspects:

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[90] See Waaldijk 2004, para. 13.2.7.
[91] See Wintemute 2004, para. 17.2.7.
[92] Idem.

- *conditions for access to employment, self-employment and occupation, including promotion* (article 3(1)(a))[93]

Access to employment is covered in all countries. The important aspect of promotion is also explicitly covered in all of them, as is required for a 'specific, precise and clear' implementation of the Directive.

Access to self-employment is not covered in Portugal. In the United Kingdom only access to self-employment in certain professions is covered (see above), and in the Netherlands only access to a 'liberal profession'. Such limited interpretations of the Directive's term 'self-employment' may derive from the mistaken assumption that most other people who are (hoping to become) self-employed (such as freelance service-providers, journalists, artists, etc.) are not in a position where they can be discriminated against in relation to conditions for access to that self-employment. At least in the United Kingdom more general terms would be required to cover self-employment.

- *access to all types and to all levels of vocational guidance* (article 3(1)(b))

Vocational guidance does not seem to be covered in France or Spain. The legislation in Austria only covers vocational guidance with respect to private employment.

- *access to all types and to all levels of vocational training* (article 3(1)(b))[94]

The federal legislation in Austria only covers vocational training with respect to private employment. In Spain only professional training for workers is covered, but it is not clear if this would also cover people hoping to be employed. In the United Kingdom vocational training provided by 'a school' is excluded (although training provided by a university or by an institution of further or higher education is covered); whether this is acceptable (possibly because of the opening words of article 3(1) of the Directive: 'within the limits of the areas of competence conferred on the Community'),[95] remains to be seen.

- *employment and working conditions including dismissal and pay* (article 3(1)(c))

Most countries mention both *employment conditions* and *working conditions*. In France and Sweden however, working conditions are not mentioned separately

[93] The Directive specifies that this must include 'selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy'.

[94] The Directive specifies that this must include 'practical work experience, advanced vocational training and retraining'.

[95] See Wintemute 2004, para. 17.2.7.

from pay and employment conditions. This seems to be incompatible with the Directive, because the terms used do not seem to clearly cover both the *formal conditions of employment* (such as pay),[96] and the *actual working conditions* (in the sense of working environment, which would include a work place without harassment). At the very least the Directive requires that the terms used are to be interpreted in such as way as to also cover actual conditions at the work place. In the United Kingdom this is accomplished by referring not only to discrimination with respect to 'terms of employment', but also to 'any other benefit' and to 'any other detriment'.[97]

Whether occupational pension schemes, which are part of pay,[98] are covered in Spain is unclear. The Directive also considers *dismissal* to be a condition of employment. This may seem a curious choice of words. Therefore, it seems reasonable to assume that for a 'specific, precise and clear' implementation, *dismissal* must be mentioned explicitly. This is not the case in Finland and Spain, although it is most probably implied.

Furthermore, it should be noted that the legislation in most of the Member States[99] does not (seem to) cover the working conditions of the self-employed, as required by the Directive (see above). Whether these are covered is neither specified nor excluded in Belgium, Denmark, Finland and the Netherlands.

- *membership of, and involvement in, an organisation of workers, employers or professionals* (article 3(1)(d))[100]

In the United Kingdom 'involvement' is not explicitly mentioned, although discrimination in relation to involvement may be covered by the prohibition for such organisations of 'any other detriment'.[101] It can be doubted as to whether this is explicit enough.

The *conclusion* must be that the material scope of pre-existing or implementing legislation appears to be too limited in almost all of the twelve countries:

- Some forms of occupation other than employment and self-employment are not covered in Austria, Finland and Sweden (and possibly in other countries).

[96] See Littler 2004.
[97] See Wintemute 2004, para. 17.2.7.
[98] See 2.2.7 above.
[99] Namely: Austria, France, Italy, Portugal, Spain, Sweden and the United Kingdom.
[100] The Directive specifies that this must include 'the benefits provided for by such organisations'.
[101] See Wintemute 2004, para. 17.2.7.

- Access to employment is covered in all countries, but access to self-employment is not or not fully covered in Portugal and the United Kingdom (also possibly in the Netherlands).
- Vocational guidance is not or not fully covered in Austria, France and Spain.
- Vocational training is not or not fully covered in Austria (and possibly in Spain and the United Kingdom).
- Dismissal is not explicitly covered in Finland and Spain.
- Occupational pension schemes may not be covered in Spain.
- Actual working conditions of employees are not covered in France and Sweden.
- Actual working conditions of those in self-employment are not covered in most of the Member States.[102]
- Membership in organisations of workers, employers or professionals is covered in all countries, but involvement in such organisations may not be covered in the United Kingdom.

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

According to its article 3(1), the Directive applies 'to all persons, as regards both the public and private sectors, including public bodies, in relation to' various aspects of employment, self-employment and occupation. Obviously, the reference to all persons includes both natural and legal persons.[103] This means that the Directive at the very least applies to all employers (who can be either natural or legal persons).[104]

The Directive does not specify what other persons apart from employers are covered by the words 'all persons'. It seems fair to take these words literally, and assume that indeed all natural and legal persons (including job agencies, vocational trainers, bosses, managers and other employees, students and other clients, freelancers, trade organisations, etc.) are covered,[105] as long as they do things 'in relation to' any of the aspects of the material scope listed in article 3(1). For

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[102] Namely: Austria, France, Italy, Portugal, Spain, Sweden and the United Kingdom, and possibly in other countries also.

[103] See 2.2.8 above.

[104] Some employers may be excluded because of the words 'within the limits of the areas of competence conferred on the Community' at the beginning of article 3(1). This may mean, for example, that employment at some or all international organisations falls outside the field of application of the Directive. See Waaldijk 2004, para. 13.4.7, for an example of this.

[105] See 2.2.8 above.

example, the actual working conditions of many people are dependent on the (non-discriminatory) behaviour of co-workers, clients and others. Of course their employer will have an important responsibility for their working conditions in general, and for preventing harassment in particular, but there is nothing in the Directive that suggests that harassment and other discriminatory behaviour of co-workers, clients and others should not be prohibited.

It is less obvious, however, whether the Member States in their implementing legislation will have to explicitly cover all these categories of persons not explicitly listed in the Directive. Such legal clarity would certainly be helpful to those affected by the prohibition of discrimination, and those responsible for enforcing it. But it would be unreasonable to expect national legislation to be that much clearer than the Directive. On the other hand, if a Member State chooses to limit its implementation to certain categories of persons, or to exclude certain categories from its anti-discrimination legislation, that cannot be considered proper implementation of the Directive. It is with this in mind that the following brief assessment is made of national legislation (with the exception of penal laws, because the various traditions in the Member States set limits to the applicability of penal legislation).

No restrictions of the personal scope of applicability were reported from Austria, Belgium, France, Italy and Spain. Of these, only the legislation in Austria explicitly prohibits harassment by a co-worker or by another third party. This good practice deserves to be followed in other Member States.

In the Netherlands the anti-discrimination provisions do not restrict the personal scope of the legislation, although the Government in the *travaux préparatoires* has suggested that the General Equal Treatment Act does not apply between workers. The legislation in Finland and Portugal probably applies to both employers and employees, though probably not to clients. In the United Kingdom employees and other third parties may be bound by the implementing legislation, but only if their actions amount to aiding an employer to discriminate. The legislation in Denmark and Ireland appears to apply only to employers (and their representatives). With a few exceptions, the same is true for the legislation in Sweden.

The *conclusion* must be that probably at least Denmark, Ireland, Sweden and the United Kingdom, and possibly some other Member States, fall short of the minimum requirements of the Directive with respect to personal scope. Further clarification of both the European and the national rules on this point is needed.

4.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

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

The concept of sexual orientation used by the Directive, and the various words used in the Member States to express this concept, have been discussed above.[106] There it was already noted that the concept of sexual orientation is not limited to *preference* for sex/eroticism and other forms of intimacy with persons of the same sex/gender, or of the opposite sex/gender, or of either sex/gender. It extends to sexual/erotic and other intimate *behaviour* with someone of the same sex/gender or opposite sex/gender. This means that according to the Directive the national legislation must cover not only discrimination between individuals with homosexual or bisexual preferences and individuals with heterosexual preferences, but also discrimination between people who engage in homosexual behaviour and people who engage in heterosexual behaviour.

This interpretation of the Directive is strongly confirmed by the case law of the European Court of Human Rights, which not only has condemned discrimination against homosexual preference,[107] but also discrimination against homosexual conduct,[108] and against same-sex relationships.[109] The Court of Justice of the EC has also classified discrimination against same-sex relationships as a form of sexual orientation discrimination.[110] Without such an interpretation the prohibition of sexual orientation discrimination would almost be meaningless, because it would not provide lesbian, gay and bisexual (LGB) persons with the same freedom as heterosexuals to live according to their sexual preferences.

From each of the twelve countries it has been reported that it is to be expected that the national courts will indeed consider discrimination between homosexual and heterosexual behaviour as covered by the prohibition of sexual orientation

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[106] See 4.2.2 above.

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

[108] 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.

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

[110] ECJ 17 February 1998, Case C-249/96, *Grant* v. *South West Trains Ltd.* [1998] *ECR* I-621, para. 47.

discrimination.[111] In Sweden and the Netherlands this is even made explicit in the *travaux préparatoires*. In Finland, Spain and Sweden there are court decisions recognising that sexual orientation discrimination takes place, when a restaurant or disco, while allowing different-sex kissing, does not allow same-sex kissing on its premises.[112] In Ireland the same principle has been applied to same-sex kissing at work.[113] It follows from the Directive that employees in all Member States should not be discriminated against because of the homosexual nature of any affection they are showing at work or outside work. This should apply to all sectors of employment.[114]

The Directive's definition of direct sexual orientation discrimination is not limited to discrimination because of the actual sexual orientation of the victim. On the contrary, for some treatment to qualify as direct sexual orientation discrimination, it is sufficient that the treatment is based on 'grounds of sexual orientation'. This means that discrimination based on a mistaken assumption about the victim's sexual orientation must be covered by the national prohibition of discrimination. This follows from the absence of possessive pronouns before the words 'sexual orientation' in article 1 of the Directive.[115]

Nevertheless, the wording of the prohibition of sexual orientation discrimination in *France* (with a possessive pronoun in front of 'sexual orientation') seems to imply that only discrimination on grounds of the actual sexual orientation of the victim is covered.[116] This is not compatible with the Directive. In the other Member States the words used are capable of covering discrimination based on a mistaken assumption, most explicitly so in Sweden (where a formulation which seemed to refer to the victims own sexual orientation was replaced in 2003 by 'discrimination which relates to sexual orientation'[117]) and in *Ireland* (where it is specified that situations where a sexual orientation 'is imputed to the person concerned' are also covered[118]). That discrimination on the basis of a mistaken

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[111] Namely: Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[112] See Hiltunen 2004, para. 6.3.1; Rubio-Marín 2004, para. 15.3.1; and see Svea Court of Appeal (Sweden) 25 April 2005, case T7778/04.

[113] See Bell 2004, para. 10.3.1.

[114] In Spain the Statute on the Disciplinary Regime for the armed forces talks of 'sexual relations that offend military dignity' (see Rubio-Marín 2004, para. 15.3.1). It would be contrary to the Directive to distinguish between homosexual relations and heterosexual relations in the application of this rule.

[115] See 2.3.1 above.

[116] See 4.2.2 above.

[117] See Ytterberg 2004, para. 16.3.1.

[118] See Bell 2004, para. 10.0.

assumption is indeed covered, has been made explicit in the *travaux préparatoires* in the *United Kingdom*.[119]

With respect to the provisions of *France* on racial discrimination, it has been specified that both real and assumed *'race'* is covered, but not with respect to the provisions on *'orientation sexuelle'*. In the *Netherlands*, in the context of discrimination on grounds of political opinion, the Dutch Equal Treatment Commission has drawn a parallel with article 1 of the Convention on the Status of Refugees which (at least according to the case law of the Dutch Supreme Court) is also applicable to persecution of someone because of a wrongly ascribed political opinion.[120]

If a different approach were taken with respect to sexual orientation, any victim of alleged sexual orientation discrimination would be forced to state (or even prove) his or her own sexual orientation, and that would clash with the constitutionally and internationally guaranteed respect for private life.

In *conclusion* it can be said that the legislation of the twelve countries seems to cover discrimination on grounds not only of a person's heterosexual, homosexual or bisexual preference, but also of a person's heterosexual, homosexual or bisexual behaviour. The legislation in most of these Member States seems to cover discrimination on grounds of a mistaken assumption about someone's sexual orientation. Only *France* (by using a possessive pronoun in front of the words 'sexual orientation') has so far failed to include this important element, which is required by the Directive.

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

It follows from the very general words used in articles 1 and 2 of the Directive (see above) that discrimination on grounds of being open about one's sexual orientation must be seen as a form of sexual orientation discrimination. Not to do so would leave a large part of sexual orientation discrimination unaddressed. One of the main purposes of the prohibition of sexual orientation discrimination is, after all, to give lesbian women, gay men and bisexual men and women, a chance to be as open as heterosexuals about their sexual orientation. The 'right to come out' can also be derived from the freedom of expression, as guaranteed by constitutions and treaties.

It is reported from the twelve countries that discrimination on grounds of being open about one's sexual orientation would most probably be considered a form of sexual orientation discrimination.

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[119] See Wintemute 2004, para. 17.3.1.
[120] See Waaldijk 2004, para. 13.3.1.

The *conclusion* can be that there is little doubt that discrimination because of someone's coming out will be covered in these twelve Member States.

4.3.3 *Discrimination between same-sex partners and different-sex partners*

Especially in the field of pay and other employment conditions (such as leave to be with family members, survivor's pensions, and other benefits for an employee's partner or for the children of that partner), discrimination between same-sex and different-sex partners is one of the most frequent forms of sexual orientation discrimination.[121] Such discrimination is often explicitly provided for in collective agreements, or even in legislation.[122] The impact of such discrimination on the employee and his or her family is often considerable (financially or otherwise). Because of the growing trend in many Member States of legally recognising same-sex couples (by opening up marriage, by introducing registered partnership, and/or by recognising *de facto* cohabitants),[123] these are also issues which get a great deal of attention in public debate.

It would not be surprising if the first sexual orientation cases in employment to reach the Court of Justice of the EC under the Directive would be about this form of discrimination.[124]

Often, though not always, this form of discrimination is linked to marital status, because many employment conditions only apply to married employees, and in most Member States same-sex couples are not allowed to marry.[125] Marital or civil status is not a prohibited ground of discrimination in the Directive; in its non-binding recital 22, however, it is stated that the 'Directive is without prejudice to national laws on marital status and the benefits dependent thereon'. The question is then, what will be the meaning of this recital for the interpretation of the Directive? It seems reasonable to assume that recital 22 can only play a role with respect to *indirect* sexual orientation discrimination.[126] This is so because only in the case of alleged *indirect* discrimination does the Directive leave room for objective justification; the statement of recital 22 can be one of

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[121] See for example Waaldijk 2004, para. 13.3.3, and Rubio-Marín 2004, para. 15.3.3.

[122] See for example Hiltunen 2004, para. 6.3.3, Bell 2004, para. 10.3.3, Fabeni 2004, para. 11.3.3, and Rubio-Marín 2004, para. 15.3.3. See also 4.6 below.

[123] See the report *More or less together* 2005.

[124] In fact, the only sexual orientation cases to reach the ECJ so far, are both about facilities for partners: ECJ 17 February 1998, Case C-249/96, *Grant* v. *South West Trains Ltd.* [1998] *ECR* I-621; ECJ 31 May 2001, Joined Cases C-122/99 and C-125/99, *D and Sweden* v. *Council* [2001] *ECR* I-4319.

[125] The three Member States that have opened up marriage are Spain (2005), Belgium (2003) and the Netherlands (2001).

[126] See 2.3.3 above.

the factors to assess, in the words of article 2(2)(b)(i), whether 'an apparently neutral provision, criterion or practice' serves a 'legitimate aim' and whether the means of achieving that aim are 'appropriate and necessary'.[127]

Apart from the even more complex situations where an employer is confronted with an employee who in another country has obtained a status (for example as registered partner) that is not available in the country of the employer, or where an employer discriminates by not providing certain benefits to the children of the same-sex partner of an employee, it seems useful to distinguish *five types of situations* in which same-sex partners may be discriminated against. Not all situation types can be found in all Member States, because the latter differ as to the types of legislation, if any, enacted to legally recognise same-sex couples:[128]

- *discrimination between same-sex cohabitants and different-sex cohabitants*

This situation has nothing to do with marital status, and is therefore not influenced by recital 22. The situation can arise in every Member State.[129] There is abundant European and international case law to confirm that this form is indeed direct sexual orientation discrimination.[130] In at least eight Member States it is considered as such.[131] In some others the same conclusion is not certain (France, Italy, Finland and Spain),[132] although the Directive clearly requires it. In Finland in 2004 a lower court had to consider whether discrimination because of someone's living in a same-sex relationship amounted to sexual orientation discrimination. It concluded that this form of discrimination should be classified as discrimination because of 'another reason related to a person', which is also unlawful in Finland.[133]

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[127] Idem.

[128] Marriage has been opened up to same-sex couples in Belgium, Spain and the Netherlands, registered partnership for same-sex couples has been introduced nationally in Denmark, Sweden, Finland, Germany and the UK and also for different-sex couples in Belgium, France, Luxembourg and the Netherlands. Several Member States have recognised *de facto* same-sex cohabitants for a smaller or larger number of purposes.

[129] See Littler 2004.

[130] ECJ 17 February 1998, Case C-249/96, *Grant* v. *South West Trains Ltd.* [1998] *ECR* I-621; ECtHR 24 July 2003, *Karner* v. *Austria*, appl. 40016/98, *Reports of Judgements and Decisions* 2003-IX; UN Human Rights Committee, 29 August 2003, *Young* v. *Australia*, Communication 941/2000.

[131] Namely: Austria, Belgium, Denmark, Ireland, Netherlands, Portugal, Sweden and the United Kingdom.

[132] This is also the case in Greece, see 4.1 above.

[133] See Makkonen 2004/2005, para. 0.3.

- *discrimination between same-sex registered partners and different-sex registered partners*

This discrimination is not based on marital status either, but only on sexual orientation. The situation can only arise in countries that have introduced a form of registered partnership that is open both to same-sex and different-sex couples (i.e. in Belgium, France, Luxembourg, Netherlands and parts of Spain). In Belgium and the Netherlands this would certainly be considered as a form of direct sexual orientation discrimination; in France and Spain this is not certain, although the Directive clearly requires it.

- *discrimination between same-sex married spouses and different-sex married spouses*

This situation can only arise in countries that have opened up marriage to same-sex couples. In Belgium and the Netherlands (and presumably also in Spain) it would be considered as a form of direct sexual orientation discrimination.

- *discrimination between same-sex cohabitants and different-sex married spouses*

In countries where marriage has not been opened up to same-sex couples, it can be argued that this type of discrimination is a form of *indirect* sexual orientation discrimination, because providing a benefit only to married spouses would clearly put same-sex partners at a particular disadvantage.[134] The question would then be whether the use of marital status as a 'neutral' criterion is objectively justified under article 2(2)(b)(i) of the Directive (also in light of its recital 22). In *Ireland* and *Italy* the national courts are prevented from making this assessment, because the anti-discrimination legislation contains an explicit exception for benefits dependent on marital status.[135] Arguably, this is not allowed under European law, because a proper assessment of the necessity and appropriateness of the means of

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[134] Drawing an analogy with the classification of pregnancy discrimination as a form of *direct* sex discrimination, it can also be argued that this is a form of *direct* sexual orientation discrimination (see 2.3.3 above, and Wintemute 2004, para. 17.3.3). However, the Directive probably sees it as *indirect* discrimination, otherwise recital 22 would be in full contradiction with the operative part of the Directive. See also De Schutter 2005, 43-45. See also ECJ, 7 January 2004, Case C-117/01, *K.B.* v. *National Health Service Pensions Agency* [2004] *ECR* I-541, in particular para. 28 (regarding this judgement, see also 2.1.7 above, and Wintemute 2004, para. 17.3.3).

[135] See Bell 2004, para. 10.3.3, and Fabeni 2004, para. 11.3.3; a similar statement can be found in the *travaux préparatoires* in Austria (see Graupner 2004, para. 3.3.3). A similar exception existed in the UK (see Wintemute 2004, para. 17.3.3), until it was narrowed down when the Civil Partnership Act 2004 came into force on 5 December 2005 and the 'Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005' simultaneously changed the text of regulation 25 of the 'Employment Equality (Sexual Orientation) Regulations 2003'.

achieving a legitimate aim can only be made in light of all the circumstances of the concrete case.[136]

Whether the argument (that this type of discrimination is a form of *indirect* sexual orientation discrimination) can successfully be made, is uncertain in Austria, France and Portugal. The same applies to Denmark, Finland, Sweden and the United Kingdom, but in these countries the situation would only arise with respect to benefits that are not being made available to *registered* same-sex partners either (because same-sex partners can choose to register their partnership).

In Belgium, Netherlands and Spain the situation would not arise as a form of indirect sexual orientation discrimination, because same-sex couples can marry. In any event, Belgium and Netherlands prohibit employment discrimination on grounds of civil status, too (which is also the case in Portugal, but it remains to be seen whether this will lead the courts to rule against discrimination between same-sex cohabitants and different-sex married spouses).[137]

- *discrimination between same-sex registered partners and different-sex married spouses*

As a potential form of indirect sexual orientation discrimination, this situation can only arise in countries where marriage is not open to same-sex couples, but registered partnership is (Denmark, Finland, France, Sweden and the United Kingdom).[138] In Sweden it would certainly be considered as a form of indirect sexual orientation discrimination (and possibly even as a form of *direct* sexual orientation discrimination, because the status of registered partner is essentially equivalent to the status of being married).[139] Whether this would also be the case in Denmark, Finland, France and the United Kingdom, seems less certain.[140] However, it follows from the Directive that this situation must at least be assessed as a form of indirect discrimination. In that context recital 22 may make it possible to conclude that, for example, the aim of protecting marriage is a legitimate one, but it will be extremely difficult for an employer to demonstrate that it

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[136] See 2.3.3 above.

[137] See De Schutter 2004, para. 4.3.3, Waaldijk 2004, para. 13.3.3, and Freitas 2004, para. 14.3.3.

[138] This is also the case in Germany and Luxembourg.

[139] See Ytterberg 2004, para. 16.3.3.

[140] In the UK the definitions of direct and indirect discrimination specify that when the circumstances of someone who is a civil partner are being compared with those of someone who is married, this difference in status 'shall not be treated as a material difference'. This specification in regulation 3(3) of the 'Employment Equality (Sexual Orientation) Regulations 2003' was introduced on 5 December 2005 by the 'Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005'.

is really appropriate and necessary (in the sense of article 2(2)(b) of the Directive) to apply different employment conditions for married employees than for employees in a registered partnership.

The *conclusion* must be that with respect to *direct* discrimination between different-sex and same-sex partners it is not certain that it will be covered by the prohibition of sexual orientation discrimination in France, Italy, Spain and Finland,[141] although the Directive clearly requires that. With respect to the Directive's requirement to also prohibit *indirect* discrimination against same-sex partners two Member States are probably falling short (Ireland and Italy).[142] The same may be true for Austria, Denmark, Finland, France and the United Kingdom, but that depends on the interpretation that will be given to their legislation.

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

As the Directive does not make use of possessive pronouns in front of the term 'sexual orientation', discrimination on the ground of someone else's sexual orientation must also be prohibited. This requirement does not seem to be met in those countries that nevertheless use or imply possessive pronouns in their national legislation (France and, with respect to indirect discrimination only, the United Kingdom).[143] In other countries discrimination on grounds of a person's association with an LGB individual seems to be covered by the legislation (this is the case in most of the Member States[144] and, with respect to direct discrimination only, the United Kingdom; and possibly also in Finland, where at least it would be covered as discrimination based on 'another reason related to his or her person').

For several countries the conclusion that also discrimination on grounds of someone's association with an LGB event or organisation is to be considered as a form of sexual orientation discrimination, is supported with arguments relating to the freedoms of assembly and associations (Belgium, Denmark, Italy and Portugal).[145]

The *conclusion* can be that at least France and the United Kingdom, and possibly Belgium and Finland have failed to fully extend the prohibition of sexual

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[141] This is also the case in Greece, see 4.1 above.

[142] Idem.

[143] See 4.2.2 and 4.2.3 above.

[144] Namely: Austria, Belgium, Denmark, Ireland, Italy, Netherlands, Portugal, and Sweden.

[145] See De Schutter 2004, para. 4.3.4; Baatrup 2004, para. 5.3.4; Fabeni 2004, para. 11.3.4; and Freitas 2004, para. 14.3.4.

orientation discrimination to discrimination on grounds of the sexual orientation of someone else.

4.3.5 *Discrimination against groups, organisations, events or information off/for/on LGB individuals*

As the Directive applies to 'persons' without any limitation, it seems fair to require that sexual orientation discrimination against legal persons and groups (and even against events and information) is also prohibited.[146] Arguments relating to the freedoms of association, assembly and expression would support such an interpretation. However, this requirement is not yet met in those countries that use or imply possessive pronouns (France and, with respect to indirect discrimination only, the United Kingdom),[147] although in France there is some criminal law protection against discrimination against legal persons because of the sexual orientation of their members. Some other countries only protect natural persons against sexual orientation discrimination (Denmark, Finland, Ireland and Sweden). Employment discrimination against LGB organisations etc. so far only seems to be covered in the legislation in Austria, Belgium and the Netherlands also possibly in France, Italy, Portugal and Spain.

The *conclusion* can be that Denmark, Finland, Ireland and Sweden (and possibly France, Italy, Portugal and Spain) have failed to sufficiently extend the prohibition of sexual orientation discrimination to discrimination against LGB organisations and groups.

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

In all countries it would almost always be considered irrelevant and/or discriminatory and therefore unlawful to ask a job applicant about his or her sexual orientation.[148] In some countries this is reinforced by legislative protection of the privacy of (future) employees (Belgium, France, Finland, Italy, Portugal and Spain),[149] or even by an explicit prohibition in the Act on Discrimination 'to request, make inquiries about, or receive and use information's about' the sexual orientation of a job applicant or employee (Denmark). Consequently, in all countries it is considered unlawful to deny employment to someone who has refused to give a (correct) answer to such an unlawful question.

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[146] See 2.3.5 above.

[147] See 4.2.2 and 4.2.3 above.

[148] For a possible exception, see Wintemute 2004, para. 17.3.6.

[149] This would be in addition to the privacy protection deriving from the European Convention on Human Rights (see 2.3.6 above).

Relying on the parallel with situations in which a job applicant did not inform her prospective employer about her pregnancy,[150] it seems fair to assume that the Directive requires the classification as discrimination of any denial of employment to someone on the ground that he or she refused to give a (correct) answer to a question about sexual orientation. At least in some countries such denial of employment would most probably be considered a breach of the prohibition of sexual orientation discrimination (Austria, Denmark, Ireland, Netherlands, Sweden and the United Kingdom). It is to be regretted that this does not seem so certain in more Member States, since normally only the classification of this sort of situations as discrimination would trigger a shift in the burden of proof, and other additional rules on enforcement.[151]

In *conclusion* it can be said that it would be desirable that other Member States follow the example of *Denmark* in specifically classifying the asking of questions about sexual orientation in the context of a job application as a form of sexual orientation discrimination.

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

Because many Member States until recently had (or even still have) penal sanctions for homosexual sexual offences without heterosexual equivalents,[152] it is quite possible that someone with a previous conviction for such an offence, encounters difficulties from employers who do not want to employ persons with a criminal record. In a case like that,[153] it can be argued that the employer applies an apparently neutral criterion that puts homosexuals at a particular disadvantage. In some countries (for example in Austria, Netherlands and the United Kingdom) this would most probably not be considered as objectively justified, but in other countries that is less certain (for example in Finland and Portugal).

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[150] See 2.3.6 above.

[151] See 4.5.8 below.

[152] See 3.7 above. 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.

[153] Comparable to the case which led to ECtHR 6 April 2000, *Thlimmenos* v. *Greece*, appl. 34369/97, *Reports of Judgements and Decisions* 2000-IV.

4.3.8 *Harassment*

The various national prohibitions and definitions of sexual orientation harassment have been analysed above.[154] The question here is whether certain common forms of anti-homosexual behaviour would indeed be considered as harassment.

Sexual forms of harassment (such as persistent unwelcome sexual advances), would in most countries often be considered as *sexual orientation* harassment, but only if the harassment can be said to be related to grounds of sexual orientation. If the latter element cannot be established, it might still count as *sexual* harassment.

Anti-homosexual verbal abuse may also be considered as a form of sexual orientation harassment, unless it is not deemed serious enough to meet the test of 'violating the dignity of a person' and of 'creating an intimidating, hostile, degrading, humiliating or offensive environment' (or whatever words are used in the national legislation). Much will depend on the appreciation by the various courts and other law enforcers. In France and Portugal it seems less certain (than for example in Finland, Italy and the Netherlands) that the courts will be prepared to occasionally consider these tests met.

In rare instances, the (non-abusive) expression of anti-homosexual opinions may also be such as to meet the tests of the definition of harassment, but even then a balancing act with the demands of the freedom of expression will have to be made.[155]

In several countries (including Finland, Italy, Netherlands, Sweden and the United Kingdom) revealing someone's sexual orientation against her or his will, may be recognised as another possible form of sexual orientation harassment. It may also be considered as a breach of privacy (for example in the Netherlands, Portugal and Spain), or as 'subjecting (someone) to any other detriment' (the United Kingdom).

In *conclusion* it could be said that much will depend on the attitude of courts towards forms of anti-homosexual behaviour that might be considered as forms of sexual orientation harassment. A useful feature of the *United Kingdom* legislation is the prohibition (alongside that of discrimination and harassment) of subjecting someone to 'any other detriment'.

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[154] See 4.2.5 above.

[155] See Hiltunen 2004, para. 6.3.8; Fabeni 2004, para. 11.3.8; Waaldijk 2004, para. 13.3.8; Ytterberg 2004, para. 16.3.8; and Wintemute 2004, para. 17.3.8.

4.4 Exceptions to the prohibition of discrimination

4.4.1 *Objectively justified indirect disadvantages (article 2(2)(b)(i))*

The prohibition of indirect discrimination as defined in article 2(2)(b) does not affect all particular disadvantages for persons of a particular sexual orientation that are caused by an apparently neutral provision, criterion or practice. Not prohibited are disadvantages caused by a provision, criterion or practice that is objectively justified by a legitimate aim, provided that the means of achieving that aim are appropriate and necessary. Although the conditions under which justification is allowed are clearly stated in article 2(2)(b)(i) of the Directive, the definitions used in two Member States vary considerably from that test: Belgium and United Kingdom. In France there is no legislative definition of indirect discrimination at all. The justification test is in line with the Directive in most[156] of the Member States.[157]

The main form of indirect sexual orientation discrimination is caused by the use of marital status as a criterion. The legislation *Ireland* and *Italy* seeks to exempt that form of indirect discrimination from the tests of objective justification, legitimate aim and appropriate and necessary means; this is done by an explicit exception for benefits dependent on marital status. In *Austria* a similar statement can be found in the *travaux préparatoires*.[158] This is probably not in conformity with the Directive.[159]

The *conclusion* must be that the laws of Belgium, France and the United Kingdom, and probably those of Ireland and Italy, do not correctly implement this part of the Directive.

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

The implementing legislation in the *United Kingdom* contains an exception for acts justified by the purpose of safeguarding national security, and with respect to Northern Ireland also for protecting public safety and public order. The legislation in *Italy* contains such an exception for existing provisions concerning public security, public order, crime prevention and health protection. In both Italy and the United Kingdom, the Directive's requirement that the measures must be 'necessary in a democratic society' is not explicitly incorporated in the exception

[156] Namely: Austria, Denmark, Finland, Ireland, Italy, Netherlands, Portugal, Spain and Sweden.

[157] See 4.2.4 above.

[158] See 4.3.3 above.

[159] See 2.3.3 and 4.3.3 above.

clause. Furthermore, these provisions fail to precisely indicate the national measures that take precedence over the prohibition of discrimination.

Perhaps the same criticisms can be made of the legislation in *Belgium*,[160] where a general exception exists for fundamental rights and freedoms as guaranteed by the Belgian Constitution and international treaties. On the other hand, the exception in Belgium is limited to certain categories of *fundamental* rights. In that sense the Belgian exception may almost be redundant, because treaties such as the European Convention on Human Rights anyhow take precedence over national legislation (and indirectly over the Directive).

More specific exceptions can be found in Ireland (for employment in a private household; and for job applicants and employees who, according to 'reliable information', engage, or have 'a propensity to engage, in any form of sexual behaviour which is unlawful'),[161] Italy (for employment in 'care, assistance or education of minors' of persons who have been 'condemned for offences related to sexual freedom of minors or child pornography'),[162] in the Netherlands (for political organisations; for employment with a 'private character'; and for the internal affairs of churches and other spiritual congregations, and especially the profession of priest, rabbi, imam, etc.).

Of all these exceptions, only the exceptions for political organisations in the Netherlands are explicitly limited to 'necessary' forms of discrimination.[163] The Dutch exception for private-character employment is limited to requirements that 'may reasonably be imposed', which does not seem to imply a test of necessity. In as far as the exception in Italy is allowing to distinguish between homosexual and heterosexual offenders (because the cases mentioned are exempted from the application of the principle of equal treatment), it does not seem to be compatible with the Directive. Both exceptions in Ireland, and the exception for the internal affairs of churches etc. in the Netherlands, would also seem to be incompatible with the Directive, because they are in no way explicitly limited to forms of discrimination that are 'necessary in a democratic society', as required by article 2(5) of the Directive.

With respect to the latter exception, this is also because the Directive has clearly chosen to deal with the special status of churches and confessional organisations, in the specific provision of article 4(2) of the Directive. This is confirmed by recital 24. Therefore there does not seem to be any scope to use

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[160] See De Schutter 2004, para. 4.4.2.

[161] See Bell 2004, para. 10.4.7.

[162] See Fabeni 2004, para. 11.4.1.

[163] Whether the exception is necessary is uncertain, as it is only intended to cover political organisations that are also based on religion. See Waaldijk 2004, para. 13.4.2.

article 2(5) for an exception for churches etc. It will be argued below that the Netherlands exception, and a somewhat similar United Kingdom exception for religious employment,[164] are not compatible with article 4(2) of the Directive.[165]

The *conclusion* must be that Ireland, Italy, Netherlands and the United Kingdom have enacted exceptions that are not or not completely justified by article 2(5) of the Directive.[166] Whether the very generally worded exception of Belgium is fully justified, will probably depend on its application.

4.4.3 *Social security and similar payments (article 3(3))*

According to its article 3(3), the Directive 'does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes'. In addition, recital 13 holds the view that the Directive does not apply to 'social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.' While in many countries every citizen enjoys an individual right to social security (regardless of sexual orientation), there are cases concerning the treatment of same-sex partners of workers where discrimination could take place (e.g. compensations in case of work-related death or sickness, unemployment subsidies for people with family responsibilities, etc.); nevertheless, if they are to be considered as social security or similar payments, they do not fall within the scope of the Directive.

Occupational pensions of private or public employees, on the other hand, should be considered as falling within the material scope of the Directive (as any benefit or payment that in light of the case law of the Court of Justice of the EC must be treated as work-related 'income'). Such pension schemes are not exempted by article 3(3) of the Directive, and are part of pay.[167] Whether occupational pensions are covered in *Spain* is unclear.[168]

Legislation concerning sexual orientation discrimination in employment does not explicitly cover social security schemes in most of the Member States.[169] The

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[164] The UK Government has not tried to justify its controversial exception for sexual orientation discrimination by religious employers in terms of article 2(5); see Wintemute 2004, para. 17.4.5.

[165] See 4.4.4 below.

[166] This may also be the case in Greece, see 4.1 above.

[167] See 2.2.7 above.

[168] See 4.2.7 above.

[169] Namely: Austria, Belgium, Finland, France, Ireland, Netherlands, Portugal, Spain and the United Kingdom.

Directive does not require covering social security. Nevertheless, in some countries equal treatment with respect to legislation and administrative discretion in the field of social security is required by existing constitutional and/or administrative principles, and by the prohibition in the Penal Code of discrimination by civil servants (for example in the Netherlands and Sweden). In Denmark, on the other hand, discrimination in social security is explicitly covered in the Act on Race Discrimination (which also applies to sexual orientation discrimination) and in Sweden in the Discrimination Prohibition Act.[170] In contrast, an exception for social security is explicitly mentioned in Italy.

In *conclusion* it can be said that perhaps Spain still has to prohibit sexual orientation discrimination with respect to occupational pensions. The explicit prohibition of sexual orientation discrimination in social security in Denmark and Sweden may be regarded as a good practice, although not required by the Directive.

4.4.4 *Occupational requirements (article 4(1))*

It is difficult to imagine many jobs for which a particular sexual orientation can properly be called a genuine and determining occupational requirement that is proportionate to a legitimate objective. The only examples given (only in reports on Sweden and the United Kingdom) are about LGB organisations which might need an LGB individual for a specific job (for example in the field of counselling).[171] This may explain why in some countries (France and the Netherlands) there is no general exception (to the prohibition of sexual orientation discrimination) for occupational requirements at all. Even an exception formulated as conditionally as required by article 4(1) of the Directive, runs the risk of suggesting that sexual orientation may also be considered an occupational requirement because of religious, historical, moral or social mores.[172] The occupational requirements of religious employers are specifically dealt with in article 4(2), which only allows a limited exception to the prohibition of discrimination on grounds of religion or belief – not on grounds of sexual orientation.[173]

Five countries (Austria, Belgium, Ireland, Spain and Sweden) have enacted an exception for occupational requirements that is in full conformity with the wording

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[170] Per 1 January 2005, Act 2004:1089 has amended the Discrimination Prohibition Act (2003:307), extending its ban on discrimination in the field of goods and services, to also cover social services, social security, unemployment benefits and health care. See Numhauser-Henning 2004/2005, para. 3.2.7.

[171] See Ytterberg 2004, para. 16.4.4, and Wintemute 2004, 17.4.4.

[172] See Freitas 2004, para. 14.4.4.

[173] See 4.4.5 below.

of article 4(1) of the Directive.[174] However, in Sweden this has only been done in the main part of its legislation; another part of the implementing legislation still contains a much wider exception ('interests that are obviously of greater importance').[175]

Exceptions for genuine and determining occupational requirements have also been enacted in Finland, Italy and the United Kingdom, but without at least one of the limiting conditions laid down by article 4(1) of the Directive:

- *the objective is legitimate*
  (a condition missing in Finland and Italy);
- *the requirement is proportionate*
  (missing in Finland and the United Kingdom).

An exception which like the above is too broad, can be found in Portugal (where the word 'genuine' has been replaced by the weaker 'justifiable') and Denmark (where 'in proper relation to the activity' it must be 'of great importance that someone is of a certain sexual orientation'). An interesting aspect of the Danish exception, however, is that it can only be invoked after consultation with the Minister of Labour. Also incompatible with article 4(1) of the Directive is the addition to the occupational requirements exception in Italy, that the taking into account of sexual orientation is not a discriminatory act when sexual orientation is 'relevant with regard to the ability to carry out the functions that the armed forces and the police, prison or emergency services may be called upon to perform'. This is worded much more loosely than the Directive allows, and it seems to suggest that sexual orientation somehow could undermine the capacity to properly take part in military, police, prison or emergency services.[176] The same double criticism can be made of the Italian exception with respect to job agencies etc. for situations in which sexual orientation 'would have affected the carrying out of the working activity'.[177] The general exception in Italy for provisions establishing 'work suitability tests' for specific jobs also appears to be at odds with the requirements of the Directive.[178]

The *conclusion* must be that so far the implementation in Denmark, Finland, Italy, Portugal, Sweden and the United Kingdom falls short of the limitations set by article 4(1).

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[174] This also seems to be the case in Greece, see 4.1 above.

[175] See Ytterberg 2004, para. 16.4.4.

[176] See Fabeni 2004, para. 11.4.7.

[177] Idem, para. 11.4.4. For other Italian provisions placing certain forms of employment outside the scope of the prohibition of sexual orientation discrimination, see 4.4.2 above.

[178] See Fabeni 2004, para. 11.4.7.

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

Article 4(2) is one of the most difficult to read in the whole Directive. It consists of two parts, with the second part drawing a specific conclusion from the first part; this follows from the word 'thus' in the second part (*'donc'* in the French version of the Directive). Therefore it seems best to read the provision as a whole.

Article 4(2) is of course inspired by the freedom of religion as guaranteed in national constitutions and international treaties (see also recital 24 of the Directive); its text seems to be loosely based on pre-existing provisions of a similar kind in Ireland and the Netherlands. So far, neither of these two countries is proposing to change its national formulation to make it more similar to the Directive's formulation. Only some of the other Member States have enacted an exception with respect to the occupational requirements of religious employers. While in Austria and Italy the exception with respect to religious employment more or less follows the text of article 4(2), the United Kingdom and Denmark have chosen a rather different approach (see below). In the Netherlands there is also a blanket exception for the internal affairs of churches and other spiritual congregations.[179] No legislation on this point has been enacted in Belgium, Finland, France, Portugal, Spain and Sweden. But even in Member States without a legislative exception, a similar rule has sometimes been articulated in case law (for example in France), in the doctrine (for example in Spain and Portugal) or in the *travaux préparatoires* (Finland).

In several ways article 4(2) limits the scope available to Member States to allow certain occupational requirements. So far not all of these limitations are being observed in the national rules. There are six limitations in the first part of article 4(2). Only if all these six limitations are observed organisations with an ethos based on belief may, in the words of the second part of article 4(2), 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. The limitations are the following:

- *There may only be an exception that can be found in national legislation predating the Directive, or that provides for national practices that pre-date the Directive.*

This restriction may have been disregarded in Finland, where the *travaux préparatoires* of the implementation bill stated the exception more widely than that contained in the existing Church Act.[180] However, such a wider exception

[179] See 4.4.2 above.
[180] See Hiltunen 2004, para. 6.4.5.

does not exist, according to a recent Finnish court decision, annulling the refusal of a church to appoint an applicant as chaplain because she was living in a same-sex relationship.[181]

- *The exception can only be about occupational activities within churches or other organisations the ethos of which is based on religion or belief.*

This is not observed in the Italian legislation, which simply speaks of 'churches or other public or private organisations'. In Denmark the exception extends to political organisations. In the Netherlands the wording of the exception extends to all non-state schools, including schools that are neither based on religion nor on belief, and there is a similar exception for organisations based on political opinion.[182] The exception for non-state schools in the Netherlands is not limited to 'occupational activities', but also covers the provision of vocational training.[183]

- *There may only be an exception for differences of treatment based on a person's religion or belief, and these should not justify discrimination on another ground.*

The exception enacted in the United Kingdom explicitly extends to discrimination on the ground of sexual orientation. This is not permitted under the Directive.

In the Netherlands both the general exception for religion based employers, and the specific one for the internal affairs of churches etc., are not explicitly related to the grounds of religion and belief; and only the general exception specifies that the requirements may not lead to a distinction based on 'the sole fact of' sexual orientation. The same is true for the jurisprudential exception recognised in France by the *Cour de Cassation*. The Dutch rule suggests that difference of treatment would be acceptable in case of 'additional circumstances', the French rule would consider such a difference of treatment acceptable if there was evidence of particular unrest (*'trouble caractérisé'*).[184]

The second part of the exception in Ireland (dealing with action to prevent employees 'from undermining the religious ethos of the institution') is not explicitly restricted to action on grounds of religion or belief.

In Denmark and Italy it is not specified that the difference of treatment should not justify discrimination on another ground.[185]

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[181] See Makkonen 2004/2005, para. 0.3.
[182] See 4.4.2 above.
[183] See Waaldijk 2004, para. 13.4.5.
[184] Idem, and see Borrillo 2004, para. 7.4.5, respectively.
[185] This is also the case in Greece, see 4.1 above.

- *That person's religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.*

The legislation in some Member States uses a similar, but differently worded test: 'necessary' in the general exception in the Netherlands, 'reasonable' or 'reasonably necessary' in Ireland, 'objectively of importance' in Denmark. The test is absent in the Netherlands exception for the internal affairs of churches etc., and in the United Kingdom legislation (although mentioned in the *travaux préparatoires*); there the requirement must either be applied 'so as to comply with the doctrines of the religion' or 'so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.

- *And this must be so by reason of the nature of the occupational activities or of the context in which they are carried out.*

This test is not explicitly provided for in Denmark and Ireland, and not in the Netherlands exception for the internal affairs of churches etc. It is also absent in the first part of the exception in the United Kingdom (dealing with requirements 'so as to comply with the doctrines of the religion'), although in the *travaux préparatoires* it is said that the exception should only be applied to 'ministers of religion, plus a small number of posts outside the clergy'.[186]

- *The implementation of the difference of treatment must take account of national constitutional provisions and principles, and of the general principles of Community law.*

In no country this is specifically provided for, probably because it is obvious that these provisions and principles apply anyhow. Depending on the context of the case they may operate so as to narrow or to widen the scope of the exceptions. Constitutional and European principles of privacy, equality and freedom of expression may help to narrow their scope, whereas principles of freedom of religion, education and association may lead the courts to widen them. This cannot completely be avoided by specific legislation, because any legislation needs to be applied in the light of higher norms.

The *conclusion* must be that the legislative exceptions for religious employment enacted in Denmark, Ireland, Italy, Netherlands and the United Kingdom are not or not fully compatible with the Directive.[187] In all Member States the courts will have an important role in balancing the prohibition of sexual orientation discrimination with other fundamental rights.

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[186] See Wintemute 2004, para. 17.4.5.

[187] This is also the case in Greece, see 4.1 above.

4.4.6 *Positive action (article 7(1))*

Using the possibility given by article 7(1), the laws of some Member States do explicitly allow measures which seek to 'prevent or compensate for disadvantages' linked to the protected grounds. Positive action is seen differently in the various member states, with some of them considering it an exception to equality, with others viewing it as the true fulfilment of equality.

Positive actions in the classical meaning do not seem particularly useful for the kind of inequalities that strike gay, lesbians and bisexuals.[188] Nevertheless, some Member States do include the ground of sexual orientation, when providing for positive action. This is the case in Austria (for private employment only), Belgium, Finland, Ireland and Spain.[189] The United Kingdom Regulations also explicitly allow positive actions, but only with respect to affording access to facilities for training and with respect to encouraging people 'to take advantage of opportunities for doing particular work' or to become members of a trade organisation. In Portugal sexual orientation is implicitly covered in a general provision on positive action. In Denmark, France, Italy, Netherlands and Sweden sexual orientation is not covered in existing legislation on positive action.

In *conclusion* it can be said that positive action for sexual orientation is explicitly being allowed in Austria, Belgium, Finland, Ireland, Portugal, Spain and the United Kingdom.[190] The Directive does not require the other countries to follow this example.

4.4.7 *Exceptions beyond the Directive*

From a recent case before the Equal Treatment Commission in the *Netherlands*, it appears that the prohibitions required by the Directive are restricted in their operation and enforcement by existing rules on the immunity of international organisations.[191] It may be assumed that other Member States also allow for the immunity of diplomatic missions, European Institutions, United Nations agencies, etc. It is difficult to say how these exceptions can be reconciled with the Directive, although it seems reasonable not to consider such exceptions as violations of the Directive.

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[188] See 2.4.6 above.
[189] This is also the case in Greece, see 4.1 above.
[190] Idem.
[191] See Waaldijk 2004, para. 13.4.7.

4.5 Remedies and enforcement

4.5.1 *Basic structure of enforcement of employment law*

For the enforcement of any prohibitions on sexual orientation discrimination, the Member States rely heavily on the general enforcement structure already in place for employment law. Most countries entrust the enforcement of employment law to specialised labour courts; exceptions are Italy, Netherlands and Spain. It is not always clear whether these courts would also be competent when discrimination takes place outside the context of an employment contract (for example in the phase of recruitment). In Denmark and Finland the enforcement of employment law is divided between specialised labour courts and ordinary courts.

In addition to regular or specialised courts, many Member States entrust the application of labour law in general (and sometimes also issues of discrimination in particular), to other enforcement bodies, notably the Labour Inspectorates. In some countries the Labour Inspectorates explicitly have a specific task with respect to harassment and/or other forms of discrimination (for example in Belgium, Finland and the Netherlands). In other Member States this is not mentioned explicitly in legislation, but Labour Inspectorates enjoy the general power to ensure compliance with labour law, including anti-discrimination legislation (for example in Portugal and Spain). In countries where discrimination has been made a criminal offence,[192] the police and public prosecutors also play a role.

4.5.2 *Specific and/or general enforcement bodies*

In addition to the role of courts and other general enforcement bodies (see above), anti-discrimination laws (usually on grounds of sex and/or race) of a number of countries also entrust some enforcement tasks to specific bodies.[193] The competence of many of these does not extend to issues of employment discrimination on grounds of sexual orientation.

In contrast with the Racial Equality Directive, the setting up of specialised enforcement bodies for the application of the principle of equal treatment is not required by the Framework Directive,[194] although some Member States have chosen to entrust the enforcement of the prohibition of sexual orientation discrimination in employment to such a body. This best practice can now be found in a majority of the old Member States.

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[192] Namely: Belgium, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Spain and Sweden.

[193] See the report *Specialised bodies to promote equality and/or discrimination* 2002.

[194] See 2.5.2 above.

Only one Member State has established an enforcement body that deals only with issues of sexual orientation discrimination:

Sweden	Office of the Ombudsman against Discrimination on grounds of Sexual Orientation (since 1999)

In seven other old Member States enforcement bodies covering a multitude of grounds, including sexual orientation, have been established:

Ireland	Equality Authority (since 1998) Equality Tribunal (since 1998) Rights Commissioner (covering sexual orientation since 1993)
Netherlands	Equal Treatment Commission (since 1994)
Belgium	Centre for Equal Opportunities and the Fight against Racism (since 2003)
United Kingdom	Equality Commission, for Northern Ireland (covering sexual orientation since 2003)[195]
Austria	Equal Treatment Commission (since 2005) Office of the Ombudspersons for Equal Treatment (since 2005)[196]
France	High Authority Against Discriminations and for Equality (since 2005)[197]
Greece	Ombudsperson (for the public sector only, since 2005)[198]

See the paragraph on procedures below, for more details on the functioning of the specialised bodies in these countries.

In *conclusion* it can be said that Austria, Belgium, France, Greece, Ireland, Netherlands, Sweden and the United Kingdom have adopted the good practice of having a specialised body to help combat sexual orientation discrimination in employment.

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[195] See Wintemute 2004, para. 17.5.2. For Scotland, England and Wales a *Commission for Equality and Human Rights*, is being proposed in the Equality Bill, which was introduced in Parliament in March 2005. The Commission is expected to start operating in October 2007; see 2 *European Anti-Discrimination Law Review* (2005) 75, and Cohen 2004/2005, para. 7.

[196] See Schindlauer 2004/2005, para. 7. Schindlauer refers to the second body (the *Anwaltschaft für gleichbehandlungsfragen*) as the National Equality Body.

[197] Created by Law 2004-1486 of 30 December 2004. See 1 *European Anti-Discrimination Law Review* (2005) 48-49, and Latraverse 2004/2005, 43-44.

[198] There is also an Equal Treatment Committee, but that seems to be only competent with respect to racial discrimination with respect to goods and services in the private sector; see Gavalas 2004/2005, 44-45. See also 4.1 above.

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

The setting up of adequate procedures is clearly seen as an important step towards the fulfilment of the requirements of the Directive, in particular those of article 17, according to which sanctions must be 'effective and […] dissuasive'. According to article 9 of the Directive, the defence of rights consists primarily in the availability of procedures for the enforcement of the prohibition of sexual orientation discrimination in employment. Procedures may be judicial and/or administrative, and where appropriate conciliatory.

The following is an overview of the available procedures in each country. See also the following paragraph on sanctions.

Judicial procedures are applicable to anti-discrimination legislation in all countries. The nature of judicial procedures may be:

- civil (everywhere),
- administrative (e.g. regarding public employees, for example in Austria, France, Netherlands and Portugal), or
- penal (in most Member States).[199]

The specialised bodies in Belgium, Netherlands and Sweden have the power to *take a case to court*. The Centre for Equal Opportunities in Belgium can do so both on behalf of an identifiable victim and in the public interest. In the Netherlands the Equal Treatment Commission may take a case to court unless the victim of the discriminatory act objects. In Sweden the Ombudsman can litigate individual cases on behalf of the victim. In France the High Authority can answer prejudicial questions from any court.[200]

Non-judicial *administrative procedures* are an important aspect of the enforcement of employment law in Portugal and Spain, where the Labour Inspectorates can impose administrative fines for breach of the anti-discrimination provisions,[201] and to a lesser extent in Austria and several other countries. In several Member States, including Austria, Portugal and the Netherlands, non-judicial adminis-

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[199] Namely: Belgium, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Spain and Sweden. However, in Ireland penal sanctions are only available in certain specific circumstances; see Bell 2004, para. 10.5.4. Also, in Sweden penal procedures are not available in cases of discrimination by an employer against an employee. Penal procedures can only be used in cases of discrimination against a student, and in cases of civil servants discriminating against someone who is self-employed or planning to be self-employed; see Ytterberg 2004, para. 16.5.3.

[200] See 1 *European Anti-Discrimination Law Review* (2005) 49.

[201] See 4.5.4 below. This is also the case in Greece, see 4.1 above.

trative procedures are available in public employment. The procedures of the specialised enforcement bodies for issues of discrimination[202] can also be classified as 'administrative'. Of these bodies, only the Equality Authority and the Equality Tribunal in Ireland may give *binding* decisions. The Equality Authority may conduct inquiries and issue binding 'non-discrimination notices' in case of breach of the law. The Equality Tribunal is entrusted with quasi-judicial tasks and may issue binding decisions upon complaints from parties. The power to take *non-binding* decisions in individual cases (in a procedure which may be chosen by complainants either in lieu or in addition to the regular courts) is given to the Rights Commissioner in Ireland, the Ombudsman against Discrimination on grounds of Sexual Orientation in Sweden, the Equal Treatment Commission in the Netherlands, the two Equal Treatment Commissions in Austria and the High Authority in France.[203]

With respect to sexual orientation discrimination in employment *conciliatory procedures* are available in several Member States.[204]

The specific enforcement bodies in certain Member States[205] also have certain *advisory functions* (for example advising possible victims of discrimination on whether they have a case, how to handle it, etc., or advising the government on issues of policy).

Specific enforcement bodies for tackling sexual orientation discrimination in employment often do not operate under rigid rules of procedure; this makes it easier for each possible victim of discrimination to bring a case. In addition to the judicial, administrative, conciliatory, and advisory procedures indicated above, certain specific enforcement bodies enjoy some *other powers*. In Ireland the Equality Authority can promote reviews of equality policies of businesses or industries. In Austria and the Netherlands the Equal Treatment Commission can investigate on its own motion instances of structural discrimination. Additionally, in Sweden the Ombudsman can promote education and information in the fight against homophobia. The Equality Commission in Northern Ireland (United Kingdom) and the Office of the Ombudspersons for Equal Treatment in Austria can provide assistance (in Northern Ireland this includes financial assistance) to indi-

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[202] Such bodies are present in Austria, Belgium, France, Ireland, Netherlands and Sweden.

[203] See 1 *European Anti-Discrimination Law Review* (2005) 49; and Cormack & Bell 2005, 79.

[204] See for example De Schutter 2004, para. 4.5.3, Bell 2004, para. 10.5.3, Fabeni 2004, para. 11.5.3, Waaldijk 2004, para. 13.5.3, Freitas 2004, para. 14.5.3, and Ytterberg 2004, para. 16.5.3.

[205] Namely: Austria, Belgium, France, Ireland, Netherlands, Sweden and Northern Ireland (United Kingdom).

viduals seeking to enforce the prohibition of sexual orientation discrimination.[206]

The *conclusion* can be that civil judicial procedures are available in all countries. No penal procedures are foreseen in Austria, Denmark, Portugal and the United Kingdom. Specific administrative procedures resulting in binding decisions are only established in Ireland, whereas procedures resulting in non-binding decisions are available in Austria, Belgium, France, Ireland, the Netherlands and Sweden.

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

The wording of the Directive in many respects sums up the evolution of the case law of the Court of Justice on sanctions.[207] According to article 17 the sanctions chosen by the Member States must be 'effective, proportionate and dissuasive', and the Member States must 'take all measures necessary to ensure that they are applied'.

While some Member States already had a system of sanctions in place, others had to create a new set of rules.

In countries that supply *penal sanctions* there have been reports of a remarkable underuse of them. This phenomenon could be related to several factors: often only particularly serious discrimination is punished, criminal procedures involve greater psychological costs, and criminal justice is generally felt as being more removed from the citizen. It should also be recalled that criminal law requires the intention or will of the offender, a requirement certainly at odds with the provisions of the Directive on indirect discrimination and on harassment; moreover, in criminal proceedings the presumption of innocence is the rule, therefore no shift of the burden of proof is applied.[208] In fact, in France (since 1985), Netherlands (since 1992), Finland (since 1995), Spain (since 1995) and Luxembourg (since 1997) there has been no reported case law on the use of these penal sanctions. In several Member States it is recognised that criminal law is of limited use. Nevertheless, as part of a larger repertoire of sanctions, the availability of penal sanctions in most of the Member States[209] may be the best way to guarantee that the combination of sanctions is 'effective, proportionate and dissuasive', as required by article 17 of the Directive. From that perspective, it is interesting

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[206] See Bell 2004, para. 10.5.3, and Schindlauer 2004/2005, para. 7.

[207] See 2.5.4 above.

[208] See article 10(3) of the Directive, and 4.5.8 below. See also De Schutter 2004, para. 4.5.8, Borrillo 2004, para. 7.5.8, Peponas 2004, para. 9.5.8, Weyembergh 2004, para. 12.5.8, and Rubio-Marín 2004, para. 15.5.8.

[209] Namely: Belgium, Finland, France, Italy, Luxembourg, Netherlands and Spain, and in specific circumstances in Ireland and Sweden.

to note that in France the Penal Code foresees some ancillary measures, such as publication of the measure, closure of the business for five or more years or even permanently, and exclusion from public procurement.

Where available, *civil sanctions* may also be problematic:

- Recovery of damages suffered as a consequence of discriminatory acts is the most widespread measure: it is foreseen in all twelve countries. The only reported exception concerns Austria, where no compensation can be claimed in case of discriminatory termination of employment (the only remedy in that case being reinstatement). Upper limits for compensation apply in Austria, Finland, Ireland and Sweden. Such limitations may cause the compensation to be less than 'effective, proportionate and dissuasive', and are therefore not permissible under article 17 of the Directive, and/or under the case law of the Court of Justice.[210]
- Discriminatory contracts or discriminatory clauses in contracts are void or voidable in almost all Member States.[211] In Ireland the Employment Equality Act provides that all employment contracts shall be taken to include a 'non-discriminatory equality clause' that modifies any provisions of the contract that would otherwise give rise to unlawful discrimination; discriminatory provisions in collective agreements are void in Ireland.
- Reinstatement is a very useful measure because of its capacity to remove the consequences of an unlawful dismissal. However, reinstatement after discriminatory dismissal on grounds of sexual orientation is only foreseen in some countries.[212] In some other countries (including the Netherlands and Sweden) the same effect is accomplished by the nullity or voidability of discriminatory dismissal (which also applies in France and Italy).
- Little is known about the remedies available in case of discrimination against a job applicant. It seems reasonable to require that, in cases where he or she would have been appointed if he or she had not be discriminated against, sanctions more specific than the recovery of damages should be available. Options include a judicial order to start a new selection procedure, or a judicial order to offer the job to the discriminated applicant. In Italy the latter option seems possible according to case law, and in Spain according to academic legal writers. The courts in some countries (including

[210] See 2.5.4 above.

[211] Namely: Austria, Belgium, Denmark, Finland, France, Italy, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[212] Namely: Austria, Belgium, France, Italy, Ireland, Portugal and Spain.

Portugal, Sweden and the United Kingdom) apparently lack the power to order that a job applicant must be hired.
- In addition to damages, nullity, voidability and reinstatement, some countries foresee a number of non-financial measures, which could be indicated as good practices. In Ireland courts have ordered the creation of an equal opportunities policy, the re-training of staff, and the changing of recruitment procedures. In Italy the Decree implementing the Directive explicitly allows courts to order a plan for removing discriminatory practices, or to order the publication of the court decision in a national newspaper.

In Portugal there are *administrative sanctions* which derive from the general rules on violations of the Labour Code. These administrative fines (up to 53,400 euro for intentional offences by legal persons with a turnover of more than 10,000,000 euro per year) can be imposed by the Labour Inspectorate. In Spain, too, administrative fines can be imposed by the Labour Inspectorate. In Austria administrative fines (up to 360 euro) apply for discriminatory job advertisements in the private sector. In Austria employers not abiding by the principle of equal treatment will automatically be excluded from federal public subsidies. In Italy public subsidies and public procurement contracts must be revoked if a company to which they were awarded is judicially convicted of discrimination. In serious cases the company may be excluded from such subsidies and contracts for up to two years. The (binding or non-binding) opinions of the specialised enforcement bodies in Austria, Ireland, France, Netherlands and Sweden also fall under the category of administrative sanctions.[213]

It could be argued that by only providing sanctions that must be imposed by a court (rather than by an administrative body), Belgium, Denmark, Finland, Italy and the United Kingdom have not taken all 'measures necessary to ensure' that sanctions are applied (as required by article 17 of the Directive). Accordingly, the availability of administrative sanctions (through specialised bodies or otherwise) in some of the Member States[214] is arguably more than just a welcome good practice.

In *conclusion* it must be said that in many Member States the total repertoire of sanctions cannot be considered 'effective, proportionate and dissuasive':

- Austria can be criticised for not providing compensatory damages in case of discriminatory termination of employment.

[213] See 4.5.3 above.
[214] Namely: Austria, Greece, France, Ireland, the Netherlands, Portugal, Spain and Sweden.

- Austria, Finland, Ireland and Sweden can be criticised because of their upper limits imposed on compensation of damages.
- Belgium, Denmark, Finland and the United Kingdom could be criticised for not providing for nullity, voidability and/or reinstatement in cases of discriminatory termination of employment.
- Belgium, Denmark, Finland, Italy and the United Kingdom could be criticised for only providing sanctions that may be imposed by a court.

4.5.5 *Natural and legal persons to whom sanctions may be applied*

The uncertainties surrounding the definition of the personal scope of applicability of the Directive have already been highlighted.[215] Similar uncertainties resurface when it comes to determining who will be subjected to the different kinds of sanctions supplied in the Member States, because the Directive does not explicitly specify this.

At the very least it seems reasonable to require that sanctions can be applied against the contractual employer (and against the employer with whom a job applicant has a pre-contractual relationship).[216] Contractual sanctions such as invalidity of the discriminatory measure, reinstatement and or contractual damages can and must be applied to the formal employer, regardless of the actual person who acted discriminatorily. When the employer is a legal person, there may be a problem with penal sanctions, because the law of some countries (including Luxembourg and Italy) does not recognise criminal liability of legal persons.

However, there are also situations where the discrimination is not actually perpetrated by an employer (nor by an agent of the employer). This can be the case where the workers are employed by a company or organisation (for example a job agency) other than the one where they are in fact working, or where someone is harassed or otherwise discriminated by a boss, co-worker or client. The question then arises whether the sanctions can (also) be applied to the actual perpetrators. In most of the twelve Member States the rules are formulated in a way that generally does not preclude the application of sanctions to others apart from the contractual employer.[217] In Denmark, Finland, Spain and the United Kingdom, on the other hand, most sanctions can only be applied to employers (or to the employer who uses the employees of a job agency, as in Finland, or to

[215] See 4.2.8 above.

[216] Where an organisation of employers, workers or professionals acts in a discriminatory way, the sanctions can be applied against that organisation, but no Member State has felt the need to make that explicit, since it clearly follows from substantive and procedural rules.

[217] Namely: Austria, Belgium, France, Ireland, Italy, Netherlands and Portugal.

the accomplices of employers, as in Spain and the United Kingdom). Such a limitation does not seem to be compatible with the Directive: for sanctions to be effective and dissuasive, at least some must be applicable to the actual perpetrators.

When the employer is liable, this normally includes responsibility for acts of an employee of the employer. While this is explicitly stated in the United Kingdom,[218] in many other countries the same follows from general rules, sometimes with substantial limitations (as for example in Portugal,[219] where legal persons are only liable to administrative sanctions for conduct of a manager or employee if the discrimination was condoned by someone with the power to act in their behalf).

Also in the case of harassment it seems reasonable to require that (at least some) sanctions should be applicable both to the natural person who harasses (for example a boss, co-worker or client) and to the formal employer (unless the harassment cannot be said to have taken place 'in relation to' any of the aspects of the material scope listed in article 3(1) of the Directive). This double responsibility is not made explicit in the legislation of most countries, with the exception of *Spain* and *Austria*. However, in Spain the administrative sanctions on harassment by a co-worker or manager can only be imposed on the employer if the conduct took place within the employer's sphere of managerial competence, or if the latter knew about the harassment and did not take the necessary measures to prevent it. And in Austria compensation for harassment by co-workers or third persons can only be claimed from the employer only if the latter, by intent or carelessness, did not take the necessary measures to prevent it. Without double responsibility, sanctions on harassment can hardly be considered effective and dissuasive.

In *conclusion* it could be said that at least Austria, Denmark, Finland, Spain and the United Kingdom seem to have drawn the circle of persons to whom sanctions may be applied too narrowly.

4.5.6 *Awareness among law enforcers of sexual orientation issues*

To promote an adequate application of the prohibitions of sexual orientation discrimination, it may well be useful to enhance the awareness of sexual orientation issues among law enforcers (e.g. police, prosecutors, judges, members of equality bodies, counsellors, etc.). An example of such a good practice can be found in Sweden, where both public prosecutors and judges are regularly trained

[218] See Wintemute 2004, para. 17.2.5.

[219] See 4.5.4 above, and Freitas 2004, para. 14.5.4.

by the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation.

Such increased awareness would also foster the victims' confidence in the effectiveness of legal remedies. Unfortunately, often a situation of diffidence or mistrust among victims seems to be the case.[220] In Ireland, Netherlands and Sweden there is room for a less pessimistic view.

4.5.7 *Standing for interest groups (article 9(2))*

According to article 9(2) of the Directive, Member States must ensure that 'associations, organisations or other legal entities which have […] a legitimate interest in ensuring that the provisions of this Directive are complied with', can play a role in the enforcement of the prohibitions of discrimination. The expression 'associations, organisations or other legal entities' is sufficiently broad to encompass not only trade unions, but also other interest groups, such as associations for the defence of a particular professional category, or associations for the defence of LGB rights. The only condition established by the Directive is that such groups must have a legitimate interest ('in accordance with the criteria laid down by their national law') in ensuring the enforcement of the Directive. It is often the case that national law requires that the objective of safeguarding the relevant interests (e.g. worker's rights, gay rights, etc.) is stated in the founding charter of the association, or even that the group is recognised by a governmental body. Countries that only allow trade unions to play a role (as is the case in Italy, Portugal, Spain,[221] and Sweden), fall short of the minimum requirements of the Directive. Also falling short is Austria, where only one specific non-governmental (umbrella) organisation can play a role in court, and only with respect to private employment.

Legal standing for interest groups is often a controversial issue. The Directive does not go so far as to require that interest groups are allowed to take part in procedures for the enforcement of a collective right, but only that they 'may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. Although autonomous legal standing in case of patterns of discrimination, discriminatory advertising or discrimina-

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[220] See Borrillo 2004, para. 7.5.6, Peponas 2004, para. 9.5.6, Fabeni 2004, para. 11.5.6, and Freitas 2004, para. 14.5.6.

[221] In Spain only trade unions can act in the name of individual members, but other interest groups can represent groups of workers that are not individually identified; see Rubio-Marín 2004, para.15.5.7.

tory collective agreements is the case in several Member States (France,[222] Italy,[223] Spain,[224] Sweden and the Netherlands), this may not be seen as a requirement of the Directive.

The wording of article 9(2) (unlike that of recital 29) could suggest that the choice between engaging 'on behalf of' and engaging 'in support of' (the complainant) should be left to the interest groups and complainants themselves, and should not be already made in the legislation. This interpretation is further supported by the fact that in many Member States 'acting in support' is already an option under general rules of procedure. If this interpretation were correct, then national laws which only allow an interest group to act 'in support of' (but not on behalf of) the victim, fall short of the Directive's requirements (this is the case in Austria, Denmark, Finland and the United Kingdom).[225]

In some other countries (Ireland, Spain and Sweden) 'engaging on behalf of' appears to be understood in the sense that the wronged party is 'represented' by the interest organisation, meaning that the organisation acts as legal counsel. Such a minimal interpretation of the words 'on behalf of' does not seem compatible with the Directive, because this would make the words 'with his or her approval' in article 9(2) superfluous. That such representation in Ireland is not possible in the appeal courts, is also incompatible with the Directive.[226]

In the other five Member States 'engaging on behalf of the complainant' is (correctly) understood as the interest organisation itself becoming party in the proceedings against the person accused of discrimination (Italy,[227] Portugal,[228] Belgium, France and the Netherlands).

In *conclusion* it can be said that at the very least Austria and Ireland are giving interest groups too limited a role in enforcement procedures, and that Austria,

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[222] In France standing is granted under article 2-6 of the Code of Criminal Procedure (but the legislature has omitted to add 'sexual orientation' next to *'moeurs'* in this provision; and criminal prohibitions in France do not cover the whole material scope of the Directive), and also under article L411-11 of the Labour Code (but that right is reserved for trade unions). See Borrillo 2004, para. 7.5.7.

[223] In Italy only trade unions have standing in cases of collective discrimination; see Fabeni 2004, para. 11.5.7.

[224] In Spain only according to case law; see Rubio-Marín 2004, para. 15.5.7.

[225] Recital 29 holds the view that the required standing for associations or legal entities is 'without prejudice to national rules of procedure concerning representation and defence before the courts'. It appears that at least one Member State (Finland) is relying on this statement to justify a complete lack of legal standing for interest groups. See Hiltunen 2004, para. 6.5.7.

[226] See Bell 2004, para. 10.0.

[227] But only for trade unions, see above.

[228] Idem.

Italy, Portugal, Spain and Sweden are violating the Directive by excluding most interest groups from this role.

4.5.8 *Burden of proof of discrimination (article 10)*

Article 10(1) of the Directive requires measures to ensure that when persons who consider themselves wronged 'establish […] facts from which it may be presumed that there has been direct or indirect discrimination' the respondent shall have to 'prove that there has been no breach of the principle of equal treatment'. As already indicated in the discussion of the difficulty of proving that something was done 'on grounds of' sexual orientation,[229] shifting the burden of proof is an essential part of the effective application of the principle of equal treatment. A shift of the burden of proof has now been enacted with respect to sexual orientation discrimination in all twelve countries, though not always in full conformity with the Directive:

- The legislation in the United Kingdom and Portugal does provide a shift in the burden of proof, but it requires the alleged victim to 'prove' facts, a wording that may be more stringent than the Directive allows. In Portugal the provision on the burden of proof also requires the victim to point to 'the worker or workers in regard to whom he or she believes to have been discriminated against'; such a requirement is not in line with article 2(2)(a) of the Directive, which uses the words 'would be treated'.
- In Italy the relevant provision is very narrowly worded, and does not specify that it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Similarly in Austria the respondent only has to establish facts from which it may be presumed that there has been no discrimination; after such establishing of facts the burden of proof shifts back to the victim.
- In France the shift in the burden of proof is so far only provided for private employment, not for public employment.

In *conclusion* it can be said that Austria, France, Italy, Portugal and possibly the United Kingdom have not correctly implemented the Directive's requirement of a shift in the burden of proof.

4.5.9 *Burden of proof of sexual orientation*

Recital 31 begs the question as to whether the complainant of discrimination on grounds of sexual orientation is required to disclose and 'prove' a particular sexual

[229] See 4.2.3 above.

orientation. As discussed above,[230] this question only becomes relevant if one concludes – contrary to both a textual and a purposive interpretation of article 2(2) of the Directive – that only discrimination on grounds of the victim's own sexual orientation must be prohibited. The possessive pronoun used in front of 'sexual orientation' in the legislation of *France* seems to imply the duty to allege (and perhaps 'prove') the sexual orientation of the victim. It follows from the wording chosen with respect to indirect discrimination in the *United Kingdom* that the victim may have to allege his or her sexual orientation, although he or she will not be required to 'prove' it.

Apart from the incompatibility of these requirements with the Directive, it also would almost always be impossible for someone to 'prove' his or her sexual orientation, and it would almost always be a violation of the right to privacy to require someone to disclose his or her sexual orientation.

The *conclusion* must be that in anti-discrimination proceedings in France and the United Kingdom the victim may sometimes have to disclose his or her sexual orientation. This is not compatible with article 2(2) of the Directive.

4.5.10 *Victimisation (article 11)*

The protection of employees from dismissal and other adverse treatment 'as a reaction to a complaint within the undertaking or to any legal proceeding aimed at enforcing compliance with the principle of equal treatment' is a clear requirement set by article 11 of the Directive. Nevertheless not all Member States have implemented it correctly:

- In Italy victimisation as such is not explicitly prohibited, but if a prohibited act of discrimination takes place as retaliation to an earlier complaint or judicial decision about discrimination, the judge must take this into account when fixing the amount of compensation for non-pecuniary damages.[231] In Austria the reverse situation applies: a prohibition of victimisation applies, but with no sanctions attached to it.[232]
- It appears from the very broad wording of article 11 ('reaction to *a* complaint within the undertaking or to *any* legal proceeding') that protection should apply not only to the employee wronged by discriminatory acts, but also to other employees in any way linked to a complaint or proceeding (such as a colleague willing to testify against the employer, or even employees who do not explicitly take the side of the employer). Nevertheless, the

[230] See 2.3.1 and 4.3.1 above.
[231] See Fabeni 2004, para. 11.5.10.
[232] See Graupner 2004, para. 3.5.4.

protection enacted in Belgium and Denmark is only offered to the complainant, in France only to the complainant and to witnesses, and in the Netherlands the protection is limited to the complainant and employees who have supported the complainant.

The *conclusion* must be that adequate protection against victimisation is only provided in Finland, Ireland, Portugal, Spain, Sweden and the United Kingdom.

4.6 Reform of existing discriminatory laws and provisions

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

Apart from introducing an adequate prohibition of sexual orientation discrimination, the Member States also had to remove such discrimination from primary and secondary legislation. In the words of article 16(a) of the Directive, the Member States had to take the 'necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'. The phrase 'principle of equal treatment', defined in article 2(1) of the Directive, refers both to direct and indirect discrimination.

None of the Member States seem to have taken any measures to comply with article 16(a). And for none of them it was reported that a systematic scrutiny of legislation was carried out to discover what directly or indirectly discriminatory provisions could still be found in legislation in the field of employment and occupation.[233]

Any remaining discriminatory provision could be repealed or amended by the competent legislative or administrative body. In most countries the courts are also competent to deal with such a provision, by declaring it unlawful, void or non-binding, by annulling it, or by interpreting it in a non-discriminatory way. To that end most national courts can invoke the Directive and/or a constitutional or international non-discrimination clause. In some countries (including France) discriminatory provisions may have lost their validity through the operation of the principle that later laws take precedence over previous laws.[234]

The absence of any specific measures, with respect to *directly* discriminatory provisions, could be justified in most countries by the (likely) fact that such provisions can no longer be found in their primary and secondary legislation. As regards same-sex and different-sex cohabitants most countries either do not

[233] See for example Ytterberg 2004, para. 16.6.2.
[234] See for example Borrillo 2004, para. 7.6.1.

recognise them at all in employment legislation (for example Italy), or they do not distinguish between same-sex and different-sex cohabitants (for example in Denmark, France, Netherlands and Sweden). However, the possible existence of legislative provisions that directly discriminate on grounds of sexual orientation (mainly between same-sex and different-sex cohabitants), has been reported for Germany and the United Kingdom.[235] In France and Sweden, which until recently still had some differences between the legal position of different-sex and same-sex cohabitants, the last examples of direct discrimination have been abolished in 1999 and 2003 respectively.[236] It is expected that the same may soon happen in the United Kingdom.[237]

Examples of legislative provisions that can be said to *indirectly* discriminate on grounds of sexual orientation, however, can still be found in most Member States, including Austria, Denmark, Germany, Ireland, Spain and the United Kingdom.[238] Only for Finland, Netherlands and Sweden is it being claimed that such indirect legislative discrimination (in the field of employment) has been abolished effectively.[239]

As indirectly discriminatory provisions may be justified under article 2(2)(b) of the Directive, and because it is not certain that directly discriminatory provisions still exist, the *conclusion* must be that it is difficult to say in how many Member States the primary and secondary legislation is incompatible with article 16(a) of the Directive.

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

To comply with article 16(b) all twelve countries do provide that discriminatory provisions in collective agreements and/or other contracts are null and void, and/or they rely on general rules of law that entail nullity.[240] It is not always clear whether discriminatory internal rules, or discriminatory rules governing professions or organisations, are also affected by nullity.

Most Member States have not taken any specific measures to ensure amendment of such discriminatory provisions. Mostly they rely on the general sanc-

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[235] See 4.6.3 below.

[236] See Borrillo 2004, para. 7.6.1 and 7.3.3, and Ytterberg 2004, para. 16.6.2.

[237] See Wintemute 2004, para. 17.6.1 and 17.3.3.

[238] See 4.6.3 below.

[239] See Waaldijk 2004, para. 13.6.4, and Ytterberg 2004, para. 16.6.2.

[240] In Portugal discriminatory provisions in collective agreements will only be considered null and void if they are not repealed within one year following the enactment of the Labour Code in December 2003. See Freitas 2004, para. 14.6.3.

tions available in discrimination cases,[241] which may induce the relevant employers and organisations to amend their discriminatory provisions. However, in a few countries the legislation is more specific. In Finland the courts have been given the power to change or ignore discriminatory provisions in contracts;[242] in Ireland the Employment Equality Act actually inserts equality clauses into every employment contract and these clauses would modify any discriminatory clause in the same contract;[243] and in Sweden an employee has a right to demand that his or her employer amends a discriminatory contractual provision.[244]

It is hardly known how many contracts, collective agreements, internal rules, etc. still contain discriminatory provisions.[245]

The *conclusion* must be that it is not certain that all Member States have taken all of the necessary measures required by article 16(b) of the Directive.

4.6.3 *Discriminatory laws and provisions still in force*

In primary and secondary employment legislation of most Member States, provisions that *directly* discriminate on grounds of sexual orientation no longer exist. Such provisions (mainly discriminating between same-sex and different-sex cohabitants) may still exist in *Germany* and the *United Kingdom*.[246]

An example of an apparently neutral law that due to its application might be indirectly discriminatory on grounds of sexual orientation can be found in *Spain*, where the Statute on the Disciplinary Regime provides that those sexual relations on military grounds that offend against military dignity could deserve a disciplinary sanction.[247]

In several countries (including Austria, Ireland, Italy, Portugal, Spain and the United Kingdom) employment legislation still contains provisions that could be said to be indirectly discriminatory, because they limit certain employment conditions to married partners only, thus excluding all same-sex partners. It is debatable whether such exclusion can be justified under article 2(2)(b) of the Directive.[248]

The same can be said about employment conditions (such as parental leave) that are only available to legal parents, thus excluding many same-sex partners

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[241] See 4.5.4 above.
[242] See Hiltunen 2004, para. 6.6.3.
[243] See Bell 2004, para. 10.6.3.
[244] See Ytterberg 2004, para. 16.6.3.
[245] See 4.6.3 below.
[246] See Baer 2004, para. 8.6.4, and Wintemute 2004, para. 17.6.1.
[247] See Rubio-Marín 2004, para. 15.6.4.
[248] See also 4.3.3 above.

who cannot adopt their partner's child,[249] or have not yet been able to do so because the adoption process takes time.[250]

It is not only direct discrimination in family law legislation that may lead to indirect discrimination in the field of employment. The remaining examples of direct sexual orientation discrimination in criminal law legislation (in Greece, Portugal and Ireland) may also lead to indirect employment discrimination.[251] 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.[252]

As far as contracts, collective agreements and internal rules are concerned, it is almost impossible to know whether any of these still contain provisions that are directly or indirectly discriminatory. In not one Member State has a systematic monitoring effort been made (by the government, by employers, or by any other organisation) to check for the existence of such discriminatory provisions. In most Member States there will still be many examples of indirect discrimination in contracts, collective agreements and internal rules. In some there still are some examples of direct discrimination in such documents.[253]

The same can probably be said about rules governing the independent occupations and professions, and about rules governing workers' and employers' organisations.

4.7 Concluding remarks

By 2 December 2003 fifteen Member States had to have implemented the Directive. They began from different legal and social starting points. Before the Directive was adopted in 2000, some Member States did already have legislation against sexual orientation discrimination in employment, but others did not.

Since the adoption of the Directive thirteen Member States have enacted implementing legislation with respect to sexual orientation discrimination. In Belgium, France, Italy, Portugal, Sweden and the United Kingdom this happened mostly before 2 December 2003. In Denmark, Finland, Netherlands, Spain, Austria, Ireland and Greece it happened after that deadline. By the summer of

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[249] For examples in Spain, see Rubio-Marín 2004, para. 15.6.4. See also 3.7 above.

[250] For an example in Denmark, see Baatrup 2004, para. 5.3.3 and 5.6.1.

[251] See 3.7 and 4.3.7 above.

[252] See 2 *European Anti-Discrimination Law Review* (2005) 69-70.

[253] For examples in Austria, see Graupner 2004, para. 3.6.4, and for an example in the Netherlands, see Waaldijk 2004, para. 13.6.4. See also Littler 2004.

2005, the proposals for implementing legislation were still being discussed in Germany and Luxembourg.

This chapter set out to assess whether the minimum requirements of the Directive are met by the legislation that has been enacted in *twelve* countries, i.e. all 'old' Member States except Germany, Luxembourg and Greece.[254] The conclusions of this critical implementation assessment can be found in the various paragraphs of this chapter. The most important of these conclusions have been summarised in table 8. The table highlights the certain or probable *major* shortcomings (indicated with 'X') and the possible *major* shortcomings (indicated with '?'). *Minor* shortcomings are not incorporated in the table.

In short, it has become clear that in many old Member States there appear to be major implementation problems with respect to:

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

[254] The first two countries because by the summer of 2005 their proposals for implementing legislation had not been adopted yet, and Greece because detailed information on its legislation that came into force early in 2005 was not available (see 4.1 above).

Table 8: Major shortcomings in the implementation of the Directive

X means that the implementation of a provision of the Directive is (certainly or probably) not completely correct;
? means that there is doubt about the correctness of the implementation of a provision of the Directive;
– means that the exception allowed by a provision of the Directive is not part of existing legislation;
✓ means that there do not seem to be major shortcomings in the implementation of a provision of the Directive.

	AUS	BEL	DNK	FIN	FRA	IRL	ITA	NLD	PRT	ESP	SWE	UK
article 1 'sexual orientation' (see 4.2.2 and 4.3 above)	✓	?	✓	X	X	✓	✓	?	✓	✓	✓	✓
article 2(2)(a) direct discrimination (see 4.2.3 above)	✓	✓	✓	✓	✓	✓	✓	✓	X	X	✓	✓
article 2(2)(b) indirect discrimination (see 4.2.4 and 4.3.3 above)	✓	?	✓	✓	X	X	X	?	✓	✓	✓	X
article 2(3) harassment (see 4.2.5 above)	?	✓	✓	✓	X	✓	✓	✓	✓	✓	?	?
article 2(4) instruction to discriminate (see 4.2.6 above)	✓	✓	✓	✓	X	✓	✓	✓	X	✓	X	X
article 2(5) rights of others, etc. (see 4.4.2 above)	–	?	–	–	–	X	X	X	–	–	–	X
article 3(1) material scope (see 4.2.7 above)	X	✓	✓	?	X	✓	?	✓	X	X	X	X
articles 3(1) & 2(2) personal scope (see 4.2.8 above)	✓	✓	?	✓	✓	?	✓	✓	✓	✓	?	?
article 4(1) occupational requirements (see 4.4.4 and 4.4.7 above)	✓	✓	X	X	–	✓	X	–	X	✓	?	X
article 4(2) religion based employers (see 4.4.5 and 4.4.2 above)	✓	–	?	–	–	X	?	X	–	–	–	X
article 7(1) positive action (see 4.4.6 above)	✓	✓	–	✓	–	✓	–	–	✓	✓	–	✓
article 9(1) procedures (see 4.5.3 above)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
article 9(2) interest groups (see 4.5.7 above)	X	✓	✓	✓	✓	X	X	✓	X	X	X	✓
article 10 burden of proof (see 4.5.8 above)	X	✓	✓	✓	X	✓	X	✓	X	✓	✓	?
article 11 victimisation (see 4.5.10 above)	X	✓	✓	✓	✓	✓	X	✓	✓	✓	✓	✓
article 17 sanctions (see 4.5.4 and 4.5.5 above)	X	?	?	X	✓	X	?	✓	✓	✓	X	?
article 18 implementation largely completed (see 4.2.1 above)	July 2004	Mar. 2003	April 2004	Feb. 2004	Nov. 2001	July 2004	Aug. 2003	April 2004	Dec. 2003	Jan. 2004	July 2003	Dec. 2003
	AUS	BEL	DNK	FIN	FRA	IRL	ITA	NLD	PRT	ESP	SWE	UK