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

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Chapter 5

IMPLEMENTATION OF THE DIRECTIVE IN THE TEN NEW MEMBER STATES AND IN THE TWO ACCEDING COUNTRIES¹

5.1 INTRODUCTION

A recent study on discrimination and violence against lesbian, gay, and bisexual (LGB) people, highlights in almost all new Member States a worrying level of social exclusion and a danger to personal safety.²

Problems deriving from prejudice and marginalisation exist in many areas, including employment. In this field, an important instrument to counter such problems is the Employment Equality Directive (2000/78/EC, hereafter the Directive).³ As of 1 May 2004 (date of their accession to the Union), the ten new Member States⁴ were bound to have implemented this Directive. In fact, the European Commission reiterated on numerous instances that the Directive is part of the *acquis communautaire* and that all of its provisions had to be incorporated in the Member States' legal orders.⁵

¹ This chapter is written by Matteo Bonini-Baraldi (mbonini@giuri.unibo.it), researcher, University of Bologna. To a large extent it is written on the basis of summaries outlining the main provisions against sexual orientation discrimination in employment, as enacted in most of the twelve countries covered in this chapter. These summaries have been contributed by lawyers who were acting as voluntary experts, namely: Mihaela Preslavska (Bulgaria), Haris Kountourous (Cyprus), Lucie Otáhalová (Czech Republic), Juris Lavrikovs (Latvia), Christian Attard (Malta), Krzysztof Smiszek (Poland), and Iustina Ionescu (Romania). Many thanks to them for their dedication and expertise. Most of these summaries can be found online at www.emmeijers.nl/experts. 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 the report *Meeting the challenge of accession 2004*; see also the report *Going beyond the law 2005*.

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

⁴ Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

⁵ See Press release IP/03/1337, 3 October 2003, *Anti-discrimination rules must be in place before accession*, online at www.stop-discrimination.info. See also information provided by the European Commission's Directorate-General for Enlargement, online at <http://europa.eu.int/comm/enlargement/negotiations/index.htm>.

This chapter aims at providing a general overview on the state of transposition of the Directive in most new Member States and in two acceding countries (Bulgaria and Romania, set to join the Union in 2007 or 2008), in addition to a tentative analysis of the conformity of national law with the provisions of the Directive.

The process of transposition in the ten new Member States was nearly completed by the end of 2004; only the Czech Republic was missing from the list of states that had notified the Commission that they had implemented the Directive,⁶ but it finally did so in 2005.

The first five states that took some explicit steps in banning sexual orientation discrimination were:

Slovenia

- Penal Code (article 141), in force since 1 January 1995;⁷
- Employment Relations Act, in force since 1 January 2003;⁸
- Implementation of the Principle of Equal Treatment Act, in force since 7 May 2004.

Romania

- Ordinance 137/2000, in force since 2 November 2000, modified by Law 48/2002 and Law 27/2004;
- Labour Code (Law 53/2003), in force since 1 March 2003.⁹

Czech Republic

- Labour Code (Act 65/1965), as amended (*inter alia*) by Act 155/2000 (in force since 1 January 2001) and by Act 46/2004 (in force since 1 March 2004);
- Act 221/1999 on Members of the Armed Forces, as amended by Act 155/2000 (in force since 1 January 2001) and by Act 254/2002 (in force since 28 June 2002);

⁶ See *Equality and non-discrimination* 2005; and 1 *European Anti-Discrimination Law Review* (2005), 32.

⁷ Article 141 of the Penal Code (1995) contains an explicit prohibition of sexual orientation discrimination. This provision stipulates: 'Who – on the ground of nationality, race, colour, religion, ethnic group, gender, sexual orientation, financial status, birth, education, social status, or any other circumstance – discriminates against someone in any human rights and fundamental freedoms, accepted by international community or stated by the Constitution or by law; or who limits any of these rights or freedoms; or who grants any special rights or privileges on this ground; must be punished with a fine or imprisonment of up to 1 year' (see Greif 2001, 69; and Tratar et al. 2004/2005, 6).

⁸ Notably article 6(1), see Tratar et al. 2004/2005, 5. See also *Opinion on the situation of homosexuals in Slovenia* 2005, 4.

⁹ See Ionescu 2005. The Unique National Level Collective Agreement no. 1285 of 17 June 2002, for 2002-2003, also expressly bans discrimination on grounds of sexual orientation: see Weber 2003, 6. On the developments in Romania see also Cârstocea 2006.

- Act 435/2004 on Employment, in force since 1 October 2004;¹⁰
- Act 361/2003 on Members of the Security Forces (article 16(4)), not yet in force;¹¹
- Act 218/2002 on Civil Servants (article 80(2)), not yet in force.¹²

Lithuania

- Penal Code (article 169), in force since 1 January 2003;¹³
- Labour Code, in force since 1 January 2003;
- Law on Equal Treatment, 2003, in force since 1 January 2005.

Poland

- Labour Code, amended in 2003, in force since 1 January 2004;¹⁴
- Act on the Promotion of Employment and the Institutions of the Labour Market, 2004, in force since 1 June 2004.¹⁵

Concurrently or subsequently, the seven other states adopted specific legislation. These were:

Bulgaria

- Law on Protection Against Discrimination, 2003, in force since 1 January 2004.¹⁶

Hungary

- Act on Equal Treatment and the Promotion of the Equality of Opportunities, 2003, in force since 27 January 2004.¹⁷

¹⁰ This law replaces Act 1/1991 on Employment, which, as amended by Act 167/1999, already contained an explicit prohibition of sexual orientation discrimination since 1 January 2000.

¹¹ This law replaces Act 186/1992 on Members of the Police Force, as amended by Act 155/2000 (in force since 1 January 2001).

¹² See Boučková 2004/2005 and Otáhalová 2005. Note that in the Czech Republic a comprehensive anti-discrimination bill is currently being discussed in Parliament and was provisionally passed by the Lower Chamber on 7 December 2005.

¹³ See Platovas 2001, 44-45, and Vindrinskaite 2004/2005, 15. Vindrinskaite gives a translation of article 169 that does not include the words 'sexual orientation'; however, several other sources (including the *Lithuania Handbook of National Laws* 2005, 104-106) confirm that those words are in this article of the Penal Code.

¹⁴ See Filipek & Pamula 2004/2005.

¹⁵ This law replaces the Act on Employment and Counteracting Unemployment, where a provision in force since 6 February 2003 prohibited sexual orientation discrimination in job advertisements and by employment agencies when offering jobs. See Smiszek 2005, 2 and Pogodzinska 2006, 177.

¹⁶ See Preslavská 2005.

¹⁷ See Kádár & Farkas 2004/2005.

Cyprus

- Equal Treatment in Employment and Occupation Law, 2004, in force since 1 May 2004.¹⁸

Estonia

- Law on Employment Contracts, amended in 2004, in force since 1 May 2004.¹⁹

Slovakia

- Act 365/2004 on Equal Treatment in Certain Areas and Protection against Discrimination, in force since 1 July 2004, amending various laws, including Labour Code, Act on Civil Service, and Act on Military Service.²⁰

Malta

- Employment and Industrial Relations Act 2002, in force since December 2002, not explicitly including sexual orientation;²¹
- Equal Treatment in Employment Regulations, 2004, in force since 5 November 2004.

Latvia

- Labour Law, 2001, in force since 1 June 2002, with amendments in force since 8 May 2004 (sexual orientation not explicitly included to date, but discrimination on 'other' grounds is).²²

5.2 THE PROHIBITION OF DISCRIMINATION

In general terms, it is not surprising that discussions which led to legislative change in the new Member States and the two acceding countries (Bulgaria and Romania) resulted in a number of different approaches.

Interestingly, in some cases a single multi-ground law combines the level of protection offered by the Racial Equality Directive and the Employment Equal-

¹⁸ See Kountouros 2005 and Trimikliniotis 2004/2005.

¹⁹ See Poleshchuk 2004/2005.

²⁰ See Dlugosova 2004/2005, 9.

²¹ The Employment and Industrial Relations Interpretation Order (Legal Notice 297 of 2003) refers explicitly to sexual orientation, but on a closer look it was not considered sufficient to ensure proper implementation of the Directive; see Attard 2005, 2-3. See also Ellul 2004/2005.

²² Amendments to various laws have been prepared by the Secretariat of the Minister for Special Assignment for Society Integration Affairs and are currently awaiting final approval by Parliament; these amendments aim at including sexual orientation among the protected grounds and at removing further inadequacies of current legislation (such as applicability to civil and military service and standing for interest groups). Information provided by Juris Lavrikovs. See also Feldhune 2004/2005, 3.

ity Directive: this often implies that sexual orientation discrimination is banned not only in employment but also in other areas, or that any specialised body might play a role with respect to the enforcement of rights of LGB people. A multi-ground law, for instance, can be found in Hungary, Lithuania, Slovenia, Bulgaria, and Romania.²³ In Cyprus, where the prohibition of sexual orientation discrimination only applies with respect to employment and occupation, the law has nonetheless gone further than the Directive, because it allows the Ombudsman to investigate complaints of discrimination based on sexual orientation.²⁴

It is also encouraging to note that the process of implementation prompted the *Bulgarian* legislature to include sexual orientation in the anti-discrimination provisions of other existing laws, such as the Law on protection against unemployment and occupational encouragement (article 2), the Social security code (articles 231 and 283), the Social welfare law (article 3), the Labour code (article 8), and the Ordinance for the recruitment procedure for state servants (article 16). The new Health law (in force since 1 January 2005) also includes sexual orientation in its anti-discrimination provision (article 85).²⁵ It is to be hoped that the legal changes triggered by the Directive in the field of employment will continue to be supplemented in other countries as well, by more thorough and far-reaching adjustments of this kind.

In some instances, national lawmakers chose to adopt new, overarching anti-discrimination laws, sometimes setting rules applicable in many areas of civil life (employment, education, health, etc.); in other instances, single anti-discrimination clauses were inserted into each law aimed at regulating a specific sector (the diffusive approach), thus preserving the old system. This often augmented the complexity and obscurity in a matter, namely that of fundamental rights, that would require greater clarity.

Moreover, in some respects the new measures aim at going beyond the requirements of the Directive, whilst in other instances they fail even to comply with some of its basic tenets. As far as employment is concerned, criticism of earlier measures sometimes led to further changes in those countries that had already legislated on sexual orientation discrimination.

It must be pointed out that some countries showed a less than hidden antipathy for embracing sexual orientation as a prohibited ground of discrimination;

²³ In Slovakia the multi-ground Act makes a distinction between discrimination on grounds of sex, race and national or ethnic origin, which is prohibited in a number of areas, and discrimination on grounds of, *inter alia*, sexual orientation, prohibited only in employment.

²⁴ See 5.4.2 below.

²⁵ See Preslavská 2005, 7.

some of them were subjected to repeated calls from the Commission and the European Parliament to amend their laws or bills.²⁶ Whilst most countries have finally eliminated the most blatant examples of discriminatory (criminal) provisions and have embraced sexual orientation as a protected ground in their (employment) laws, *Latvia* still has not managed to bring its anti-discrimination law in line with the Directive in this respect. By the summer of 2005, the Latvian Welfare Ministry had just elaborated a new proposal for amending articles 7 and 29 of the Labour Law to include sexual orientation in the ban on discrimination. The proposal has passed a second reading as of December 2005; but in the past years numerous attempts to include sexual orientation in article 7 were repeatedly rejected by the parliamentary Human Rights and Social Affairs Committee. However, it seems that courts have been willing to read-in sexual orientation because of the open-ended clause of article 29(9).²⁷ For this reason, and because it is possible that in the near future sexual orientation will be explicitly added to the list of protected grounds, Latvian law will be examined, in the following pages, alongside that of the other Member States; the reader should, however, be advised once again that the current implementing law has left sexual orientation out of the picture.

A closer look will now be taken at the definitions adopted by various national laws.

5.2.1 *Direct and indirect discrimination (article 2(2))*

Though great caution should be exercised when dealing with unofficial translations of foreign law, with regards to the definitions of direct and indirect discrimination countries may be split in two groups. Sometimes the notion of what constitutes discrimination is taken almost *verbatim* from the provisions of the

²⁶ Examples of the deliberate exclusion of sexual orientation from new employment legislation are Malta, Latvia, and Slovakia (see Bell 2003(a), 37). During negotiations for accession, the European Parliament kept under close scrutiny any development with respect to the repeal of discriminatory rules for LGB people in Bulgaria, Cyprus, Hungary, Estonia, Lithuania, and Romania (see the Fact sheets at www.europarl.eu.int/enlargement, under 'State of Negotiations'). Examples of the repeal of discriminatory criminal laws, after calls from the Commission and the Parliament, concurrent or even subsequent to new employment anti-discrimination legislation, could be found in Bulgaria (2002), Cyprus (2002), Estonia (2002), Lithuania (2003), and Romania (2001). This positive development may be seen as another beneficial – though indirect – effect of the process triggered by the Employment Equality Directive (and, of course, by already existing Strasbourg case law; see 3.4 above).

²⁷ *Rigas pilsētas Ziemeļu rajona tiesa* (Court of the Ziemeļu District of Riga) 29 April 2005, case of *Māris Sants pret Rīgas kultūras vidusskolu*, No. C32242904047505, C-475/3 (Latvian version of the judgement online at www.politika.lv/index.php?id=111436&lang=lv). See also Lavrikovs 2005, 5.

Directive or echoes them rather closely, whereas in other instances a peculiar wording is chosen.

Among countries that fall in the first group we find Cyprus, Lithuania, Malta, Slovakia, Slovenia and Bulgaria.

In *Cyprus*, the Equal Treatment in Employment and Occupation Law – which implements both Directives, except for disability – defines in article 2 both direct and indirect discrimination by repeating the terms chosen by the Directive.²⁸ The same can be said for the definitions adopted in *Slovakia*²⁹ and *Slovenia*, although in the latter the definition of indirect discrimination adds the need to verify that the neutral provision operates in equal or comparable situations and under alike conditions, and substitutes ‘particular disadvantage’ with ‘less favourable position’.³⁰

In *Lithuania*, the Law on Equal Treatment defines direct discrimination by using the same terms of the Directive (but adds a list of exceptions),³¹ whilst indirect discrimination focuses on advantage rather than disadvantage and does not foresee a justification system.³² In *Malta*, definitions which mirror the Directive are provided by one of the two instruments used to implement it, the Equal Treatment in Employment Regulations (October 2004); the other is the Employment and Industrial Relations Act (2002), which in its article 2 defines discrimination in much vaguer terms.³³ Sexual orientation is explicitly included only in the regulations, which might be considered to incorporate provisions that appear to be *ultra vires*, thus casting doubt on their legality in some respects.³⁴

In *Bulgaria*, article 4(2) of the Law on Protection Against Discrimination replicates the Directive’s definition of direct discrimination,³⁵ whereas as far as

²⁸ See Kountouros 2005, 4.

²⁹ See Dlugosova 2004/2005, 14-5.

³⁰ See Tratar et al. 2004/2005, 7-8.

³¹ See 5.3.3 below.

³² According to article 2(4), indirect discrimination occurs when an action or inaction, legal norm, criterion, provision or practice, apparently neutral, gives rise to a restriction of the enjoyment of rights or provides privileges, priorities or advantages for people of a certain sexual orientation. Translation of the law provided by Ms. Laima Vengale of the Office of the Equal Opportunities Ombudsman.

³³ ‘Any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association’: see text provided by Attard 2005, 4. See also Ellul 2003, 6.

³⁴ See Attard 2005, 5-6.

³⁵ Direct discrimination shall be ‘any less favourable treatment of a person on the grounds, referred to in paragraph 1, than another person is, has been or would be treated under comparable circumstances’.

indirect discrimination is concerned article 4(3) speaks about a 'less favourable position' rather than a 'particular disadvantage', but this seems compatible with the Directive.³⁶

Among the second group – that of countries which show greater departures from the Directive – are the Czech Republic, Estonia, Hungary, Latvia, Poland, and Romania.

In the *Czech Republic*, article 1(6) of Act 65/1965 (the Labour Code), states that 'direct discrimination shall be taken to occur where an employee is, has been or would be treated less or more favourably than another employee on specified grounds of discrimination'.³⁷ A similar definition also appears in the Act on Employment (435/2004), which adds that different treatment must concern people placed in a comparable situation; this is also the case in the Act governing service in the security forces. No definition of direct discrimination seems to have been incorporated in the Act on Members of the Security Forces and in the Act on Civil Servants.³⁸

With respect to indirect discrimination, article 1(7) of the Czech Labour Code defines the concept as referring to 'a conduct or omission where an apparently neutral decision, distinction or promotion on the part of the employer advantages or disadvantages an employee at the benefit or expense of another as a result of the grounds of discrimination specified'.³⁹ A similar definition appears in Act 435/2004 concerning access to employment (article 4(6)) which adds a justification system in line with the directive (though the aim must be objective, and not legitimate). On the other hand, the laws on the armed forces (Act 221/1999) and on the civil service (Act 218/2002) outlaw any conduct that is discriminatory in its consequences, whereas the law on the security forces (Act 361/03) considers as indirect discrimination any conduct which is apparently non-discriminatory that disadvantages a member in comparison with another member on the basis of specific reasons.⁴⁰

In *Estonia*, the law speaks of unequal treatment rather than discrimination: article 10(2)(2) reproduces the wording of the Directive, but limits the choice of

³⁶ Article 4(3): 'Indirect discrimination shall be to put a person, on the grounds referred to in paragraph 1, in a less favourable position in comparison with other persons by means of an apparently neutral provision, criterion or practice, unless the said provision, criterion or practice have objective justification in view of achieving a lawful objective and the means for achieving this objective are appropriate and necessary'. See the translation at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lgac_en.htm.

³⁷ As translated by Otáhalová 2005, 6.

³⁸ See also Boučková 2004/2005, 17 ff.

³⁹ In the translation of Otáhalová 2005, 7.

⁴⁰ See Otáhalová 2005, 7.

the comparator to 'another person applying for employment or another employee',⁴¹ whilst the Directive is slightly more permissive in this respect because it only speaks of 'another [person]'. The same criticism could be directed towards the definition of indirect unequal treatment of article 10(2)(3), which speaks of 'a particular disadvantage compared with other employees or persons applying for employment'.⁴²

In *Hungary*, the definition of direct discrimination given by article 8 of the implementing Act is somewhat incomplete, because it does not allow for a past or hypothetical comparison (the words 'has been' and 'would be treated' have been left out). Another worrying aspect of Hungarian legislation is that the law foresees the possibility of justifying direct discrimination: article 7(2) stipulates that 'an action, conduct, omission, requirement, order or practice based on a characteristic listed in article 8 shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'.⁴³ As far as indirect discrimination is concerned, article 9 of the Hungarian act provides that 'a provision not deemed as direct discrimination and ostensibly meeting the requirement of equal treatment is deemed as indirect discrimination if it puts individual persons or groups with characteristics specified in article 8 in a significantly disproportionately disadvantageous situation compared to a person or group in a comparable situation'. This definition is problematic from several perspectives: first, it only refers to 'a provision', thus leaving out discriminatory criteria and practices; second, it requires a comparison with people 'in a comparable situation'; and third, because the general justification test seen above applies, it fails to anchor the possibility of justifying indirect discrimination to a legitimate aim and to appropriate and necessary means. Clearly all of this is unacceptable according to the Directive.

Article 29(5) and (6) of the Labour Law of *Latvia* define direct and indirect discrimination on the basis of gender, and article 29(9) extends the ban on gender discrimination to several other grounds; while sexual orientation has been deliberately excluded, there is an open-ended clause ('or other circumstances') which, nevertheless, cannot be regarded as sufficient transposition.⁴⁴ Latvian law foresees a sound definition of direct discrimination,⁴⁵ whilst it stipulates

⁴¹ See Poleshchuk 2004/2005, 12.

⁴² Poleshchuk 2004/2005, 12.

⁴³ See Kádár & Farkas 2004/2005, 9-10.

⁴⁴ See case law cited in 2.2.1 above.

⁴⁵ Article 29(5) stipulates that 'Direct discrimination exists if in comparable situations the person, based on her [gender], is, was or may be treated less favourably than another person'; see Feldhune 2004/2005, 10.

that indirect discrimination ‘exists if in comparable situations an apparently neutral provision, criterion or practice cause adverse consequences for persons belonging to one [gender], except in cases where such provision, criterion or practice is objectively justified by a legitimate aim, the means for attaining which are proportionate’.⁴⁶ This definition substitutes ‘particular disadvantage’ (article 2(b) of the Directive) with ‘adverse consequences’ which, although it leaves out an important part of the Directive’s definition, namely the reference to disadvantage, could be considered as a minor departure from the spirit of the provision. More importantly though, it does not make reference to the *necessity* of means used for achieving the aim.

In *Poland*, the Directive was implemented through amendments to the Labour Code (2003) and the adoption of the Act on Promotion of Employment and the Institutions of Labour Market (April 2004).⁴⁷ The former defines direct discrimination by following the Directive very closely, but limits the definition to ‘one employee’, rather than ‘one person’ (article 18(3)(a)(3)).⁴⁸ By contrast, the provision which defines indirect discrimination (article 18(3)(a)(4)) seems to be somewhat more problematic: it requires that ‘particular disadvantage’ is caused by ‘disproportions with respect to the employment conditions’ and that it is assessed with respect to ‘other employees’ (rather than ‘other persons’); furthermore, whilst the Directive speaks of particular disadvantage of ‘persons’, the Polish rule is limited to ‘all or some of the employees’. More importantly, it contains a very loose justification system (‘unless these disproportions can be objectively justified’), with no reference to the legitimate aim, or to appropriate and necessary means.⁴⁹

In *Romania*, sexual orientation discrimination in employment is tackled both by the Labour Code and by the 2000 Ordinance. Article 2(1) of the latter contains a broad definition of discrimination that stems from the elaboration of international bodies.⁵⁰ This did not seem sufficient for correct implementation

⁴⁶ See Feldhune 2004/2005, 11 (para. 2.3). The translation by the Translation and Terminology Centre, online at www.ttc.lv/New/lv/tulkojumi/E0223.doc, is slightly different. The text of the Labour Law is also published in Feldhune 2003, 35.

⁴⁷ See Smiszek 2005.

⁴⁸ Idem; Filipek & Pamula 2004/2005, 10.

⁴⁹ See the English version as provided in Smiszek 2005, 3.

⁵⁰ Article 2(1): ‘According to the ordinance herein, the term “discrimination” shall encompass any difference, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, belief, sex or sexual orientation, appurtenance to a disfavoured category or any other criterion, with the aim of or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’ See Weber 2003, 7.

of Community law. By contrast, article 5(3) of the Labour Code more correctly stipulates that 'a direct discrimination shall be represented by actions and facts of exclusion, differentiation, restriction, or preference, based on one or several of the criteria stipulated under paragraph (2), the purpose or effect of which is the failure to grant, the restriction or the rejection of the recognition, use, or exercise of the rights stipulated in the labour legislation'.⁵¹ As far as indirect discrimination is concerned, the definition is the following (article 5(4)): 'an indirect discrimination shall be represented by actions and facts apparently based on other criteria than those stipulated under paragraph (2), but which cause the effects of a direct discrimination to take place'.⁵² It is evident that both definitions are quite distant from a sound implementation of the corresponding concepts embraced by the Directive.

The *conclusion* is that the law in the Czech Republic, Estonia, Hungary, Latvia, Poland, and Romania does not fully comply with the provisions of the Directive at least as far as the definitions of direct and/or indirect discrimination are concerned.

5.2.2 *Harassment (article 2(3)) and instruction to discriminate (article 2(4))*

If a number of countries have taken significant steps for defining, in a sound fashion, concepts of direct and indirect discrimination, efforts aimed at defining harassment did not always result in particularly clear choices. This could be partially attributed to the widespread novelty of such a concept.

Nine countries see both harassment and instruction to discriminate as a form of discrimination. These are: Estonia,⁵³ Hungary,⁵⁴ Latvia,⁵⁵ Lithuania,⁵⁶ Malta,⁵⁷ Poland,⁵⁸ Slovakia,⁵⁹ Slovenia,⁶⁰ and Bulgaria.⁶¹

⁵¹ See the translation of the Labour Code at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lgac_en.htm.

⁵² Idem.

⁵³ Articles 10(2)(4) and 10(2)(5) of Law on Employment Contracts.

⁵⁴ Following article 10(2) of the implementing Act, 'harassment is a conduct violating human dignity related to the relevant person's characteristic defined in article 8 with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment' (as translated by Kádár & Farkas 2004/2005, 12). Note that, in contrast with the Directive, in this definition 'purpose or effect' is only referring to the creation of a negative environment, and not to the violation of human dignity. Instruction to discriminate is prohibited as a form of discrimination by article 7(1).

⁵⁵ Article 29(4) and (7) of the Labour Law.

⁵⁶ Article 2(5) and (6) of the Law on Equal Treatment.

⁵⁷ Article 29 of the Employment and Industrial Relations Act 2002, and regulation 3(3) of the Equal Treatment in Employment Regulations.

⁵⁸ Articles 18(3)(a)(5) and (6), and 94(3)(1) of the Labour Code.

Some problematic definitions can be found in *Estonia* and *Slovenia*. In the former, the law adds to a definition of harassment that corresponds to the one used in the Directive, that harassment shall be taken to occur when ‘the person rejects such conduct or tolerates it for a reason that it affects his or her access to office or employment or in order to maintain the employment relationship, have access to training, receive remuneration or have access to other advantages or benefits’. This addition raises the question whether an unwanted conduct, tolerated for other reasons, would then not be considered harassment; such a conclusion would appear quite remote but, in any case, particularly unreasonable given the prevailing objective nature of the Directive’s provision on harassment.

In *Slovenia*, the law does not contain any reference to ‘purpose or effect’. Conversely, in *Malta*, the definition of harassment goes beyond the minimum standards of the Directive, because it does not require that the conduct violates both the dignity of the person *and* creates a ‘bad’ environment, either of the two circumstances being sufficient for finding discrimination. Moreover, regulation 3(4)(b), of the Equal Treatment in Employment Regulations, explicitly requires employers to take active steps in order to eliminate all forms of harassment in the workplace.⁶² With respect to instruction to discriminate, the Employment and Industrial Relations Act 2002 did not take any specific action, whereas the regulations replicate the language of the Directive.⁶³

Other Member States do not explicitly state that harassment ought to be regarded as a form of discrimination. For example in *Cyprus*, one of those countries that does correctly define harassment as an ‘unwanted conduct, expressed in words or deeds and related to one of the reasons listed [...], with the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’, the law does not make it explicit that harassment is a form of discrimination.⁶⁴ This could be problematic when other provisions of anti-discrimination law should play a role, for example in the sharing of the burden of proof. The same could be said for the

⁵⁹ Article 2(2) and (3) of the Anti-Discrimination Act.

⁶⁰ Articles 5(1) and 4(4) of the Implementation of the Principle of Equal Treatment Act.

⁶¹ Article 5 of the Law on Protection against Discrimination. See also additional provisions 1.1 (definition of harassment), 1.2 (definition of sexual harassment), and 1.4 (definition of incitement to discrimination).

⁶² See Attard 2005, 5; Ellul 2004/2005, 8, reports that harassment on grounds of sexual orientation is also prohibited by article 7.1.3.4 of the Public Service Management Code, laying down rules of conduct for public service employees.

⁶³ See regulation 3(4)(a).

⁶⁴ Article 2 of the Equal Treatment in Employment and Occupation Law, in the translation of Kountouros, 2005, 5.

Cypriot definition of instruction to discriminate, which does not appear to be considered as a form of discrimination. In *Romania*, whilst the 2000 Ordinance failed to tackle the issue, article 2(3)(1) of Law 27/2004 prohibits harassment but not explicitly as a form of discrimination; furthermore, the definition seems limited to behaviour that has the *effect* of creating a 'bad' environment, however with no reference to the purpose of the perpetrator.⁶⁵ As far as the prohibition of instruction to discriminate is concerned, it appears that the 2000 Ordinance had taken significant steps in this direction which, were nevertheless subsequently revoked by Parliament with Law 48/2002.⁶⁶

Some countries (Czech Republic, Bulgaria, Lithuania and Poland) see sexual harassment as separate from moral harassment or 'mobbing'; however, it does not necessarily follow that the law draws different consequences from this distinction, although this might sometimes happen to be the case. In fact, according to the English version of article 18(3)(a)(6) and article 94(3)(2),⁶⁷ in *Poland* sexual harassment must have 'purpose or effect', whilst mobbing must have 'purpose and effect', a criterion that violates the provisions of the Directive.

In the *Czech Republic* the Labour Code⁶⁸ distinguishes sexual harassment (conduct of a sexual nature) from harassment, but sees both of them as a form of discrimination, either in purpose or effect.⁶⁹ Act 435/2004 on Employment contains similar definitions in article 4. Instruction to discriminate apparently is not tackled as such; however, among commentators there seems to be some disagreement. For some, the Czech legal system prohibits *incitement* to discriminate, that is encouraging or pressing someone to discriminate, though it is doubtful whether it sees such conduct as a form of discrimination;⁷⁰ for others, article 1(4) of the Labour Code stipulates that instigating, instructing and inciting pressure in order to discriminate shall be deemed a form of discrimination (see also article 2(3) of law regulating the armed forces and article 77(2) of the law on the security services).⁷¹

The *conclusion* is that, as far as harassment is concerned, the law is still problematic in Cyprus, Estonia, Poland, Slovenia, and Romania; regarding instruc-

⁶⁵ See Ionescu 2005, 6.

⁶⁶ See Weber 2003, 9.

⁶⁷ As provided in Smiszek 2005, 3.

⁶⁸ Article 1(8), (9) and (10). See also article 7(2), as reported in Bukovská & Boučková 2003, 9.

⁶⁹ Other acts aimed at implementing the Directive give different definitions: article 2(4) of Act 221/1999 on service in the armed forces, article 77(2) of Act 361/2003 on service in the security forces, article 80(3) of Act 218/2002 on the civil service. See Otáhalová 2005, 7-8.

⁷⁰ Otáhalová 2005, 8.

⁷¹ Boučková 2004/2005, 25.

tion to discriminate, problems still exist in Cyprus, Romania, and perhaps in the Czech Republic.

5.2.3 *Material scope (article 3)*

The Directive provides protection in virtually all areas of the employment relationship, and even before or outside of it. National laws of the new and acceding countries, on the other hand, show some gaps in this respect. In particular, there seems to be a consistent lack of protection in the field of self-employment.

In fact, only two countries appear to be close to the wording and the substance of the Directive (Cyprus, article 4, and Slovakia, article 6). In most other Member States, provisions on material scope are quite compatible with the Directive in many respects, but some elements are lacking. For instance, in Malta and Latvia provisions on equal treatment do not apply to some or all areas of the public sector (e.g. civil service, police, and/or armed forces).⁷²

In the Czech Republic, Lithuania, and Poland⁷³ neither membership of or involvement in organisations of workers or employers, nor self-employment are explicitly covered; in Latvia, in addition to these two items, employment conditions and practical work experience seem to be missing, although the provision of the Labour Code might be considered non-exhaustive, as one can infer from the use of the formula 'in particular'.⁷⁴ In Malta, self-employment and work

⁷² See Cormack & Bell 2005, 40; Feldhune 2004/2005, 16. In Malta, article 48(1) of the Employment and Industrial Relations Act allows the Prime Minister to 'prescribe by regulations the applicability of any article or subarticle of Title I and of Title II of this Act to service with the government'. It is reported that no such regulation has been adopted thus far (Ellul 2004/2005, 13).

⁷³ Note that article 18(3)(b)(1) of the Polish Labour Code states that 'refusal to enter into or dissolution of an employment relationship, introduction of unfavourable payment scheme or other employment conditions, passing employees over for promotion or other employment benefits, and passing employees over for vocational training' is not a violation of equal treatment, if 'the employer can prove that the grounds for these actions were legitimate and objective'. This provision could be seen as an exception beyond the Directive, or an attempt to transpose the provision on genuine occupational requirements, or an even more doubtful attempt to transpose the provision on the burden of proof. See the translation provided by Smiszek 2005, 4.

⁷⁴ Article 29(1) of the Labour Law states that 'Differential treatment [...] is prohibited when establishing employment legal relationships, as well as during the period of existence of employment legal relationships, in particular when promoting an employee, determining working conditions, work remuneration or occupational training, as well as when giving notice of termination of an employment contract'. See translation by the Translation and Terminology Centre, online at www.ttc.lv/New/lv/tulkojumi/E0223.doc. It is reported that in the field of civil and military service, self-employment and contract work the Law on Education might apply, but this law does not cover sexual orientation discrimination: see Feldhune 2004/2005, 18.

performed in a professional capacity are not mentioned,⁷⁵ whilst in Bulgaria self-employment does not seem to be covered; and in Romania the same is true for access to employment, self-employment, and membership of or involvement in organisations of workers or employers.⁷⁶ In Slovenia the law is rather vague and deficient in many respects: article 6 of the Employment Relations Act does not specify that the prohibition of discrimination applies in relation to selection criteria, recruitment conditions and promotion, equal pay and possibly dismissal, vocational training and practical work experience. There is doubt that self-employment and membership of, and involvement in, professional organisations are explicitly covered.⁷⁷

Hungary and *Estonia* clearly stand out as exceptions. The former chose to disregard the specific list provided by the Directive, relying instead on a more detailed inventory with respect to personal scope. Articles 4 and 5 of the Act on Equal Treatment enumerate the public and private actors that fall within the scope of the law: among the latter it is possible to find '(i) those who offer a public contract or make a public offer, (ii) those who provide public services or sell goods, (iii) entrepreneurs, companies and other private legal entities using state support, and (iv) employers and contractors'.⁷⁸ The odd situation created by the Hungarian law, which applies not only to employment, has been documented and requires careful consideration.⁷⁹

⁷⁵ See Attard 2005, 5; Ellul 2004/2005, 13. Material scope is dealt with by regulation 2(4).

⁷⁶ It should be remarked that Ordinance 137/2000 has a very broad scope; the prohibition of sexual orientation discrimination thus extends to areas outside the employment realm, such as legal and administrative public services, public health services, and access to goods and services. See Weber 2003, 12.

⁷⁷ See Tratar et al. 2004/2005, 15-17.

⁷⁸ See Kádár & Farkas 2004/2005, 19: 'When specifying the requirement of equal treatment in the field of employment, article 21 of the ETA [Act on Equal Treatment] distinguishes between labour relations and other relations aimed at employment. Actions leading up to employment in the wider sense, as well as actions relating to the commencement and termination, as well as remuneration are specifically spelt out as being covered in both relations. With regard to other areas specified in article 21, such as promotion, training, working conditions, selections criteria, public job announcements and liability for damages and disciplinary actions other relations aimed at employment are not mentioned. This might lead to a narrow interpretation of other relevant domestic provisions as pursuant to article 1 of the ETA, which claims that provisions pertaining to the principle of equal treatment, set out in separate legal acts, shall be applied in harmony with the provisions of ETA'.

⁷⁹ Kádár & Farkas 2004/2005, 21. They report that 'Employment and working conditions as well as pay and dismissals are covered in relation to employment in a wider sense, i.e. both labour relations and other relations aimed at employment', and that 'article 21 of the ETA does not specifically include other relations aimed at employment in relation to access to vocational training, however the provision may be interpreted as including other relations aimed at employment

Estonia's law, in turn, is very narrowly crafted as far as its material scope is concerned. There is a very long list of exceptions to the applicability of its provisions (article 7), such as state and local government officials, armed forces, farm family enterprises, work on the basis of a contract of service, work during imprisonment, self-employment, and other cases. With respect to those employment areas where the law does indeed apply, not all aspects of the work (or prospective) relationship are fully and explicitly covered, such as conditions for access to employment and selection criteria, employment conditions, membership of and involvement in an organisation of workers or employers.⁸⁰

The *conclusion* is that, as far as material scope is concerned, the law is incomplete in all countries but Cyprus and Slovakia.

5.3 EXCEPTIONS

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

The general exception based on the preservation of some overriding public interests has not been taken up very diffusely. Only Cyprus, Malta, and Slovakia chose to transpose article 2(5) of the Directive, by using largely the same terms.⁸¹ In contrast, no specific exception based on article 2(5) of the Directive may be found in the other nine countries.⁸²

The *conclusion* is that, though in line with the Directive, the specific exception related to some overriding public interests has been transposed only in Cyprus, Malta and Slovakia.

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

Social security and similar payments are explicitly covered in Hungary,⁸³ Slovenia,⁸⁴ and Romania,⁸⁵ all of which chose to ignore the possibility for an

as well'. Finally, with respect to membership or involvement in professional organisations, they claim that article 21 of the ETA only refers to workers' organisations, whilst 'other relations aimed at employment are not included in this provision. However, if such organisations fall under the personal scope of the ETA (articles 4 and 5), they are obliged to abide by the requirement of equal treatment in all their actions, practices, policies, measures, which of course includes the benefits they provide too'.

⁸⁰ See Poleshchuk 2004/2005, 16 ff.

⁸¹ See Kountouros 2005, 7; Attard 2005, 7; Ellul 2004/2005, 25; Dlugosova 2004/2005, 35.

⁸² Namely: Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovenia, Bulgaria and Romania (nor, apparently, in Hungary).

⁸³ See article 21 of the implementing Act.

⁸⁴ See Tratar et al. 2004/2005, 18.

exception provided by article 3(3) of the Directive. Cyprus explicitly transposed the exception by excluding the applicability of the principle of equal treatment as far as social security payments are concerned. In Slovakia the law prohibits social security discrimination based on a number of grounds, but this does not include sexual orientation.⁸⁶ In most countries the anti-discrimination provisions implementing the Directive are silent on this specific issue (Czech Republic, Estonia, Lithuania, Malta,⁸⁷ Poland and Bulgaria); this does not necessarily mean that social security payments are exempted from the principle of equal treatment.

In *Latvia*, a parliamentary committee is currently discussing a proposal aimed at prohibiting discrimination in the field of social services, but this proposal does not encompass sexual orientation discrimination.⁸⁸

The *conclusion* is that only Cyprus chose to transpose the exception relating to social security payments, and that examples of legislation that chose to ignore such possibility, thus achieving a higher level of protection, may be found at least in Hungary, Slovenia, and Romania.

5.3.3 *Occupational requirements (article 4(1)) and loyalty to the organisation's ethos based on religion or belief (article 4(2))*

The Directive does not envisage fully egalitarian work relationships, because it sometimes allows employers to adopt a decision-making process that takes into account characteristics connected to the protected grounds (genuine occupational requirements). Moreover, although article 4(2) is applicable only with respect to discrimination based on religion or belief, its second part – which does not add much to its first part⁸⁹ – states that the Directive does not prejudice the right of churches (and other ‘organisations the ethos of which is based on religion or belief’) to ‘require individuals working for them to act in good faith and with loyalty to the organisation’s ethos’; this might sometimes lead to a curtailment of the freedom to live according to a particular sexual orientation.

⁸⁵ See article 6(1) of the Labour Code: ‘Any employee who performs a work shall benefit from adequate work conditions for the activity carried out, social security, labour safety and health, as well as the observance of his/her dignity and conscience, without any discrimination’ (see the translation at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lgac_en.htm). See also Ordinance 137/2000.

⁸⁶ Dlugosova 2004/2005, 25.

⁸⁷ Though the regulations are silent in this regard, the Act does define ‘employment conditions’ as encompassing any benefit which descends from the employment relationship.

⁸⁸ See Lavrikovs 2005.

⁸⁹ See 2.4.5 and 4.4.5 above.

Generally all countries foresee an exception similar to the provision on genuine occupational requirements that may be found in article 4(1) of the Directive. An interesting exception to this is *Estonia*, where the law does foresee the possibility for employers of employing only people with certain requirements related to certain protected grounds (sex, language proficiency, age, or disability), but not when related to sexual orientation. This means that having a particular sexual orientation may never be regarded as a legitimate requirement for assigning a job position.⁹⁰

Only Cyprus,⁹¹ Malta,⁹² and the Czech Republic⁹³ have adopted a wording that mirrors very closely that of article 4(1) and (2) of the Directive. Remarkably, though, some regulations in the *Czech Republic* require that recruitment of soldiers is subject to the lack of 'defects of sexual preference'; as far as recruitment of custom officials, necessary health criteria encompass 'sexual preference defects', 'defects of psychology and behaviour (sexual development and orientation)', and 'sexual identity defect'. Whilst the regulation on recruitment of soldiers maintains that sexual orientation as such is not to be considered a 'defect', the regulation concerning custom officials does not hold the same view.⁹⁴ In any case, both regulations are clearly at odds with the Directive, at least insofar as they relate to homosexual, heterosexual or bisexual orientations.

With respect to organisations with a (religious) ethos, regulations 4(2) and 4(3) of the Equal Treatment in Employment Regulations in *Malta* – which allow employers to require individuals working for them to act in good faith and with loyalty to the organisation's ethos – seem to allow for discriminatory practices introduced after the adoption of the Directive, thus running contrary to its requirements; on the contrary, no such exception seems foreseen in the Czech Republic and Cyprus.

Some states have chosen a different wording which, nonetheless, seems to be in line with the standard set by the Directive. In *Lithuania*, the provision concerning occupational requirements has been included in the definition of direct discrimination: article 2(3) of the Law on Equal Treatment explicitly excludes

⁹⁰ See Poleshchuk 2004/2005, 22. Note that the law does not apply 'to the work in a religious organisation as a person conducting religious services if the fundamental document of such organisation does not require entry into an employment contract with such person' (article 7).

⁹¹ Article 5(2) of the Equal Treatment in Employment and Occupation Law.

⁹² Regulation 4.

⁹³ Article 1(5) of the Labour Code. Other acts adopt different, more loose, definitions. See Otáhalová 2005, 10. Though there is no specific exception for organisations with a religious ethos, the Constitutional court has held that labour law in its entirety does not apply to the employment of the clergy (Boučková 2004/2005, 34).

⁹⁴ See Boučková 2004/2005, 35.

discrimination 'when owing to the character of specific types of professional activity or conditions of implementation thereof, a certain human characteristic is the usual and decisive professional requirement, and this aim is lawful and the requirement is appropriate'.⁹⁵ In Lithuania there are no specific rules for employers with an ethos based on religion or belief.⁹⁶ In *Bulgaria* (article 7(1)(2)), the test of proportionality is even substituted with a more stringent test of necessity.⁹⁷ In *Romania* article 9 of the 2000 Ordinance relates genuine occupational requirements to the hiring process only, by correctly stating that the employer may 'refuse to hire a person that does not correspond to the occupational requirements in the respective field, as long as this refusal does not constitute an act of discrimination according to this ordinance, and these measures are objectively justified by a legitimate aim and the methods of fulfilling that aim are adequate and necessary'.⁹⁸ It should also be noted that a protocol signed by the Ministry of Health and the Ministry of Education, concerning health requirements for teachers and auxiliary personnel, considers people affected by 'sexual preference disorders' not medically fit for the job. Apparently the Government conceded that LGB people do not fall into this category. On the other hand, there seems to be a rather wide provision (arguably based on the first part of article 4(2) of the Directive) dealing with work in religious institutions responsible for training church personnel, which are granted the possibility of rejecting applications when the 'religious status' of the applicant 'does not meet the requirements established for access to the respective institution'.⁹⁹

In other instances though, Member States have allowed employers greater freedom, thus failing to correctly transpose article 4 of the Directive: this is the case at least in Hungary, Latvia, Poland, and Slovakia.

In *Hungary*, article 22 of the Act on Equal Treatment foresees a specific exception that will take precedence over the general exemption clause of article 7(2).¹⁰⁰ This article states that the principle of equal treatment is not violated if:

- (a) 'the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of recruitment; or

⁹⁵ Translation of the law provided by Ms. Laima Vengale of the Office of the Equal Opportunities Ombudsman.

⁹⁶ See Vindrinskaite 2004/2005, 20.

⁹⁷ See unofficial translation at www.stopvaw.org/bulgaria2.html (under *List of law and policy documents*).

⁹⁸ See translation provided by Ionescu 2005, 8.

⁹⁹ Article 15(5) of Ordinance 137/2000. See Weber 2003, 14.

¹⁰⁰ See 5.2.1 above.

(b) the differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportionate and justified by the nature of the employment activity or the conditions of its pursuit'.¹⁰¹

The part under (a) clearly does not satisfy the degree of stringency demanded by the Directive, because it requires the 'terms and conditions' to be 'relevant and legitimate', rather than the 'occupational requirement' being 'genuine and determining'. Not every 'relevant' requirement is also 'genuine', and the fact that it must be 'legitimate' has little to do with the need of assessing whether it is 'determining' or not. Moreover, 'proportionality' is referred to in connection with the differentiation, rather than in connection with the requirement: this might not be a problem, as long as it is clear that requirements that differentiate need to be proportionate.

Part (b) of the rule found in article 22 of the Hungarian implementing Act could be considered to be based on article 4(2) of the Directive, but it does not specify that the only differentiation allowed is that based on religion; in addition, the other requirements foreseen by article 4(2) of the Directive (e.g. that differential treatment arises from existing legislation or existing national practices, and that only differences in treatment based on a person's religion or belief do not constitute discrimination, etc.) have not been mentioned. Thus, it probably should be considered a specification of article 4(1), but in this case the wording is incomplete: it does not at all refer to 'genuine and determining occupational requirement', thereby allowing any differentiation, even for trivial reasons, as long as it is justified by the nature of the activity. The same criticism must be made of article 6 of the Act on Equal Treatment which stipulates that the Act does not apply at all to 'a denominational legal person's legal relationship directly related to the denomination's religious activity',¹⁰² that is to say, churches and other organisations or institutions based on a religious ethos.¹⁰³

In *Latvia* the formula 'genuine and determining requirement' has been phrased as an 'objective and substantiated precondition [...] for the performance of the relevant work or for the relevant employment'; there is no reference to the 'legitimate objective' and the requirement of proportionality has been substituted by the need for the precondition to be 'reasonable for the legal purpose reached as a result'.¹⁰⁴ Substituting 'proportionality' with 'reasonableness' may not be prob-

¹⁰¹ Kádár & Farkas 2004/2005, 27.

¹⁰² As reported by Kádár & Farkas 2004/2005, 19.

¹⁰³ See 5.5 below for a case concerning discrimination by a religious university.

¹⁰⁴ Article 29(2) of the Labour Law, in the translation of the Translation and Terminology Centre, online at www.ttc.lv/New/lv/tulkojumi/E0223.doc. Note that article 32(1) and (2) has

lematic, but leaving out the requirement of a legitimate objective surely renders the text incomplete. This exception, more or less worded in terms of article 4(1) of the Directive, perhaps also implies an exception for religious employers based on article 4(2).¹⁰⁵

In *Poland*, article 18(3)(b)(2), of the Labour Code considers differential treatment acceptable in recruitment, when 'it is justified by reason of the nature of the particular occupational activities concerned, by conditions in which they are carried out or by genuine occupational requirements'.¹⁰⁶ It must be remarked that this provision does not make any reference to a legitimate objective, or to the proportionality of the requirement. No specific provision concerning organisations with a (religious) ethos has been adopted.

In *Slovakia*, article 8 of the Anti-Discrimination Act stipulates that differential treatment shall not constitute discrimination if such treatment is objectively justified by the nature of the activities to be carried out or by the circumstances under which they are carried out, provided that the difference in treatment is proportionate and necessary in light of the activities or the circumstances.¹⁰⁷ This definition does not mention the formula 'occupational requirements' nor the fact that these concern characteristics related to a protected ground; more importantly, it does not mention the need for a legitimate objective. However, it adds a test of necessity, as far as differences of treatment are concerned, which accounts for a stricter justification system. As far as ethos-based employers, such as churches, etc. are concerned, article 8(2) – which seeks to transpose article 4(2) of the Directive – explicitly allows differential treatment based on sexual orientation, thus running contrary to the Directive. It also adds that religion-based organisations may require those who work for them to 'act in conformity with the organisations' religion or belief and with the principles of their religion or belief'.¹⁰⁸

As far as *Slovenia* is concerned, it seems that only special laws can identify cases in which a particular occupational requirement may justify differential treat-

specific provisions concerning job advertisements, which cannot be discriminatory 'except in cases where belonging to a particular gender is an objective and substantiated precondition for the performance of relevant work or for a relevant employment' or 'in cases where, in accordance with the law, persons of a certain age may not perform relevant work': in these cases even the reasonableness test has been left out. With regard to job interviews, article 33(2) clarifies that 'a job interview may not include such questions by the employer as do not apply to performance of the intended work or are not related to the suitability of the employee for such work, as well as questions which are directly or indirectly discriminatory [...]'.

¹⁰⁵ As suggested by Feldhune 2004/2005, 23 (para. 4.2).

¹⁰⁶ See Smiszek 2005, 4; Filippek & Pamula 2004/2005, 26.

¹⁰⁷ See Dlugosova 2004/2005, 28.

¹⁰⁸ Idem, 29.

ment, subject to a test of proportionality; furthermore, there does not seem to be any exception based on an organisation's religious ethos.¹⁰⁹

The *conclusion* is that in the Czech Republic, Hungary, Latvia, Poland, and Slovakia the wording of the provision(s) on occupational requirements is crafted in a fashion that is incompatible with the Directive.

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

As is largely the case in the old Member States, the issue of positive action is dealt with by most new Member States only in general terms, so as to make sure that any positive differential treatment is not caught by the definition of unlawful discrimination. Though sexual orientation is sometimes explicitly mentioned among other grounds, there seem to be no specific provisions dealing with a possible (under)representation of gay and lesbian employees at work. The situation is, of course, different as far as other grounds are concerned (gender, disability, etc.): in Cyprus, as an example, the legislature adopted a separate law for implementing the Directive with respect to disability discrimination, where an explicit provision allowing for positive action may be found, which is not the case in the law dealing with the remaining grounds. A similar conclusion may be drawn as far as Estonia is concerned, where the law stipulates that 'preferences' on grounds of pregnancy or disability shall not be deemed to be unequal treatment.¹¹⁰

In Latvia¹¹¹ and Slovakia¹¹² positive action is still rather alien to the legal system, and not allowed with respect to sexual orientation. In the Czech Republic the Act on Employment (article 2(1) and article 4(4)), which deals with access to the labour market and vocational training, aims at affording state support to classes of people that are disadvantaged because of a group characteristic, which includes LGB people; but the Labour Code only foresees positive action by the employer with respect to gender. In Romania, article 2(7) of the Ordinance allows positive action, connecting it with the need of ensuring equal opportunities for a person, a group of persons or a community, but it does not foresee specific measures for LGB people.¹¹³ According to the law in Malta, positive action –

¹⁰⁹ Tratar et al. 2004/2005, 22.

¹¹⁰ See Poleschuk 2004/2005, 12 and 32.

¹¹¹ See Feldhune 2004/2005, 27.

¹¹² See Dlugosova 2004/2005, 36-7.

¹¹³ It seems that the National Council for Combating Discrimination (see 5.4.2 below) may recommend the setting up of 'special measures or actions for the protection of disfavoured persons and categories who either find themselves in an unequal position as compared to the majority due to their social origin or a disability, or are confronted with rejection and marginalisation and do

considered as any act done in or in connection with access to benefits relating to training or to opportunities for doing particular work – is allowed ‘when it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to any of the grounds referred to’.¹¹⁴

In some countries it is made explicit that positive action must or should be of a special nature and of limited duration in time. Thus, in Lithuania the exception can be found in the definition of direct discrimination, from which are excluded ‘special temporary measures applied while striving to ensure equality and to bar the way to violation of equal treatment on the ground of [...] sexual orientation’ (article 2(3)(6)). The same idea characterises the Labour Code in Poland, where article 18(3)(b)(3) makes it clear that the principle of equal treatment is not breached by measures adopted for a specific period of time, intended to make opportunities equal to all by way of reducing the actual inequalities. Positive action on all protected grounds including sexual orientation is allowed in Bulgaria subject to a test of necessity (article 7(13) of the Law on Protection Against Discrimination), in addition to state policies aimed at protecting pregnant women and mothers, people with disabilities, parentless children, minors and single parents, etc. (article 7(7) and (14)).

The *conclusion* is that sexual orientation is covered implicitly or explicitly by the framework of clauses allowing for positive measures in Bulgaria, the Czech Republic, Lithuania, Malta, Poland and Romania, but specific programmes aimed at greater inclusion of LGB people in the workforce are not required nor foreseen in any country.

5.4 ENFORCEMENT

Making sure that once protection against sexual orientation discrimination has been made part of legal texts it is also realised in practice is certainly a most crucial task for all actors involved. Academic debate and discussions carried out within non-governmental organisations and other stakeholders have emphasised on several occasions that the effort of realising the principle of equal treatment should not be left wholly to individual victims’ initiatives. Public bodies responsible for vigilance must also play a role, as well as other groups or agencies committed to equality and non-discrimination. Furthermore, employers themselves

not enjoy equal opportunities’. See article 2 of the Governmental Decision on the Organization and Functioning of the National Council for Combating Discrimination, no. 1194, of 27 November 2001. See Weber 2003, 20.

¹¹⁴ Regulation 6 of the Equal Treatment in Employment Regulations.

may choose from a range of possibilities in order to see anti-discrimination law not only as yet another imposition, but as an opportunity.¹¹⁵

The law of *Bulgaria* clearly stands out as an example in demanding an active role from employers in ensuring compliance with anti-discrimination rules. Articles 17 to 19 of the Law on Protection Against Discrimination require the employer to take efficient measures to *prevent* any form of discrimination; but, if and when an employee does complain, the former is required to carry out investigations, to take measures to stop harassment and to impose disciplinary sanctions. In case nothing is done, the employer is considered responsible for discriminatory acts of his or her employees. In addition, articles 22 and 23 require the employer to display on accessible locations the text of the law and of other provisions related to anti-discrimination, as well as to provide information to the person who claims that his or her rights have been violated. Finally, article 8 states that persons who have consciously assisted to acts of discrimination shall bear responsibility under the Law on protection against discrimination.

In most other Member States *explicit* provisions on indirect liability are not common.¹¹⁶ It is however fair to assume that similar duties may be inferred either from general principles or clauses of civil or labour law, or from the wide personal scope of the anti-discrimination law, which indicate that the (contractual) employer is often under a duty to protect the 'personality' or the well-being of employees.

5.4.1 *Sanctions (article 17)*

It is interesting to note that the European Commission attaches great importance to the problem of accessing justice and to the practical application of equal rights, as the proceedings of the 2005 Action Programme's annual conference demonstrate.¹¹⁷

Nonetheless, as it has been highlighted with regard to the old Member States,¹¹⁸ the issue of sanctions appears to be one of those intricate areas that show the most evident aspects of obscurity, as well as several inadequacies with respect to the requirement of article 17 of the Directive of effectiveness, proportionality, and dissuasiveness. This is so because only rarely have Member States adopted specific measures aimed at ensuring full compliance with the right to a personal

¹¹⁵ See, e.g., the reports *Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises* 2003; and *Straight talk – Gays, lesbians and bisexuals at work* 2004.

¹¹⁶ It has been argued in 4.5.5 above that liability of the employer for any discriminatory act, no matter who performs it, may be required by the Directive.

¹¹⁷ *Equal Rights in Practice – Key Voices 2005*.

¹¹⁸ See 4.5.4 above; Tobler 2005, 26.

remedy; more often, they have relied on existing general rules or principles set by civil, criminal, labour, administrative and/or procedural law, without removing the restrictions they may entail, such as time-limits, caps on possible awards, proof of fault or intention and the like. In some instances, sanctions may even differ depending on the specific statute that is assumed to be violated.¹¹⁹

It is not possible to comprehensively summarise all of the variations that may be found at the national level. Moreover, since very few cases have so far been brought before courts or other bodies, it is difficult to assess how the complex array of sanctions may or will work in practice.

In general terms, sanctions for breach of the prohibition of discrimination may include payment of damages to the victim. However, it is not always clear what kind of damages can be recovered: for instance, compensation for non-pecuniary damages is sometimes barred because of general principles of law which require specific legal provisions that have not been adopted (this is the case in Lithuania and Malta). It must be pointed out that, with specific regard to Lithuania, it has been reported that the Labour Code 'does not provide for any sanctions for workplace discrimination' unless based on gender, and that 'the Law on Equal Treatment does not govern sanctions'.¹²⁰

As already mentioned,¹²¹ one of the specific criteria spelled out by the Court of Justice is that, in cases of discriminatory dismissal, the victim has at least a right to either compensation or reinstatement. As far as the latter is concerned, it is encouraging to note that a large majority of states do foresee some form of removal of the negative consequences of discrimination. Explicit provisions on reinstatement exist in Bulgaria, Cyprus, Estonia, Hungary and Poland. In the Czech Republic the wording of the Labour Code does not explicitly include reinstatement, but according to article 7(4) and (5) whoever considers himself or herself wronged by a discriminatory act may seek judicial redress in terms of the removal of the negative consequences.¹²² In Romania, article 21(1) of Ordinance 137/2000 stipulates that the victim may seek judicial redress in the form of 'restoration of the situation that existed before the discrimination or the cessation of the situation that was created as a result of the discrimination, according to the general legal framework'.¹²³ In Latvia, the victim of discrimination may obtain a 'restoration of violated rights' in court or via the Labour Inspectorate.¹²⁴

¹¹⁹ See Bell 2003(a), 31.

¹²⁰ Vindrinskaite 2004/2005, 30-1. Note, however, that also the Lithuanian Penal Code prohibits sexual orientation discrimination; see 5.1 above.

¹²¹ See 2.5.4 above.

¹²² See Otáhalová 2005, 11.

¹²³ See Weber 2003, 23.

¹²⁴ See Feldhune 2003, 27.

In Malta article 30(2) of the Employment and Industrial Relations Act empowers the Industrial Tribunal to 'take such measures as it may deem fit', and this includes ordering the 'cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory'.¹²⁵ Finally, it is reported that in Slovakia article 9 of the Anti-Discrimination Act enables courts to 'rectify the illegal situation' or to 'remedy an unlawful situation',¹²⁶ whilst in Slovenia discriminatory dismissal is not valid.¹²⁷

As 'sanctions' not only bring benefits to the victim, but can also have a deterrent and an afflictive effect for socially deplorable behaviour, some public entities have the power to impose administrative sanctions such as fines.¹²⁸

Whilst it would be fair to assume that general civil law remedies apply in most countries, it is interesting to note that in *Poland* a violation of the principle of equal treatment is seen as an 'infringement of personal interests' or personality rights. According to articles 23 and 24 of the Civil Code a victim may ask courts to order the cessation of any unlawful activity impinging upon personal interests, the removal of its effects, and pecuniary compensation for material damages;¹²⁹ apart from this, the Labour Code foresees a 'compensation complaint', a special procedure for violations of the principle of equality.¹³⁰ In *Hungary*, freedom from discrimination qualifies as a vested right that enables the victim to petition the court under articles 75 and 76 of the Civil Code, which provides for: cessation of the infringement, restraint order to the perpetrator, restitution, restoration of the situation as it was before the unlawful act, damages, and *astreintes* and other forms of injunction. In addition, Labour Courts have the power to declare an act null and void, and to order reinstatement or the payment of compensation for damages (lost income, material damages, and justified expenses).¹³¹ When it comes to administrative sanctions, there seems to be an overlap between the role of the Equal Treatment Authority (see below) and Labour Inspectorates, which can impose fines up to 13,000 euro for breach of anti-discrimination rules. The choice of activating one or the other rests upon the victim.¹³²

¹²⁵ See Ellul 2004/2005, 28.

¹²⁶ Dlugosova 2004/2005, 40 and 43.

¹²⁷ Article 81(4) of the Employment Relations Act; see Tratar et al. 2004/2005, 40.

¹²⁸ For example: Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Slovakia, Slovenia and Romania, and also Poland, but here only for employment agencies and for refusal to hire.

¹²⁹ See Smiszek 2005, 5.

¹³⁰ Filipek & Pamula 2004/2005, 35.

¹³¹ See Kádár & Farkas 2004/2005, 38.

¹³² Idem, 41.

5.4.2 *Enforcement bodies*

It is somewhat surprising to note that, in sharp contrast with the choices made by the majority of the fifteen old Member States,¹³³ most of the new Member States and acceding countries have chosen to include all grounds specified in the two Directives within the remit of their (old or new) enforcement bodies. Therefore, victims of sexual orientation discrimination may or will be able to complain to either general enforcement bodies or to specific equality bodies.

General enforcement bodies, dealing with human/civil rights in general may be found in:

Cyprus	Commissioner of the Administration (Ombudsman)
Estonia	Office of the Chancellor of Justice (Legal Chancellor)
Latvia	National Human Rights Office ¹³⁴
Poland	Commissioner of Civil Rights Protection
Slovakia	National Centre for Human Rights

Specific equality bodies may be found in:

Bulgaria	Commission for Protection Against Discrimination
Hungary	Equal Treatment Authority
Lithuania	Office of the Equal Opportunities Ombudsman
Romania	National Council for Combating Discrimination
Slovenia	Office for Equal Opportunities Advocate for the Principle of Equality Council for Implementation of the Principle of Equal Treatment

There is yet no equality body in the *Czech Republic*,¹³⁵ nor in *Malta*, although

¹³³ See 4.5.2 above.

¹³⁴ Although sexual orientation is not yet explicitly included.

¹³⁵ It is reported that a new Law on Labour Inspection (251/2005), in force since 1 July 2005, entrusted the regional Labour Inspectorates with the task of ensuring that equal treatment legislation is properly complied with. A power of vigilance over employment laws rests also upon local Employment Offices, whose competence is defined by the Act on Employment. These offices may require an employer to stop any unlawful conduct and comply with the law, as well as to remove any prejudicial consequence of his or her wrongdoing (Section 126(1)); they may also impose fines up to around 34,000 euro, to both natural and legal persons. In addition, the Public Defender of Rights ensures good state administration, but for the moment deals only with public law matters, at least until the adoption of the Anti-discrimination Bill which would make it a specialised body as required by article 13 of the Racial Equality Directive (see Otáhalová 2005, 12-13 and 16).

the mandate of the National Commission for the Promotion of Equality for Men and Women there might be extended to other grounds.¹³⁶

Though the broad mandate of national enforcement bodies should be praised because it avoids creating a hierarchy in the level of protection afforded to various classes of people, it is true that there are numerous – though not always noticeable – differences in terms of tasks and powers entrusted to such bodies. Sometimes one can observe an overlap between different bodies in the same country.

Let us briefly examine first the role of general enforcement bodies, and then that of specialised equality bodies.

In *Cyprus* the Commissioner may receive complaints from individual victims or from organisations and investigate the case; in addition, it has a power of vigilance on the public service and public officers.¹³⁷ The investigation will end with a suggestion or a binding recommendation,¹³⁸ and according to article 13 of the Equal Treatment in Employment and Occupation Law, where applicable, with a fine.¹³⁹ The Commissioner can also start investigations on its own initiative, and publish codes of conduct with a view to making more explicit what concrete behaviour will be considered discriminatory; moreover, it is under an obligation to report to the Government, Parliament, and the country's Attorney General.¹⁴⁰ In addition, the provisions of the Equal Treatment in Employment and Occupation Law may be enforced by special Inspectors (article 19), but regulations implementing this provision have not yet been issued.¹⁴¹ In *Poland*, the existing Commissioner of Civil Rights Protection has been entrusted with the task of ensuring a non-judicial procedure for dealing with cases of discrimination. The Polish Commissioner can carry out investigations and issue persuasive, non-binding recommendations to those responsible for discrimination. It is possible for the office to demand that judicial proceedings are commenced or to take part in pending proceedings, and to request to other administrative bodies to 'employ measures laid down by law'.¹⁴² In addition, this body may conduct general inquiries and studies on issues of discrimination as well as advise on

¹³⁶ See *Equality and non-discrimination, Annual report 2005*, 24.

¹³⁷ Trimikliniotis 2004/2005, 56.

¹³⁸ *Idem*, 47.

¹³⁹ Kountouros 2005, 9-10, argues that the maximum fine that can be imposed – around 600 euro – 'cannot be considered as a sufficient deterrent'. Powers of the Ombudsman are also defined by Act 36(I)/2004 and Act 42(I)/2004.

¹⁴⁰ Trimikliniotis 2004/2005, 55.

¹⁴¹ Kountouros 2005, 10.

¹⁴² Filipek & Pamula 2004/2005, 41.

policy choices.¹⁴³ In *Latvia*, the National Human Rights Office was set up as far back as 1996 and may receive complaints concerning suspected violations of human rights. The investigation is free of charge and may result in a conciliation agreement or a non-binding recommendation; no sanctions can be imposed.¹⁴⁴ Moreover, the Office is responsible for producing analyses and studies, as well as for training and informing specialists and the general public on human rights issues. The office has already dealt with sexual orientation discrimination,¹⁴⁵ although this ground has not yet been explicitly mentioned in the legislation.

In *Slovakia*, the National Centre for Human Rights has been entrusted with such tasks as monitoring the respect of human rights and equal treatment, carrying out research and surveys, and enjoys an active role in the field of education and dissemination of information. The body does not seem to be able to carry out quasi-judicial functions, though as far as individual complaints are concerned it may provide legal assistance, deliver opinions and represent victims in legal proceedings.¹⁴⁶ Finally, in *Estonia*, the Legal Chancellor is envisaged by the Constitution as an advisory body, but has been empowered by recent legislative amendments to receive individual complaints concerning issues of discrimination both by public authorities and by private (natural or legal) persons. The Chancellor may search for evidence of discrimination on its own initiative and issues non-binding opinions. Though it cannot start (nor be a party in) court proceedings, it can engage in a 'conciliation procedure' in case of discrimination by natural or legal persons in private law.¹⁴⁷

As far as specific equality bodies are concerned, in *Hungary* today the organ principally responsible for ensuring the application of the principle of equal treatment is the Equal Treatment Authority, although Labour Inspectorates have retained competence for investigating cases of discrimination.¹⁴⁸ It is vested with all the powers foreseen by the Racial Equality Directive, while dealing with all

¹⁴³ Until the adoption of the Council of Ministers Regulation of 3 November 2005, which decided on the abolition of the Government Plenipotentiary for Equal Status of Women and Men, this body was competent for investigating cases involving sexual orientation discrimination, for carrying out activities of awareness raising and monitoring the legal system with a view to fostering the anti-discrimination perspective. The functions formerly performed by the Government Plenipotentiary have now been entrusted to the Ministry of Labour and Social Policy (information provided by Krzysztof Smiszek).

¹⁴⁴ See Feldhune 2004/2005, 30.

¹⁴⁵ See 5.5 below.

¹⁴⁶ Dlugosova 2004/2005, 45.

¹⁴⁷ See Poleshchuk 2004/2005, 35 and 42-3.

¹⁴⁸ See Kádár & Farkas 2004/2005, 41.

grounds of discrimination. It may start investigations *ex officio* (article 14 of the Act on Equal Treatment), act as a 'representative' in procedures concerning discrimination cases (article 18), and launch lawsuits aimed at protecting the rights of persons and groups. Furthermore, the Authority is entrusted with the task of providing assistance to individual victims, of making proposals and of advising other public entities on issues of discrimination (article 14). According to article 16(1), the Authority may order cessation of the unlawful conduct, prohibit further continuation, publish its decision and impose fines of up to 26,000 euro.¹⁴⁹

In *Lithuania* the Equal Opportunities Ombudsman may, since 1 January 2005, investigate cases of sexual orientation discrimination when brought by a natural or legal person. Interestingly, the office of the Ombudsman may also start investigations on its own motion when it suspects that discrimination is taking place in the communication service by mass media or other sources. All investigations could end with a referral to prosecutors in case of criminal offences, with a recommendation to stop any conduct violating the principle of equal treatment and/or with an admonition. Remarkably, the law requires all parties to co-operate with the Ombudsman's investigation, by making available documents and other materials of interest and by providing explanations when requested. The office is also responsible for carrying out the other activities foreseen by article 13 of the Racial Equality Directive.¹⁵⁰

In *Slovenia*, whilst the Council has monitoring and advisory functions, the Advocate – which operates within the Office for Equal Opportunities – is responsible for hearing individual complaints and for providing assistance to victims of discrimination. In cases of non-compliance with the opinion or the recommendations, the Advocate may inform the competent inspection bodies which, after reviewing the case, may take appropriate action.¹⁵¹

Bulgaria has formally established a Commission for Protection against Discrimination (articles 40 ff. of the Law on protection against discrimination), though it has not proceeded to actually appoint its members so as to allow its concrete functioning. The Commission should, nonetheless, provide independent assistance to victims of discrimination, especially through an internal division of tasks which should increase the specialisation of permanent panels on certain grounds. According to article 65 of the Law on protection against discrimination, the Commission has the power to ascertain the committed violation, the offender and the affected person, determine the kind and the amount of the sanction, and enforce coercive administrative sanctions.

¹⁴⁹ *Idem*, 51.

¹⁵⁰ Vindrinskaite 2004/2005, 32.

¹⁵¹ See Tratar et al. 2004/2005, 43.

In *Romania* the National Council for Combating Discrimination is responsible not only for receiving complaints brought by individuals and non-governmental organisations, deciding upon them, and imposing administrative fines, but also for monitoring government proposals and compliance by public authorities, as well as for setting up affirmative action programmes.¹⁵²

5.4.3 *Burden of proof (article 10) and victimisation (article 11)*

Not surprisingly, the Directive's requirement on the shift or the sharing of the burden of proof has caused some level of unease in several States, because it often impacts on general principles of procedural law that legislatures might be unwilling to adapt. As to victimisation, there normally seem to be fewer reasons for concern, though protection is sometimes limited to those bringing a claim of discrimination, thus excluding other persons that might play a role.

In *Cyprus*, the provision on the sharing of burden of proof has been correctly transposed by article 11 of the implementing law; moreover, article 10 prohibits victimisation against any person who lodges a complaint or is involved in a procedure, thus making it explicit that not only the victim of discrimination is protected, but also other people such as colleagues who agree to act as a witness.¹⁵³ In the *Czech Republic* civil procedural law is such that, in the field of employment, claims of sexual orientation discrimination are considered well-founded until the contrary is proven;¹⁵⁴ on the other hand, the separate laws on the civil service, the armed forces and the security forces transpose the Directive inadequately, because they do not provide for a shift in the burden of proof in cases of discrimination involving sexual orientation (only for sex, nationality and race).¹⁵⁵ Victimisation is covered by all acts, and also by the Czech Charter of fundamental rights and freedoms,¹⁵⁶ but the provisions only protect those who bring a complaint.¹⁵⁷ In *Bulgaria*¹⁵⁸ and *Slovenia*¹⁵⁹ transposition seems to be sufficient with respect to the burden of proof and victimisation provisions.

¹⁵² See Bell in the report *Equality, Diversity and Enlargement* 2003, 35.

¹⁵³ See Kountouros 2005, 6.

¹⁵⁴ See article 133a of Act 99/1963, on Civil Procedure, as amended by Amendment 151/2002. See Otáhalová 2005, 14; Bukovská & Boučková 2003, 30.

¹⁵⁵ As reported by Otáhalová 2005, 14.

¹⁵⁶ Article 3(3) states: 'Nobody may suffer curtailment of their rights for enforcing their fundamental rights and freedoms'.

¹⁵⁷ See Boučková 2004/2005, 52.

¹⁵⁸ Article 9 of the Law on Protection Against Discrimination states that 'in proceedings for protection against discrimination, after the party, claiming to be a victim of discrimination, proves facts, sustaining the assumption of occurred discrimination, the defendant party must prove that the right to equal treatment has not been violated'. There are no elements which suggest that

In contrast, a few inadequacies may be found in Estonia and Slovakia. In *Estonia*, article 144(1)(1) of the Law on Employment Contracts requires the alleged victim to submit an application containing the ‘facts in proof of the unequal treatment’, whilst the employer – once ‘it may be presumed that direct or indirect unequal treatment has occurred’ – ‘shall be required [...] to explain the reasons for his or her conduct or decision’. Thus, the employee is still required to present some sort of evidence of unequal treatment, whilst the employer is not required to ‘prove’ the lawfulness of his or her conduct, but only to ‘explain’ it. It is unclear how this provision will be interpreted by courts.¹⁶⁰ More critically, no provision on victimisation has yet been adopted. In *Slovakia*, article 11(2) of the Anti-Discrimination Act apparently requires the plaintiff to submit ‘evidence’ capable of leading the court to reasonably assume that there has been a violation of the principle of equal treatment: again, it should be recalled that the Directive speaks only of the need to ‘establish facts’. Article 2(8) of the same Act, dealing with victimisation, adopted a far-reaching definition which protects those that have been discriminated against when seeking legal protection for oneself or on behalf of others, when providing explanations or testifying, or when being otherwise involved in proceedings dealing with discrimination.¹⁶¹

With specific regard to the burden of proof, the situation appears to be somewhat more problematic in Hungary, Latvia, Malta, and Poland.

In *Hungary* article 19 of the Act on Equal Treatment is clearly insufficient, because it requires the complainant to ‘prove’ at least two circumstances: that he or she has been disadvantaged, and that he or she possesses the protected characteristic.¹⁶² Whilst the former event will often be relied upon by someone who considers himself or herself victim of discrimination, the Directive’s wording is

proceedings before the Commission for protection against discrimination are excluded. Additional provision 1.3 to the Law makes it clear that protection from victimisation concerns not only the person bringing an action, but also ‘related persons’ and those refusing to discriminate.

¹⁵⁹ Articles 3 and 22(2) of the Implementation of the Principle of Equal Treatment Act; article 6(4) of the Employment Relations Act.

¹⁶⁰ See Poleshchuk 2004/2005, 39.

¹⁶¹ Dlugosova 2004/2005, 42.

¹⁶² Article 19 reads as follows (translation provided by Kádár & Farkas 2004/2005, 46):

‘(1) In procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to assert claims of public interest must prove that
 (a) the injured person or group has suffered a disadvantage, and
 (b) the injured party or group possesses characteristics defined in article 8.
 (2) If the case described in paragraph (1) has been proven, the other party shall prove that
 (a) it has observed or
 (b) in respect of the relevant relationship was not obliged to observe, the principle of equal treatment.’

far more general because it only requires the victim to 'establish facts', thus taking away from the victim the burden of submitting specific information on discrimination in practical terms. More importantly, the second requirement impacts on people who have been discriminated against on the basis of a (mistaken) assumption about a personal characteristic, a situation that is not excluded by the wording of the Directive. On this point, there seems to be an unresolved conflict between this provision and other provisions of the Act.¹⁶³

In *Malta*, both criminal and civil proceedings are available to victims of discrimination. Whilst in the first case the shift of the burden of proof does not apply, and this is consistent with the Directive, in the case of civil proceedings regulation 10(3) of the Equal Treatment in Employment Regulations only reiterates a general principle of law, namely that whomever makes a claim in court has to provide evidence in order to prove his or her right.¹⁶⁴ This can not be considered a sufficient transposition of the rule on the burden of proof. It is however interesting to note that regulation 9 enables the employee who alleges discrimination to request a written statement from his/her employer containing his/her versions of the facts and an explanation of any relevant procedure adopted to prevent discriminatory treatment. This statement can be used in court and, if the employer has omitted to present it, the court may draw any inference that it considers just and equitable to draw, including an inference that the employer committed an unlawful act. It is unclear if such statement can be requested by associations or other interest groups.

In *Poland*, the Labour Code (article 18(3)(b)(1)) merely states that certain acts of the employer are discriminatory 'unless the employer can prove that the grounds for these actions were legitimate and objective'. As already remarked, there seems to be a degree of confusion here between rules of evidence (burden of proof) and substantive law: this provision, whilst it does not clearly state the sharing of the burden of proof, could also be regarded as an exception that is beyond what is allowed by the Directive.¹⁶⁵ The same could be said about *Latvia*, because article 29(3) of the Labour Law stipulates that, in case of controversies, the employee shall 'indicate conditions which may serve as a basis for his or her direct or indirect discrimination based on [gender]', whilst the employer must

¹⁶³ According to Kádár & Farkas (2004/2005, 9) 'article 8 of the ETA expressly prohibits discrimination based on "real or assumed" characteristics [...]. This prohibition is reinforced by article 19 Paragraph (1) Point (b), which provides for the reversal of the burden of proof on the basis of both the victim's real protected characteristic or that "assumed by the perpetrator".'

¹⁶⁴ See Attard 2005, 9.

¹⁶⁵ An interpretation that seems to consider the provision in line with the Directive is offered by Filipek & Pamula 2004/2005, 38.

prove that 'the differential treatment is based on objective circumstances not related to the [gender] of the employee, or that belonging to a particular [gender] is an objective and substantiated precondition for the performance of the relevant work or the relevant employment'.¹⁶⁶

The prohibition of victimisation is covered by article 28 of the Maltese Employment and Industrial Relations Act and, partly, by article 18(3)(e) of the Polish Labour Code: whilst the former makes it explicit that the protection also applies to those that 'participate' in legal proceedings or disclose information, the latter protects only employees, and only from dismissal or termination of the employment contract.¹⁶⁷ In Hungary, article 10(3) specifies that protection against victimisation encompasses both those making a complaint and those 'assisting in such a procedure'.¹⁶⁸ In Latvia, victimisation is prohibited by article 8 of the Labour Law, but only for the benefit of the victim, and not of other persons involved in a claim of discrimination.

In *Romania* and Lithuania the situation is rather critical. In the former, a draft of the 2000 Ordinance sought to provide for the shift of the burden of proof, but the proposal was rejected by the lawmakers, who chose a final version that shows a worrying omission in this respect.¹⁶⁹ Similarly, no provision exists with respect to protection from victimisation. In *Lithuania*, article 13(2) of the Law on Equal Treatment makes it clear that complaints will be treated by the Office of the Equal Opportunities Ombudsman under rules set by the Law on Equal Opportunities of Women and Men. This law provides for the shift of the burden of proof, but only in gender discrimination cases, thus putting Lithuanian legislation at odds with the Directive. Concerning victimisation, article 7(5) protects from 'persecution' only the employee or public servant who filed a complaint regarding discrimination.

The *conclusion* is that the provision on the sharing of the burden of proof has been incorrectly or incompletely transposed in the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland and Romania. As far as victimisation is concerned, the Directive is inadequately transposed in Estonia, Poland, and Romania.

¹⁶⁶ Translation by Translation and Terminology Centre, online at www.ttc.lv/New/lv/tulko/jumi/E0223.doc.

¹⁶⁷ See Filipek & Pamula 2004/2005, 38-9.

¹⁶⁸ See Kádár & Farkas 2004/2005, 46.

¹⁶⁹ See Weber 2003, 28-9. A bill aimed at modifying the anti-discrimination legal framework, currently discussed at governmental level before being presented to Parliament for approval, would provide for a shift in the burden of proof, although it is not clear at this stage how exactly the provision will be drafted.

5.4.4 Standing for interest groups (article 9(2))

At first glance, one could remark that the issue of ensuring legal standing for associations involved in the work for equality and non-discrimination is not a particularly controversial one because most of the old and new Member States, have not altogether ignored this requirement.¹⁷⁰ On a closer look, the topic appears more problematic, since it has been necessary for Member States to determine which associations could play a role and the extent of their powers. In fact, it can be debated whether article 9(2) of the Directive foresees alternative or cumulative options.¹⁷¹

The only country where this provision of the Directive has not been implemented at all is *Estonia*, though a 'person who has a legitimate interest to check compliance with the requirements for equal treatment' may eventually represent victims before the Legal Chancellor.¹⁷²

On the other hand, a clear example of a law that encompasses both aspects foreseen by the Directive ('on behalf' and 'in support' of the victim), one that even went beyond the minimum requirements, may be found in *Bulgaria*. According to article 71(2) of the Law on Protection against Discrimination, trade unions and 'not-for-profit legal persons carrying out activities beneficial to the public' may lodge a claim before the court or 'step in as a concerned party into a pending legal action'; in addition, article 71(3) makes it clear that when rights of many people have been violated, such organisations 'may lodge an independent claim'. As far as proceedings before the special enforcement body, article 50(1)(3) stipulates that they may be instituted by the Commission itself after 'signals from natural or legal persons'.¹⁷³ *Hungary* also foresees the possibility of an *actio popularis* (article 20 of the Act on Equal Treatment) – alongside the right of 'social and interest representation organisations' to act on behalf of the complainant (article 18) – when 'the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately'.¹⁷⁴ The same can be said for *Romania*, which recognises legal standing in court for non-governmental organisations involved in the field of human rights, in addition to the possibility of assisting single victims with their consent, 'in cases in which the discrimination takes place in their domain of activity and prejudices a

¹⁷⁰ See 4.5.7 above.

¹⁷¹ See 2.5.7 and 4.5.7 above.

¹⁷² Poleshchuk 2004/2005, 39.

¹⁷³ See the translation of the Labour Code at http://europa.eu.int/comm/employment_social/fundamental_rights/legis/lgac_en.htm.

¹⁷⁴ See Kádár & Farkas 2004/2005, 45.

community or a group of persons'.¹⁷⁵ It is unclear whether non-governmental organisations may also take action before the National Council for Combating Discrimination.

Whilst Cyprus chose to allow interest groups to act only on behalf of victims, and Slovenia only allows organisations to 'take part' in proceedings commenced by victims of discrimination, in Malta organisations having a legitimate interest may act either on behalf or in support of the complainant (regulation 11). In Poland article 61(4) of the Code of Civil Procedure, amended by the Act of 2 July 2004 (in force since 5 February 2005), makes it clear that organisations devoted by statute to work on equality and non-discrimination may 'institute actions on behalf of the citizens' or 'join the proceedings in each stage thereof' upon consent from the victim.

On the contrary, some concern should be raised regarding the compatibility of legislation in a few other countries. In the Czech Republic associations may only represent in Court victims of discrimination, according to article 26(3) of the Act on Civil Procedure or article 35(4) of the Judicial Administrative Code. In Lithuania only trade unions are allowed to represent the interests of their members, and only if the matter proceeds to court; article 56 of the Civil Procedure Code, moreover, seems to refer to a mere power of representation in court.¹⁷⁶ It is the case in Latvia that trade unions or 'voluntary organisations' may play an active role in the defence of rights, but only when their own members are involved.¹⁷⁷ A proposal for ensuring better compliance with the Directive is currently being discussed in the relevant parliamentary committees. Finally, the law in Slovakia is very narrow: the National centre for human rights (see above) or other legal entities having the aim of protecting against discrimination may only 'represent' a victim in legal proceedings, although, given the lack of an explicit prohibition, there does seem to be the (remote) possibility for interest groups to file legal opinions in support of a claim.¹⁷⁸

In *conclusion*, it can be said that the provision on legal standing for interest groups has not been correctly transposed in the Czech Republic, Estonia, Latvia, Lithuania, and Slovakia.

5.5 CASE LAW ON SEXUAL ORIENTATION DISCRIMINATION

It is encouraging to note that in some new Member States and acceding countries the new rules have already been tested as a means of redress against sexual

¹⁷⁵ Article 22(1) of Ordinance 137/2000. See Weber 2003, 25.

¹⁷⁶ See Vindrinskaite 2004/2005, 3 and 28.

¹⁷⁷ See Feldhune 2003, 21; Feldhune 2004/2005, 31.

¹⁷⁸ Dlugosova 2004/2005, 41.

orientation discrimination. For example, in the *Czech Republic*, where the Labour Ministry keeps a record of all violations of the anti-discrimination provisions since the end of 2004, it appears that at least one case in 2005 concerned indirect sexual orientation discrimination of a man in the field of access to employment.¹⁷⁹ In *Latvia* the case of a gay man who had been denied a job prompted the court to read sexual orientation in the list of prohibited grounds of discrimination foreseen by article 29 of the Labour Law.¹⁸⁰ Already in 1997 the National Human Rights Office had found discrimination in a case involving dismissal of a gay policeman, on the basis of Latvian legislation (because, according to the Office, article 28 of the Law on Police 'does not require heterosexual orientation as a requirement for serving the police, but instead requires education, physical preparedness, health, ability and willingness to carry out police duties, knowledge of the Latvian language and absence of criminal records') and of international law (because article 6 of the International Covenant on Economic, Social and Cultural Rights refers to 'other status').¹⁸¹

In *Bulgaria*, interestingly, the first case of sexual orientation discrimination was commenced by a non-governmental organisation (Queer Bulgaria Foundation) before the Sofia District Court. However, it does not involve the employment sphere, as it was brought (and won) against the refusal of the Sofia University to grant access to a sports facility to four gay men.¹⁸² Midway between employment protection and the guarantee of 'personality rights' is a case that was heard in *Romania* by the National Council for Combating Discrimination. At stake was the behaviour of a priest of the Romanian Orthodox Church who publicly accused a singer and church assistant of being gay, and took steps toward having the man removed from his job by the church council. The National Council for Combating Discrimination found that the personal dignity of the church assistant had been violated, but failed to provide relief against the acts of the local unit of the orthodox church.¹⁸³

Finally, in *Hungary* both the first instance court and the Court of Appeal found in favour of the Károli Gáspár Calvinist University which in 2003 had

¹⁷⁹ It has not been possible to trace the references for this case. See Otáhalová 2005, 14.

¹⁸⁰ Rīgas pilsētas Ziemeļu rajona tiesa (Court of the Ziemeļu District of Riga) 29 April 2005, case of *Māris Sants pret Rīgas kultūras vidusskolu*, No. C32242904047505, C-475/3 (Latvian version of the judgement online at www.politika.lv/index.php?id=111436&lang=lv). See also Lavrikovs 2005, 5; and 2 *European Anti-Discrimination Law Review* (2005) 67.

¹⁸¹ Opinion of the Latvian National Human Rights Office of 17 April 1998. See Lavrikovs 1998.

¹⁸² Information provided by Mihaela Preslavská.

¹⁸³ National Council for Combating Discrimination, 18 January 2005, decision 16; information provided by Iustina Ionescu.

expelled a theology student after learning about his homosexuality. The decision is based on principles that could well have severe repercussions in the employment sphere, because it affords churches and religious institutions an over-arching right to freedom of expression and religion. On these grounds, both courts refused to review the consequences of religious or moral views of the University on the right to non-discrimination of LGB people, but accepted that homosexuality is a protected personal characteristic. The lawsuit had been commenced by an non-governmental organisation under the new Act on Equal Treatment, but does not seem to relate directly to the exception foreseen by article 4(2) of the Directive: the Court of Appeal referred to:

- (i) a decision of the Constitutional Court on the right of churches to be free from state interference,
- (ii) the freedom (recognised by the Act on Public Education) of determining educational contents, and
- (iii) article 28 of the Act on Equal Treatment, which grants educational institutions the possibility of organising separate groups or classes for believers of a certain religion.¹⁸⁴

On 8 June 2005 the Supreme Court rejected a request for extraordinary review of the lower court's decision, on the ground that because of the general justification provision of article 7(2) of the Act on Equal Treatment,¹⁸⁵ a denominational university is exempted from the duty to observe the principle of equal treatment.¹⁸⁶

5.6 CONCLUDING REMARKS

By the end of 2005 all new Member States had notified the European Commission that they had implemented the Directive. Moreover, laws against sexual orientation discrimination in employment can also be found in the two acceding countries, Bulgaria and Romania. This chapter has analysed, within this rather positive situation, the structure and contents of national law aimed at ensuring the transposition of the Directive into the domestic legal system.

It is encouraging to remark that in some states the legislature chose to apply the new rules not only to the field of employment and occupation, but also to other sectors of private and public law, such as social security, education, provi-

¹⁸⁴ See 1 *European Anti-Discrimination Law Review* (2005), 55.

¹⁸⁵ See 5.2.1 (but also 5.3.3) above.

¹⁸⁶ See 2 *European Anti-Discrimination Law Review* (2005), 63.

sion of goods and services and others. In addition, in most countries a greater practical application of the principle of equal treatment is ensured through the possibility of bringing complaints of sexual orientation discrimination to the attention of specialised (equality) bodies, sometimes even by non-governmental organisations through some form of *actio popularis*.

Nevertheless, steps adopted by new Member States and acceding countries are not always sufficient for ensuring correct transposition of the Directive. Sometimes the definitions of direct and indirect discrimination are inaccurate or incomplete; sometimes it is not made explicitly clear that harassment and instruction to discriminate are a form of discrimination. As far as material scope is concerned, there is a tendency to omit self-employment and/or membership of, and involvement in, professional organisations; furthermore, in some instances the law only applies to the private sector.

The possibility of justifying differential treatment through recourse to the notion of genuine occupational requirements has led some Member States to conceive formulae that appear to be too broad when compared with the requirements set by article 4 of the Directive, thus allowing employers greater decision-making possibilities than the Directive permits. Also, in a number of states there appear to be critical areas with respect to the sharing of the burden of proof and legal standing for interest groups.

In particular, the following countries seem to have incomplete legislation or legislation otherwise incompatible with the Directive:

- definitions of direct and indirect discrimination:
Czech Republic, Estonia, Hungary, Latvia, Poland, and Romania;
- harassment:
Cyprus, Estonia, Poland, Slovenia, and Romania;
- instruction to discriminate:
Cyprus, Romania, and perhaps the Czech Republic;
- material scope:
all countries but Cyprus and Slovakia;
- occupational requirements:
Czech Republic, Hungary, Latvia, Poland, and Slovakia;
- burden of proof:
all countries but Bulgaria, Cyprus, Slovenia, and Slovakia;
- victimisation:
Estonia, Poland, and Romania;
- standing for interest groups:
Czech Republic, Estonia, Latvia, Lithuania, and Slovakia.

Given these multiple shortcomings, enforcement of the new legal rules will thus be a particularly demanding task for most stakeholders involved in combating sexual orientation discrimination, a job also made more onerous in light of the widespread difficulty in accepting openness and visibility of LGB people in society and of the scarce knowledge of the new legal framework.