



# Combating Sexual Orientation Discrimination in the European Union

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# Combating Sexual Orientation Discrimination in the European Union

European Network of Legal Experts in the Non-discrimination field

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Gideon | 1996

# Executive Summary

The Employment Equality Directive (Directive 2000/78) requires all EU Member States to provide for protection against discrimination on grounds of sexual orientation in employment and occupation. The present report describes the scope of protection provided by the Directive and its normative impact on the national legal systems of the Member States against the background of international and other human rights law.

Today, the prohibition of discrimination on grounds of sexual orientation is firmly embedded in the law of the United Nations and of the Council of Europe. With respect to the latter, and more specifically the European Convention on Human Rights, there is a particularly close link with EU law through Article 6 TEU.

Before the Employment Equality Directive obliged the EU Member States to do so, few national legal systems contained the principle of non-discrimination on the ground of sexual orientation in the field of employment and occupation, and even fewer in other areas. Directive 2000/78 brought about common EU rules on the matter.

The Employment Equality Directive applies within the broadly defined field of employment and occupation, though to the exclusion of social security benefits that do not fall under the notion of pay within the meaning of Article 157 TFEU on equal pay for men and women.

The Directive prohibits discrimination based on the ground of sexual orientation among others. However, the meaning of this term is not clearly defined. In particular, it is open to question whether the Directive, in addition to heterosexual, homosexual and bisexual orientation, also covers broader issues of non-heteronormativity such as dress style, manners of expression or behaviour that deviate from stereotypical social roles or expectations.

Directive 2000/78 prohibits the usual four forms of discrimination of modern EU anti-discrimination law, namely direct and indirect discrimination, harassment and instructions to discriminate. Generally, these concepts have been implemented properly in the Member States, though in some countries problems exist, for example with respect to the all-important issue of the comparator.

The Employment Equality Directive covers not only discrimination based on the victim's actual sexual orientation but also on the basis of association and assumption. In this respect, national implementation in some EU Member States is problematic. Quite often there is no explicit law on these issues.

The Employment Equality Directive provides for a number of derogations that may justify unfavourable treatment of people because of their sexual orientation. These are generally correctly implemented in the Member States, though it is noteworthy that there appears to be no single statute in the European Union that would establish a regime of particular and specific regulation of positive action in respect of sexual orientation. Some national legal systems provide for positive action not only as a derogation from the principle of non-discrimination but rather as a positive obligation. This is in line with the character of the Directive as an instrument providing minimum protection.

The majority of national anti-discrimination laws provide for an exception for churches and ethos-based organisations. In this respect, the Employment Equality Directive explicitly states that this derogation cannot be relied on in order to justify unfavourable treatment on any other ground than religion or belief. A number of Member States fail to make an explicit disposition to this effect. There are practical examples showing that this creates a potential threat to the non-discrimination principle with regard to sexual orientation.

Anti-discrimination statutes in most EU Member States regulate the remedies and sanctions attached to violations of the prohibition of discrimination on the ground of sexual orientation. However, most do not explicitly and

directly refer to the Equality Employment Directive's standard according to which the sanctions are to be effective, proportionate and dissuasive. No EU Member State provides for sanctions that are designed and tailored specifically to acts of discrimination on the ground of sexual orientation.

The Equality Employment Directive does not oblige the Member States to establish an equality body, i.e. an independent body for the promotion of equal treatment. Despite the absence of such an obligation, a number of Member States have set up general equality authorities also covering sexual orientation discrimination. There is no EU Member State with an equality institution established solely to tackle problems of discrimination on grounds of sexual orientation.

Directive 2000/78 explicitly allows for more far-reaching protection under national law. Across the EU Member States, there is a significant amount of legislation governing discrimination on grounds of sexual orientation that goes beyond the scope of Directive 2000/78. The proposal of the European Commission to equalise the standard of protection within the EU, i.e. to combat discrimination outside of the field of employment in the form of a 'horizontal directive', is under discussion. It forms one of the political top priorities of the President of the new European Commission.

# Introduction

Discrimination on grounds of sexual orientation remains a serious problem in the European Union (EU). Very worryingly, it has even been on the rise recently. The present report deals with the prohibition of such discrimination in the EU and beyond. This is a broad field. Firstly, there is both primary and secondary Union law on the issue, namely Article 10 of the Treaty on the Functioning of the European Union (TFEU), according to which, in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sexual orientation among other grounds, further to the legal basis of Article 19 TFEU, the anti-discrimination Article 21 of the Charter of Fundamental Rights and the ‘Employment Equality Directive’ (Directive 2000/78).<sup>1</sup> Secondly, Member States retain a degree of independence in implementing EU law and also the power to pursue anti-discrimination policy independently. Thirdly, judicial interpretation and application is of paramount importance, in that both national courts and the Court of Justice of the European Union (CJEU) contribute to defining the standards of protection. Finally, the United Nations (UN) and the Council of Europe (CoE) participate in the elaboration of international standards. Accordingly, all those factors constitute the necessary context of this report.

Chapter I of the report analyses the international normative environment as it developed in the form of UN and CoE human rights instruments. The analysis seeks to highlight the international standard of protection from discrimination on the ground of sexual orientation as it forms the background for developing the standard of protection within the EU.

Chapter II seeks to give an overall impression of the development of the protection from discrimination on the ground of sexual orientation in the EU before the Employment Equality Directive became effective, both on the level of action of the EU institutions and of the law of particular Member States. Both inspired and informed the present Union law.

Chapter III focuses on the normative elements of the prohibition of discrimination, as interpreted by the CJEU, including also the cross-influence of case law on other protected grounds under Directive 2000/78 and other EU non-discrimination law.

Chapter IV is devoted to CJEU case law concerning sexual orientation as a protected ground of the right to non-discrimination. Compared to other grounds of discrimination, in particular sex and age, sexual orientation remains marginal in CJEU case law. Nevertheless, there are a number of landmark decisions that require a careful analysis since they provide the Court’s authoritative interpretation of the prohibition of discrimination on the ground of sexual orientation against the background of the broad paradigm of human rights protection.

Chapter V looks at the implementation of EU standards in the Member States, analysing how the domestic legal systems respond and interact with EU legislation and case law, including difficulties and challenges in implementation that may be due to culture-specific elements in this area of law. This part goes beyond the confines of the present EU law and also analyses the prohibition of non-discrimination on grounds of sexual orientation in areas beyond the material scope of the Employment Equality Directive.

Lastly, Chapter VI considers future developments in the EU, in particular the European Commission’s proposal for a new and broader directive on grounds that include discrimination on the basis of sexual orientation, which aims to increase the protection against sexual orientation discrimination under EU law.

<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

Eva | 1992

# Part I

## The international legal framework

Today, the prohibition of discrimination on grounds of sexual orientation is firmly embedded in the law of the UN and of the Council of Europe.

## 1. United Nations

Rights of LGB (lesbian, gay and bisexual) persons are protected under the general framework of international human rights law which is 'guided by the principles of universality and non-discrimination'.<sup>2</sup> Article 1 of the Universal Declaration of Human Rights states that 'all human beings are born free and equal in dignity and rights'. In the UN human rights context, this includes LGB people, even though neither Articles 2<sup>3</sup> and 26<sup>4</sup> of the International Covenant on Civil and Political Rights (ICCPR) nor Article 2(2)<sup>5</sup> of the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly mention sexual orientation. In both cases, however, the catalogue of grounds is open-ended.

In this context, the question arises of whether 'sexual orientation' constitutes a separate ground of discrimination in addition to the catalogue, i.e. whether it falls under 'other status' or whether it is covered by the term 'sex'. In 1994, the Human Rights Committee (HRC) in the individual communication *Toonen v Australia*<sup>6</sup> held that States are obligated to protect individuals from discrimination on the basis of their sexual orientation and that the 'reference to sex' in Article 2(1) (and in Article 26) ICCPR is to be taken as including sexual orientation. In later cases, the HRC confirmed that Articles 2(1) and 26 include discrimination on the ground of sexual orientation but avoided specifying that this is through the term 'sex'. Nevertheless, in their concurring opinion on the case *Joslin v New Zealand*,<sup>7</sup> two HRC members reiterated that 'it is the established view of the committee that the prohibition against discrimination on grounds of 'sex' in Article 26 comprises also discrimination based on sexual orientation'. However, in the subsequent decisions *Edward Young v Australia*<sup>8</sup> and *X. v Colombia*,<sup>9</sup> the Human Rights Committee simply recalled its earlier jurisprudence that the prohibition against discrimination under Article 26 comprises also discrimination based on sexual orientation. As for the Committee on Economic, Social and Cultural Rights, it observed in its General Comment No 20 that "[o]ther status" as recognized in Article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights.<sup>10</sup> Similar views were expressed

<sup>2</sup> UN Human Rights Council (2011), *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, <http://www.refworld.org/docid/4ef092022.html>.

<sup>3</sup> Article 2 ICCPR provides: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

<sup>4</sup> Article 26 ICCPR provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

<sup>5</sup> Article 2(2) ICESCR provides: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

<sup>6</sup> HRC, *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994.

<sup>7</sup> HRC, *Joslin v New Zealand*, CCPR/C/75/D/902/1999, UN Human Rights Committee, 17 July 2002.

<sup>8</sup> HRC, *Young v Australia*, CCPR/C/78/D/941/2000, UN Human Rights Committee, 6 August 2003.

<sup>9</sup> HRC, *X v Colombia*, CCPR/C/89/D/1361/2005, UN Human Rights Committee, 30 March 2007.

<sup>10</sup> UN Committee on Economic, Social and Cultural Rights (2009), General Comment No 20: Non-discrimination in economic, social and cultural rights: Article 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights, 2 July 2009, E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html>, para. 32.

in general comments of the Committee on the Rights of the Child,<sup>11</sup> the Committee against Torture<sup>12</sup> and the Committee on the Elimination of Discrimination against Women.<sup>13</sup>

The prohibition of discrimination on grounds of sexual orientation applies within the very broad field of application of the UN Conventions. Accordingly, the work of the UN bodies addresses different areas. For example, with respect to employment, the Committee on Economic, Social and Cultural Rights has held that through the combined effect of Articles 2(2) and 3 'the Covenant prohibits discrimination in access to and maintenance of employment on grounds of [...] sexual orientation [...] which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality'.<sup>14</sup> With respect to healthcare under Article 12(1) ICESCR, the same Committee has indicated that the Covenant proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means of and entitlements to their procurement, on the grounds of sexual orientation and gender identity.<sup>15</sup>

In terms of the substance of the prohibition of discrimination, the UN bodies in their work use the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.<sup>16</sup> The Principles were developed by human rights experts and adopted in 2006; they are not binding. The Principles bring together and clarify existing international human rights law standards. Several UN entities have used in particular the definition of 'sexual orientation' enshrined in this document, namely as referring 'to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'<sup>17</sup>

According to Principle 2, discrimination on the basis of sexual orientation or gender identity:

[...] includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

<sup>11</sup> UN Committee on the Rights of the Child (2011), General Comment No 13: The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, available at: <http://www.refworld.org/docid/4e6da4922.html>, paras. 60 and 72 (g).

<sup>12</sup> UN Committee Against Torture (2008), General Comment No 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, available at: <http://www.refworld.org/docid/47ac78ce2.html>, para. 21.

<sup>13</sup> UN Committee on the Elimination of Discrimination Against Women (2010), General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, available at: <http://www.refworld.org/docid/4d467ea72.html>, para. 18.

<sup>14</sup> UN Committee on Economic, Social and Cultural Rights (2005), General Comment No 18: Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights, 24 November 2005, E/C.12/GC/18, available at <http://www.refworld.org/docid/4415453b4.html>, para. 12 (b)(i).

<sup>15</sup> UN Committee on Economic, Social and Cultural Rights (2000), General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: <http://www.refworld.org/docid/4538838d0.html>, para. 4.

<sup>16</sup> For the text, see <http://www.yogyakartaprinciples.org/>. See further Śmiszek K. (2009), 'Równe traktowanie osób LGBT w zatrudnieniu – przepisy i orzecznictwo wspólnotowe a standardy Yogyakarta' [Equal Treatment of LGBT Persons in Occupation and Employment – Legal Provisions and Judicial Interpretation in EU Law compared against the Yogyakarta Principles], in: Wieruszewski R., Wyrzykowski M. (eds.), *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne* [Sexual orientation and gender identity. Legal and social aspects], Warsaw: EuroPrawo.

<sup>17</sup> E.g. UN High Commissioner for Refugees (UNHCR), UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008; UN Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs*, March 2009.

Principles 12-18 lay down the standards of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health.<sup>18</sup> Principle 12 on the right to work is of particular relevance in the context of present EU law, which so far is limited to employment and occupation. The Principle states that ‘everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.’

## 2. Council of Europe

### 2.1 European Convention on Human Rights

Article 14 of the European Convention on Human Rights (ECHR) guarantees equal enjoyment of rights and freedoms set out in the Convention.<sup>19</sup> This does not constitute an independent ground of protection from discrimination but is an accessory right applicable only in relation to the enjoyment of the rights and freedoms otherwise protected by the Convention and such has often been criticised and dubbed a Cinderella provision.<sup>20</sup> Only Protocol No 12 grants general protection against discrimination in respect of states that have ratified it.<sup>21</sup>

Article 14 ECHR does not explicitly mention sexual orientation as a discrimination ground. In 1997, the then European Commission of Human Rights noted that it was not clear whether a difference based on sexual orientation is a difference based on ‘sex’ or on ‘other status’ for the purposes of Article 14 ECHR.<sup>22</sup> This was clarified in 1999 in *Salgueiro da Silva Mouta v Portugal*, where the European Court of Human Rights (ECtHR) stated that a difference based on a person’s sexual orientation is ‘a concept which is undoubtedly covered by Article 14 of the Convention’, adding that ‘the list set out in that provision is illustrative and not exhaustive, as is shown by the words “any ground such as”’.<sup>23</sup> From this, it may be concluded that the Court recognises sexual orientation as a discrimination ground in its own right, rather than conceiving of it as being part of either ‘sex’ or ‘other status’.<sup>24</sup>

Under Article 14 ECHR, discrimination can result from either different treatment of comparable situations or from the same treatment of different (non-comparable) situations (*Thlimmenos*).<sup>25</sup> In its case law, the ECtHR has recognised the comparability of same-sex couples and opposite-sex couples as regards their need for legal recognition and protection of their relationship (*Vallianatos v Greece*).<sup>26</sup> ECHR law recognises that discrimination can be either direct or indirect discrimination (e.g. *Horváth and Kiss v Hungary*,<sup>27</sup> in the context of indirect discrimination on grounds of ethnic origin).

<sup>18</sup> O’Flaherty M., Fisher J. (2008), ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles’, *Human Rights Law Review*, vol. 8, issue 2, 207-248, pp. 234 and 235.

<sup>19</sup> Article 14 ECHR provides: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

<sup>20</sup> O’Connell R. (2009), ‘Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR’, *Legal Studies*, Issue No 2, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1328531](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328531).

<sup>21</sup> As at 2014, 18 states have ratified Protocol No 12 and 19 have signed it without ratification.

<sup>22</sup> European Commission of Human Rights report, *Sutherland v The UK* (Application No 25186/94), report of 1 July 1997.

<sup>23</sup> ECtHR, *Salgueiro da Silva Mouta v Portugal*, Application No 33290/96, Judgment of 21 December 1999, para. 28.

<sup>24</sup> See e.g. Tobler C. (2014), ‘Equality and Non-Discrimination under the ECHR and EU Law. A Comparison Focusing on Discrimination against LGBTI Persons’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 521-561, p. 547.

<sup>25</sup> ECtHR, *Thlimmenos v Greece*, Application No 34369/97, Judgment of 6 April 2000.

<sup>26</sup> ECtHR, *Vallianatos and Others v Greece*, Applications Nos 29381/09 and 32684/09, Judgment of 7 November 2013.

<sup>27</sup> ECtHR, *Horváth and Kiss v Hungary*, Application No 11146/11, Judgment of 29 January 2013.

In ECtHR case law, there is no explicit finding of indirect discrimination on grounds of sexual orientation yet, though according to the approach advocated by the Committee of Social Rights for the European Social Charter, the Court's approach in *E.B. and Others v Austria*<sup>28</sup> concerns indirect discrimination.<sup>29</sup> However, it seems more obvious to see the case as an example where the ECtHR found direct discrimination based on same treatment of non-comparable situations. In *E.B. and Others v Austria*, the applicants complained that their convictions for homosexual acts with consenting adolescents under Austrian criminal law remained on their criminal record even though the ECtHR had found the relevant provision of the Austrian law to be discriminatory and the Austrian Constitutional Court had annulled it. The ECtHR reiterated that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is not only violated in cases of differential treatment, but also when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. In the present case, the ECtHR found that the failure to treat the applicants differently from other persons also convicted of a criminal offence, but where the offence in question had not been quashed by the Constitutional Court or otherwise abolished, amounted to discrimination on grounds of sexual orientation under Article 14 in conjunction with Article 8 ECHR.

As regards justification, the ECtHR has consistently held that differences based on sexual orientation require particularly convincing and weighty reasons by way of justification.<sup>30</sup> For example, in *Karner v Austria* and in *Kozak v Poland*,<sup>31</sup> the Court was faced with the argument of justification based on the protection of the traditional family. The Court underlined that 'a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense.'<sup>32</sup> In other words, in these cases the Court rejected the justification ground by reason of proportionality. It will be seen that under EU law the approach is stricter, as reliance on the protection of the family is never possible in order to justify direct discrimination on grounds of sexual orientation.<sup>33</sup> In this respect, the degree of protection under Union law is higher than under the ECHR.

In practice, there may be tensions between different grounds of discrimination. In such cases, a balance has to be struck. *Eweida and Others v UK*<sup>34</sup> provides an example. The case concerned, among others, a registrar of births, deaths and marriages (Ms Ladele) and a sex therapist and relationship counsellor (Mr McFarlane). In both cases, the employer pursued a policy of non-discrimination against service users, who included homosexuals. The applicants' interpretation of Christianity led them to refuse to carry out certain duties, i.e. act as a civil partnership registrar and provide confidential sex therapy and relationship counselling for homosexual couples.<sup>35</sup> When dismissed, the applicants claimed that they had been discriminated against on the ground of their religious belief. However, the ECtHR ruled that there was no violation of Article 9 (freedom of thought, conscience and religion) in conjunction with Article 14 ECHR. The Court found that the events in question fell within the ambit of Article 9 ECHR and that Article 14 ECHR was applicable to the cases at hand. The Court recalled that differences in treatment based on sexual orientation require particularly serious reasons by way of justification, and that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship (although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order). Against this background, the Court considered it evident that the aim pursued by the local authority

<sup>28</sup> ECtHR, *E.B. and Others v Austria*, Application Nos 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07, Judgment of 7 November 2013.

<sup>29</sup> See above under I.2.2 of this report.

<sup>30</sup> For instance ECtHR, *Karner v Austria*, Application No 40016/98, Judgment of 24 July 2003, para 37; *Vallianatos and Others v Greece*, para. 77.

<sup>31</sup> ECtHR, *Kozak v Poland*, Application No 13102/02, Judgment of 2 March 2010.

<sup>32</sup> Cf. *Karner*, para. 41; *Kozak*, para. 99.

<sup>33</sup> See below under IV.1.1.3 of this report.

<sup>34</sup> ECtHR, *Eweida and Others v UK*, Application Nos 51671/10 and 36516/10, Judgment of 15 January 2013.

<sup>35</sup> It should be noted that there is also a very different Christian view on the matter, as expressed by Apple Chief Executive Officer Tim Cook when he said: 'I consider being gay among the greatest gifts God has given me.' Reported e.g. by the Financial Times on 30 October 2014, <http://www.ft.com/intl/cms/s/0/584fbfc2-6026-11e4-88d1-00144feabdc0.html#axzz3JpBJP30m>.

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was legitimate. In the context of proportionality, the Court took into account that the consequences for the applicants were serious. However, it also noted that employers' aim was to secure the rights of others that are also protected under the Convention. The Court concluded that, given the generally wide margin of appreciation of the national authorities when it comes to striking a balance between competing Convention rights, the national authorities did not exceed the margin of appreciation available to them. Accordingly, there was no violation of Article 14 taken in conjunction with Article 9 ECHR.

The Court's understanding of the Convention as a living instrument has opened up a broad field of application for the prohibition of discrimination on grounds of sexual orientation under Article 14 ECHR. The case law deals with issues as different as the age of consent under criminal law for sexual relations (e.g. *E.B. and Others v Austria*), succession of a deceased partner's tenancy inheritance (*Kozak v Poland*), child custody (*Salgueiro da Silva Mouta v Portugal*), adoption (e.g. *Gas and Dubois v France*,<sup>36</sup> *X and Others v Austria*),<sup>37</sup> social security (*P.B. and J.S. v Austria*,<sup>38</sup> *Manenc v France*),<sup>39</sup> public demonstrations (e.g. *Bączkowski and Others v Poland*,<sup>40</sup> *Alekseyev v Russia*,<sup>41</sup> *Genderdoc-M v Moldova*),<sup>42</sup> conditions of detention in prison (*X v Turkey*)<sup>43</sup> and marital status or other form of legal recognition (e.g. *Vallianatos and Others v Greece*).

A large part of this case law concerns the protection of private and family life under Article 8 ECHR, in conjunction with Article 14 ECHR. In the early case *Salgueiro da Silva Mouta v Portugal*, the ECtHR held that 'a judge's denial of child custody to a homosexual father because of his sexual orientation amounted to a discriminatory enjoyment of privacy.' In *P.B. and J.S. v Austria*, the Court ruled that the refusal to extend sickness insurance cover to the homosexual partner of an insured person amounted to discrimination in the field of Article 8 ECHR. Compared to an earlier case of the same year, namely *Schalk and Kopf v Austria*,<sup>44</sup> this seemed to mean that the notion of family life can no longer be restricted to heterosexual couples alone. However, in *J.M. v UK*,<sup>45</sup> the ECtHR refused to consider a case on child maintenance where persons in same-sex relationships were discriminated against under Article 8 ECHR and considered Article 1 of the Protocol 1 to the Convention instead (right to property); the Court found a violation of this provision in conjunction with Article 14 ECHR. In *X and Others v Austria*, the Court found a violation of Article 14 in conjunction with Article 8 ECHR on account of the difference in treatment of applicants in comparison with unmarried different-sex couples in which one partner wished to adopt the other partner's child. In *Vallianatos and Others v Greece*, the Court stated that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships, thus confirming the relevance of Article 8 ECHR in the context of same-sex relationships.<sup>46</sup>

## 2.2 Council of Europe soft law

Apart from the Court, other CoE bodies are also active in the field of discrimination on grounds of sexual orientation. An important step was made in 2010 with the adoption of a Resolution of the Parliamentary Assembly and a Recommendation by Committee of Ministers. The Resolution, entitled 'Discrimination on the basis of sexual orientation

<sup>36</sup> ECtHR, *Gas and Dubois v France*, Application No 25951/07, Judgment of 15 March 2012.

<sup>37</sup> ECtHR, *X and Others v Austria*, Application No 19010/07, judgment 19 February 2013.

<sup>38</sup> ECtHR, *P.B. and J.S. v Austria* (Application No 18984/02), Judgment of 22 July 2010.

<sup>39</sup> ECtHR, *Manenc v France*, Application No 66686/09, decision on inadmissibility of 21 September 2010.

<sup>40</sup> ECtHR, *Bączkowski and Others v Poland*, Application No 1543/06, Judgment of 3 May 2007.

<sup>41</sup> ECtHR, *Alekseyev v Russia*, Application Nos 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010.

<sup>42</sup> ECtHR, *Genderdoc-M v Moldova*, Application No 9106/06, Judgment of 12 June 2012.

<sup>43</sup> ECtHR, *X v Turkey*, Application No 24626/09, Judgment of 9 October 2012.

<sup>44</sup> ECtHR, *Schalk and Kopf v Austria*, Application No 30141/04, Judgment of 24 June 2010.

<sup>45</sup> ECtHR, *J.M. v UK*, Application No 37060/06, Judgment of 28 September 2010.

<sup>46</sup> *Vallianatos*, para. 78.

and gender identity',<sup>47</sup> called on Member States to 'ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000'. The Recommendation,<sup>48</sup> on measures to combat discrimination on grounds of sexual orientation or gender identity, pools the principles derived from existing European and international instruments, with a particular emphasis on the ECHR. It identifies specific measures to be adopted and effectively enforced by Member States in order to combat discrimination, to ensure respect for human rights and to promote tolerance towards LGBT persons (T standing for 'transsexuals'). With respect to employment, the Recommendation states:

Member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation.

The Recommendation also makes reference to equal rights in education, healthcare, and housing. Even though it is not a legally binding instrument, all Council of Europe Member States should implement it. The ECtHR has acknowledged the importance of both instruments by making explicit reference to them in *Vallianatos*.<sup>49</sup>

## 2.3 European Social Charter

Finally, there is the Revised European Social Charter, with its Article E on non-discrimination.<sup>50</sup> However, the legal relevance of the Charter is limited by the fact that a number of Union Member States have not ratified its revised version.<sup>51</sup>

Similarly to Article 14 ECHR, Article E of the Revised European Social Charter applies within the field of application of the rights set forth in the Charter. There is a protocol concerning collective complaints. The Charter has a broad field of application. For example, under Article 1(2) States parties undertake to protect effectively the right of the worker to earn his or her living in an occupation freely entered into. In this respect, the European Committee on Social Rights (ECSR) – the body responsible for monitoring compliance with the Charter – recalled that under this provision national legislation should prohibit discrimination in employment on grounds of (*inter alia*) sexual orientation and that such legislation should cover both direct and indirect discrimination.<sup>52</sup> As regards indirect discrimination, the Committee stated that Article E of the Revised Charter prohibits 'all forms of indirect discrimination', taking the view that: 'Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.'<sup>53</sup> However, it should be added that from an EU law perspective in such cases a finding of *direct* discrimination through unequal treatment of non-comparable situations is preferable since this considerably limits the possibilities of justification.<sup>54</sup>

<sup>47</sup> Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe 'Discrimination on the basis of sexual orientation and gender identity' of 29 April 2010.

<sup>48</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31 March 2010.

<sup>49</sup> *Vallianatos*, para. 29.

<sup>50</sup> Article E provides: 'The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.'

<sup>51</sup> For the situation as regards signatures and ratifications, see [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatificationsMarch2013\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatificationsMarch2013_en.pdf).

<sup>52</sup> Conclusions 2008 Albania, Armenia, Azerbaijan and Cyprus.

<sup>53</sup> Conclusions 2008 Albania.

<sup>54</sup> See in particular IV.1.1.3 below.

An interesting example of the practice of the ECSR concerning discrimination on grounds of sexual orientation is *Interights v Croatia*,<sup>55</sup> where Croatia was found to breach Article 11(2) on the right to health education, in particular sexual and reproductive health education in school in the light of the non-discrimination clause of the Charter, by using homophobic school textbooks. In the decision, the Committee indicated that the state has an obligation to ensure that educational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice that contribute to social exclusion, embedded discrimination and denial of human dignity. The Committee noted that statements found in the curriculum covering sex education stigmatised homosexuals and were based upon negative, distorted, reprehensible and degrading stereotypes. Subsequently, this was affirmed by the Committee of Ministers in a Resolution.<sup>56</sup>

### 3. Relevance for the European Union

Both UN and CoE human rights law are relevant to EU law in the context of combating discrimination on grounds of sexual orientation. Indeed, both UN Conventions and the ECHR are mentioned in the Preamble of Directive 2000/78 as an important part of the Directive's context and background. In its case law on the Directive, the CJEU has underlined that the prohibition of discrimination on grounds of sexual orientation derives from various international instruments among other sources. Indeed, the Court has gone so far as to hold that the Directive does not itself lay down the principle of equal treatment in the field of employment and occupation, but merely provides a general framework for combating discrimination on various grounds (*Römer*).<sup>57</sup>

In discrimination cases concerning sexual orientation, the CJEU has so far not made any reference to UN Conventions.<sup>58</sup> Instead, it prefers to refer to the ECHR and to the Union's own Charter of Fundamental Rights, which to a large extent reflects the ECHR. With respect to the latter, there is a particularly close link with the European Union in several respects. Firstly, all Member States of the EU have joined the ECHR. Secondly, according to Article 6(2) TEU the Union itself shall accede to the ECHR. Thirdly, under Article 6(3) TEU the Convention is part of the Union's general principles. Fourthly, the ECHR is explicitly mentioned in the Preamble to Directive 2000/78. Accordingly, the CJEU must always consider the ECHR standards when addressing the scope of human rights under EU law, including the prohibition of discrimination on grounds of sexual orientation under Directive 2000/78. As for these standards, the above has shown that there is now well-developed ECtHR case law on the prohibition of discrimination on grounds of sexual orientation under Article 14 ECHR. From an EU law perspective, the benefit of the ECHR and ECtHR jurisprudence on this issue lies in particular in the fields that are not yet covered by Union anti-discrimination law. Conversely, within the field of employment and occupation that falls under Directive 2000/78, the approach developed by the CJEU is stricter in certain respects, notably with regard to the possibility to justify direct discrimination, as mentioned. It should be added that from a legal perspective the fact that Union law provides for a higher degree protection in this respect should not be a problem even in the event of EU accession to the ECHR, given the character of the ECHR as an instrument providing mere minimum and subsidiary protection.<sup>59</sup>

Finally, the protection against discrimination on grounds of sexual orientation provided by EU law and the ECHR may be complemented by the European Social Charter for those Union Member States that have signed and ratified it, especially in fields not covered by either EU law or the ECHR.

<sup>55</sup> *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia* (No 45/2007).

<sup>56</sup> Resolution CM/ResChS(2009)7 of the Committee of Ministers (Collective complaint No 45/2007 by the International Centre for the Legal Protection of Human Rights (INTERIGHTS) against Croatia) on 21 October 2009.

<sup>57</sup> CJEU, Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECR I-3591, paras. 59 and 60.

<sup>58</sup> Though Advocate General Ruiz-Jarabo Colomer did in his opinion on the *Maruko* case: CJEU, Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757, fn. 87 in the Advocate General's opinion.

<sup>59</sup> Tobler C. (2014), 'Equality and Non-Discrimination under the ECHR and EU Law. A Comparison Focusing on Discrimination against LGBTI Persons', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 521-561, p. 561.

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# Part II

## Development in the European Union

## 1. EU Member State laws before the adoption of Directive 2000/78

Whilst many Member State constitutions contain a general and openly formulated equality clause, before 2000 none of them explicitly mentioned sexual orientation as a prohibited ground of discrimination. **Portugal** and **Malta** were the first to introduce such provisions in 2004 and 2014 respectively.

On the statutory level, at the time of the adoption of the Employment Equality Directive only a limited number of the then 15 EU Member States prohibited discrimination on grounds of sexual orientation in the area of employment and occupation. In accordance with their national legal cultures, Member States chose different instruments, such as national employment laws (e.g. **Belgium**,<sup>60</sup> **France**, **Ireland**),<sup>61</sup> criminal provisions (e.g. **Finland**, **France**, **Luxembourg**, the **Netherlands**, and **Spain**) or specific anti-discrimination statutes (e.g. **Denmark**, the **Netherlands**, **Sweden**).<sup>62</sup>

The area of employment and occupation has usually been the first area where national legislation has addressed the problem of discrimination on grounds of sexual orientation. In other areas, before the adoption of the Employment Equality Directive a prohibition of discrimination on that ground was even more rare than in the field of employment and occupation. **Denmark**, **Finland**, **France**, **Ireland**,<sup>63</sup> **Luxembourg**, the **Netherlands**, **Spain** and **Sweden** had such legislation for access to goods and services.<sup>64</sup>

## 2. Development on the level of the Union

### 2.1 Action of the EU institutions before the adoption of Directive 2000/78

Even though it did not translate into positive law until 2000, European Community policy against sexual orientation discrimination was in the making as of 1984. At that time, Members of the European Parliament (MEPs) relied on the ECtHR judgment in *Dudgeon v UK*<sup>65</sup> as an argument for the idea of drafting a report on the situation of gays and lesbians. It was noted in the discussion on the report that the matter fell beyond the powers of the

<sup>60</sup> In Belgium, before the Framework Employment Equality Directive entered into force, the ground of sexual orientation was mentioned only in the collective labour agreement with regard to recruitment (*Convention collective de travail n 38quater du 14 juillet 1999, conclue au sein du Conseil national du Travail, modifiant la convention collective de travail n 38 du 6 décembre 1983 concernant le recrutement et la sélection de travailleurs, modifiée par les conventions collectives de travail n 38bis du 29 octobre 1991 et n 38ter du 17 juillet 1998. Convention. Enregistrée le 12 août 1999 sous le n 51855/CO/300*).

<sup>61</sup> Dismissal from employment on the basis of sexual orientation has been unlawful in Ireland (in that it has been treated as unfair dismissal) since 1 October 1993 (Unfair Dismissals (Amendment) Act 1993). In the employment context, discrimination on the basis of sexual orientation has been unlawful since 1999 (Employment Equality Act 1998, which came into force on 18 October 1999).

<sup>62</sup> Cf. Waaldijk C., Bonini-Baraldi M.T., Littler A.D. (2004), *Combating sexual orientation and discrimination in employment: legislation in fifteen EU member states, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, Leiden: Leiden University, p. 524.

<sup>63</sup> In Ireland, discrimination in relation to the provision of goods and services, accommodation and education has been unlawful since 25 October 2000 (Equal Status Act 2000). Discrimination on the basis of sexual orientation has been specifically deemed unlawful in the context of health insurance provision since 1 July 1994 (Health Insurance Act 1994).

<sup>64</sup> Cf. Waaldijk C., Bonini-Baraldi M.T., Littler A.D. (2004), *Combating sexual orientation and discrimination in employment: legislation in fifteen EU member states, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, Leiden: Leiden University, p. 524.

<sup>65</sup> ECtHR, *Dudgeon v UK*, Application No 7525/76, Judgment of 24 February 1983. Note that this decision is based on Article 8 ECHR only, to the exclusion of Article 14 ECHR.

then European Community. Despite much opposition, the European Parliament adopted a resolution on ‘sexual discrimination’, which called upon the Commission to propose draft legislation on combating discrimination of homosexual persons in access to employment.<sup>66</sup> The EP addressed the issue again in 1986 when it adopted two resolutions that explicitly mentioned sexual orientation as relevant to acts of intolerance.<sup>67</sup> In 1994, a report detailed the variety of discrimination against lesbians and gays in the EU, and the European Parliament adopted a resolution on equal rights for homosexuals and lesbians in the European Community.<sup>68</sup> The report called for a comprehensive legal reform aimed at the elimination of any discrimination in criminal, civil, contract and commercial law as well as of all forms of discrimination in employment and public service law, for a more intensive protection of human rights and the establishment of a Community authority that would be able to ensure equal treatment, without reference to nationality, religious faith, colour, sex, sexual orientation or other differences. The report further called on the Member States to abolish all legal provisions that criminalised and discriminated against sexual activities between persons of the same sex or set different ages of consent for homosexual and heterosexual activities. The report called also for an end to the unequal treatment of homosexuals in regulations concerning social security, social benefits, housing, adoption, inheritance, as well as criminal law. It is worth noting that the report understood the term ‘sexual orientation’ as comprising sexual orientation towards the same or the opposite sex.

Invited to become active, the European Commission acknowledged the relevance of this issue and addressed discrimination on the grounds of sexual orientation. It included sexual harassment on grounds of sexual orientation in its code of practice on measures to combat sexual harassment, which recognised that ‘harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour.’<sup>69</sup> In 1998, the Staff Regulations for officials of the European Communities<sup>70</sup> were amended<sup>71</sup> so as to include a clause providing against discrimination on grounds of sexual orientation.

These initiatives suggest that the Employment Equality Directive did not spring out of the blue to set the general conditions of equal treatment in employment and occupation in the Member States. However, as long as there were no explicit legal provisions of a directive to be interpreted, there were legal limits. In CJEU case law, the attempt to approximate the protection afforded by the Directives to non-discrimination on the grounds of sex did not result in extending the meaning of that term to include sexual orientation. *Grant*<sup>72</sup> concerned employment benefits that were reserved to heterosexual couples. The Court notably refused the argument that the inequality of treatment resulted from the sex of a person who chose to have a durable relationship with a partner of the same sex and would normally be entitled to the privileges if she were of the other sex. In doing so, the Court refused the ‘but for’ test of discrimination<sup>73</sup> and chose instead to adopt the ‘similarly situated’ analysis where the relevant similar situation was that of a male employee with a male partner. The Court thus preferred to reason in terms of what could well be described as equality of misery. In that sense, the *Grant* judgment can be seen as a step back from its ruling in

<sup>66</sup> European Parliament Resolution on sexual discrimination at the workplace [1984] OJ C 104/46.

<sup>67</sup> European Parliament Resolution on the rise of fascism and racism in Europe [1986] OJ C 141/461 and European Parliament Resolution on violence against women [1986] ECR C 176/73.

<sup>68</sup> Resolution on equal rights for homosexuals and lesbians in the EC [1994] OJ C 61/40.

<sup>69</sup> European Commission, A code of practice on measures to combat sexual harassment, Annex to the Commission Recommendation on the dignity of women and men at work [1992] OJ L 49/1.

<sup>70</sup> Regulation 259/68/EEC, Euratom, ECSC of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission [1968] OJ L 56/1.

<sup>71</sup> Council Regulation (EEC, ECSC, Euratom) 781/98 amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities in respect of equal treatment [1998] OJ L 113/4.

<sup>72</sup> CJEU, Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECR I-621.

<sup>73</sup> A test commonly used to determine actual causation. The test simply asks, ‘but for the existence of X, would Y have occurred?’ If the answer is yes, then factor X is an actual cause of result Y. See: [http://www.law.cornell.edu/wex/but-for\\_test](http://www.law.cornell.edu/wex/but-for_test).

*P v S*,<sup>74</sup> where the Court was prepared to accept an interpretation of the prohibition of sex discrimination that goes beyond the criterion of sex understood in a traditional manner and also includes discrimination on the ground of the gender reassignment of transsexual people, based on human rights standards.<sup>75</sup>

## 2.2 Adoption of Directive 2000/78

In *Grant*, the Court noted that, at the relevant time, Community law did not include a prohibition of sexual orientation discrimination and therefore it was not possible to rule in favour of Ms Grant. With the Treaty of Amsterdam, signed in 1997, the European Community was given the competence to legislate not only on discrimination on grounds of sex outside the field of pay (which falls under Article 157 TFEU) but also on grounds of race and ethnic origin, religion and belief, age, disability and sexual orientation (Article 13(1) EC; now, after amendment, Article 19 TFEU). In November 2000, Directive 2000/78 was adopted. It prohibits discrimination, among other grounds, on the ground of sexual orientation in the field of employment and occupation.

Earlier in the same year, the Racial Equality Directive<sup>76</sup> had been adopted. It offers protection from discrimination on grounds of race and ethnic origin in fields considerably broader than employment and occupation (i.e. social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public, including housing). There are also differences between the two Directives with respect to exceptions and enforcement mechanisms. Overall, the level of protection is higher under the Racial Equality Directive.

This difference in the standard of protection has been subject to much controversy. It has been argued that the limited material scope of the Employment Equality Directive is contrary to the principle of universal human rights. As noted by Ellis, Arnall & Wincott,<sup>77</sup> the wording of Article 13 EC did not provide for differentiated levels of protection of the legally protected human characteristics in respect of discrimination. However, it seems possible that the political momentum created by the forthcoming UN 2001 World Conference against Racism ('Durban I') released the energy that was necessary to elaborate the legal framework aimed at combating racially motivated discrimination in the European Union. At the same time, it has been suggested that the Union legislator's actions reflect an understanding that is based on different degrees of relevance of the various human characteristics.<sup>78</sup>

However, whilst it is acceptable within the legal framework of the EU to proceed step by step in pursuing equal treatment and non-discrimination (*Test-Achats*),<sup>79</sup> from an anti-discrimination perspective it is not clear why racial discrimination should be more important than e.g. sexual orientation discrimination. It was therefore welcome when, in

<sup>74</sup> CJEU, Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

<sup>75</sup> On the conceptual approach used by the Court in these cases, see Agius S. and Tobler C. (2012), *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, Luxembourg: Publications Office of the European Union, pp. 33 *et seq.*

<sup>76</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>77</sup> Ellis E., Arnall A.M., Wincott D. (2002), *The Principle of Non-Discrimination in the Post-Nice Era*, in: Arnall A., Wincott D. (eds.), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, p. 294.

<sup>78</sup> Cf. the discussion of the potential reasons underlying differential protection against discrimination on different grounds in Bell M., Waddington L. (2003), 'Reflecting on inequalities in European equality law', *European Law Review*, vol. 28, 349-369.

<sup>79</sup> CJEU, Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773, para 23. Here, the Court stated that 'it is permissible for the EU legislature to implement the principle of equality for men and women [...] gradually, with appropriate transitional periods'.

2008, the Commission presented a proposal for a new directive on the discrimination grounds now covered by Directive 2000/78 that has a broader field of application. This proposal will be discussed at the end of the present report.<sup>80</sup>

## 2.3 The Charter of Fundamental Rights and the general principle of non-discrimination on grounds of sexual orientation

In 2000 the European Union Charter of Fundamental Rights was proclaimed as a then non-binding instrument. The Lisbon revision (effective 1 December 2009) introduced Article 6(1) TEU according to which the Charter has the same legal value as the Treaties. It is thus now binding and part of Union primary law. The Charter includes sexual orientation as a prohibited ground of discrimination in Article 21, being the first international human rights instrument to do so. In this respect, the Charter not only reflects the ECHR, as already mentioned, but also a number of the Union's general non-discrimination principles. Among these is the principle of non-discrimination on the ground of sexual orientation, whose existence the Court confirmed in *Römer*,<sup>81</sup> based on the age discrimination cases of *Mangold*<sup>82</sup> and *Küçükdeveci*.<sup>83</sup> According to its Article 51(1) the Charter is addressed to the Member States only 'when they implement Union law'. *Åkerberg Fransson* clarifies that this means that the Member States act 'within the scope of' EU law. That scope, though broad, is clearly less encompassing than that of the UN and CoE human rights instruments.

Uitz has suggested that 'the Charter has the potential to become a consolidating force, infusing EU anti-discrimination law with a human rights perspective', but she also notes that the CJEU appears to show little enthusiasm with respect to relying on the Charter in non-discrimination cases.<sup>84</sup> However, two Advocates General (AG) have underlined the role of the Charter in this respect. AG Ruiz-Jarabo Colomer in his Opinion on the first sexual orientation case under Directive 2000/78, namely *Maruko*, noted that the principle of non-discrimination on grounds of sexual orientation 'is included in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and is specifically laid down in Article 21 of the Charter of Fundamental Rights of the European Union. The fact that it is fundamental in nature means that respect for the right is guaranteed in the European Union, pursuant to Article 6 EU'.<sup>85</sup> Further, AG Jääskinen in his opinion on *Römer* stated that the prohibition of any discrimination based on e.g. sexual orientation 'is not to create new rights but to reaffirm the fundamental rights recognised by Union law'.<sup>86</sup>

The CJEU has yet to rely on the Charter of Fundamental Rights in its case law on discrimination on grounds of sexual orientation. However, recent age discrimination case law shows that whilst Directive 2000/78 gives specific expression to the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter, cases falling within the scope of that Directive must be examined by reference to the Directive alone (*Schmitzer*).<sup>87</sup> In that situation, the role of the Charter with respect to the Directive remains that of a constitutional benchmark.<sup>88</sup>

<sup>80</sup> See Chapter VI of this report.

<sup>81</sup> *Römer*, para. 59.

<sup>82</sup> CJEU, Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

<sup>83</sup> CJEU, Case C-555/07 *Seda Küçükdeveci v Swedex* [2010] ECR I-365.

<sup>84</sup> Uitz R. (2013), 'The Old Wine and the New Cask: The Implications of the Charter of Fundamental Rights for European Non-Discrimination Law', *European Anti-Discrimination Law Review*, No 16, 24-36, pp. 25 and 35.

<sup>85</sup> *Maruko*, para. 78.

<sup>86</sup> *Römer*, para. 130.

<sup>87</sup> CJEU, Case C-530/13 *Leopold Schmitzer v Bundesministerin für Inneres*, Judgment of 14 November 2014, n.y.r., paras. 22 *et seq.*

<sup>88</sup> See generally Tobler C., 'The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the *Mangold* Approach', in: Allan Rosas/Egils Levits/Yves Bot (eds.), *La cour de justice et la construction de l'Europe: Analyses et perspectives de 60 ans de jurisprudence [The Court of Justice and the construction of Europe: Analyses of and perspectives on 60 years of case law]*, The Hague: Asser Press/Springer 2013, 443-467.

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# Part III

## The prohibition of discrimination under Directive 2000/78

## 1. Aim of the Directive

The Employment Equality Directive has to be seen against the background of the aims of the European Union as a whole. Thus, the Preamble to the Directive mentions not only the fundamental values of the Union, in particular respect of human rights (Recital 1 *et seq.*), but also more generally the fact that discrimination based on sexual orientation among other grounds may undermine the achievement of the objectives of the European Union, in particular the attainment of a high level of employment and social security, enhancement of the level and quality of life, economic and social cohesion, solidarity and free movement of persons (Recital 11). To this end, the Directive prohibits throughout the Union any direct or indirect discrimination based on sexual orientation among other grounds, in the areas covered by the Directive (Recital 12). In the following section, the normative elements provided by the Directive in order to achieve this aim are discussed.

## 2. Scope

### 2.1 Personal scope

According to Article 3(1) of the Employment Equality Directive ‘this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies.’ This means that employees from all areas of employment, regardless of its providers, are covered by the protection against discrimination on the ground of sexual orientation. The Directive’s addressees also include the social partners (i.e. management and labour), as confirmed in the judgment in the sexual orientation case of *Hay*<sup>89</sup> with its references to previous age discrimination case law. It is submitted that the personal scope of the Employment Equality Directive should be construed so as to comprise both physical and legal persons among those protected (as is the case under the law of certain Member States).<sup>90</sup>

### 2.2 Material scope

Under Article 3(1) of the Employment Equality Directive, the prohibition of discrimination applies with respect to the following aspects of employment and occupation:

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

The protection against discrimination applies to all forms of work and not only to traditional employment regulated by the national labour law. Accordingly, all individuals who provide their services in whatever form for remuneration are entitled to protection from discrimination based on sexual orientation among other grounds (e.g. in the framework of civil employment contracts, self-employment etc.). However, given the Court’s case law from the field of the free

<sup>89</sup> CJEU, Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, Judgment of 12 December 2013, n.y.r., para. 27.

<sup>90</sup> See V.1 of this report.

movement of persons, this might exclude persons providing services on such a small scale as to be regarded as purely marginal and ancillary.<sup>91</sup>

The concepts of ‘access to employment’ and ‘employment and working conditions’ have already been interpreted broadly by the CJEU in the context of sex equality case law. For example, in *Meyers*,<sup>92</sup> the CJEU found that the income-related benefit known as family credit concerned access to employment because it encouraged people to take low-paid jobs. In the same case, the CJEU stated that the notion of ‘working conditions’ refers to the whole employment relationship, rather than only to the employment contract. In *Roca Álvarez*,<sup>93</sup> the Court held that the right of the working mother to take time off work each working day in order to feed a child falls under the notion of ‘working conditions’. The CJEU also found that the provision of workplace nurseries<sup>94</sup> and the reduction of working time<sup>95</sup> relate to working conditions. This case law is also relevant in the framework of the Employment Equality Directive, namely for homosexual parents.

With respect to the specific issue of pay, under the Employment Equality Directive this concept is interpreted in the same manner as under Article 157 TFEU (formerly Article 141 EC) on equal pay for men and women. As will be seen below, Recital 13 of the Preamble to the Directive refers to this provision in the context of income. Article 157 TFEU defines pay as the ‘ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer’. In the sexual orientation case of *Hay*, the CJEU reiterated that the notion of pay includes:

[...] any consideration, whether in cash or in kind, whether immediate or future, provided that the employee receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis.<sup>96</sup>

The ambit of this definition has been considered in a range of cases before the CJEU under various anti-discrimination directives. It has been held to cover all benefits associated with employment, including e.g. travel benefits, expatriation allowances, Christmas bonuses and occupational pensions.<sup>97</sup> In the sexual orientation case *Hay*, the CJEU ruled that paid leave and salary bonuses payable on a company employee’s marriage must be considered pay. In *Maruko*, another sexual orientation case, the Court stated that the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being ‘pay’ within the meaning of Article 157 TFEU.<sup>98</sup>

According to Article 3(3), the Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes. Recital 13 of the Preamble to the Directive more generally refers to ‘social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purposes of applying [Article 157 TFEU]’. In *Maruko*, a survivor’s benefit granted in the framework of an occupational social security system was classified as pay, following the Court’s sex equality case law

<sup>91</sup> CJEU, Case C-456/02 *Michel Trojani v Centre public d’aide social de Bruxelles (CPAS)* [2004] ECR I-7573, para. 15.

<sup>92</sup> CJEU, Case C-116/94 *Jennifer Meyers v Adjudication Officer* [1995] ECR I-2131.

<sup>93</sup> CJEU, Case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

<sup>94</sup> CJEU, Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.

<sup>95</sup> CJEU, Case C-236/98 *Jämställdhetsombudsmannen v Örebro läns landsting* [2000] ECR I-2189.

<sup>96</sup> *Hay*, para. 28.

<sup>97</sup> See e.g. Council of Europe, European Union Agency for Fundamental Rights (2011), *Handbook on European non-discrimination law*, Luxembourg: Publications Office of the European Union, p. 67, available at: <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law>.

<sup>98</sup> *Maruko*, para. 45. See e.g. Tobler C., Waaldijk K. (2009), ‘Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008’, *Common Market Law Review*, vol. 46, 723-746, p. 731.

on this matter. The Court held that the fact that such a pension is paid not to the worker but to his survivor cannot affect that interpretation.<sup>99</sup>

Finally, under EU law protection against discrimination on the ground of sexual orientation is not yet provided in the fields of social protection, social advantages, education, access to and supply of goods and services, including housing and access to public infrastructure. However, as will be shown in Chapter VI, many EU Member States have legislated outside the scope of the Directive, awarding protection on the ground of sexual orientation in these areas as well.

### 3. Forms of discrimination

The Employment Equality Directive prohibits four kinds of discrimination, namely direct and indirect discrimination, harassment and instructions to discriminate. Generally speaking, direct and indirect discrimination involve less favourable treatment of a (group of) person(s) than of another (group of) person(s). In the case of harassment, a broader definition applies. Instructions to discriminate relate to discrimination effected through another person.

#### 3.1 Direct discrimination

All sexual orientation cases so far decided by the CJEU have been direct discrimination cases.<sup>100</sup> Article 2(2)(a) of the Employment Equality Directive states that:

[...] direct discrimination shall be taken to occur where one person is treated less favourably than other is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 [...].

The treatment has to be unfavourable by comparison to someone who is in a comparable situation but does not have the specific characteristic that is the ground of the discrimination in question ('a comparator'). As far as sexual orientation is concerned, unfavourable treatment of homosexuals as well as of bisexual persons will be compared to that of heterosexual persons. However, identifying the correct comparator is not always easy. In cases concerning employment-related benefits for homosexual partners in registered partnerships, the CJEU held that the assessment of comparability must not be carried out in a global and abstract manner. Rather than examining whether national law generally and comprehensively treats registered partnership as legally equivalent to marriage, the analysis should be case-specific and take account of the particular benefit concerned and the circumstances of the case (*Hay*).<sup>101</sup> In practice, this means that situations may be comparable in the case of one particular benefit but not in the case of another. Furthermore, for the same kind of benefit the analysis might be different where partnerships under different legal regimes are compared.

A practical example of direct discrimination on grounds of sexual orientation is the situation where an employer dismisses or refuses to hire or promote persons simply because they are thought to be homosexual. Direct discrimination will also arise where religious organisations refuse to employ LGB persons explicitly because of their sexual orientation.<sup>102</sup>

#### 3.2 Indirect discrimination

Article 2(2)(b) of the Employment Equality Directive states that:

<sup>99</sup> *Maruko*, para. 45.

<sup>100</sup> See Chapter V of this report.

<sup>101</sup> *Hay*, para. 34.

<sup>102</sup> On both issues, see again Chapter V of this report.

[...] indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice **would put** persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation **at a particular disadvantage** compared with other persons unless [...] that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary [...] (emphasis added).

This kind of discrimination is called 'indirect' in order to indicate that it focuses on the effect of the treatment in question rather than on its occurrence. In this framework, the intentions of the perpetrator of the measure are irrelevant. The Employment Equality Directive does not explain the meaning of the term 'particular' disadvantage. There is complex sex equality case law on this issue,<sup>103</sup> though the issue has lost some of its edge under the modern definition under which it is sufficient that the measure in question 'would put persons at a particular disadvantage'. It is therefore sufficient that a measure is apt to have such an effect. In practice, it may be more difficult to show unfavourable treatment in the case of indirect discrimination than in that of direct discrimination. With respect to the means, statistical evidence is not required since, again, a hypothetical disparate effect is sufficient. However, Recital 15 of the Preamble to the Employment Equality Directive underlines the usefulness of statistical evidence for establishing indirect discrimination.

There is no indirect discrimination where the practice or criterion can be objectively justified by a legitimate aim and where the means of achieving that aim are appropriate and necessary, i.e. proportionate. The objective character of the employer's legitimate reasons is essential to the standard of protection from discrimination. Following CJEU case law in the field of sex equality law, the objective justification invoked by the respondent can pertain to the needs and aims of the employer as well as to the employee (e.g. matters related to the employee's flexibility and adaptability to the time and place of assignment, the employee's background and training as well as experience at the workplace).<sup>104</sup> Further, there is justification of the difference in treatment only if the measure chosen is rationally related to a (legitimate) aim and is adequate and necessary for the attainment of that aim, i.e. it needs to be strictly proportional, and it must be unrelated to any of the grounds of prohibited discrimination.<sup>105</sup>

There is no CJEU case law on indirect discrimination on grounds of sexual orientation yet, though indirect discrimination was argued in *Maruko*.<sup>106</sup> Practical examples from the field of employment may include a scenario where the employer chooses to organise a training seminar for his employees in a country where homosexuality is illegal<sup>107</sup> or where the employer demands that a future employee must be settled down, requiring a certificate of marriage as proof of meeting this criterion.

### 3.3 Harassment

According to Article 2(3) of the Employment Equality Directive, there is harassment:

[...] when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

<sup>103</sup> For this and the following, see Tobler C. (2008), *Limits and potential of the concept of indirect discrimination*, Luxembourg: Office for Official Publications of the European Communities, pp. 40 *et seq.*

<sup>104</sup> CJEU, Case C-127/92 *Dr Pamela Mary Enderby v Frenchay Health Authority* [1993] ECR I-5535.

<sup>105</sup> CJEU, Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961.

<sup>106</sup> See further under section IV.1.1.1 of this report.

<sup>107</sup> Tobler C. (2008), *Limits and potential of the concept of indirect discrimination*, Luxembourg: Office for Official Publications of the European Communities, p. 30.

Importantly, there is no need for a comparator in this context.

The concept of harassment encompasses expressions of homophobia, entailing negative or derogatory comments, innuendos, offensive nicknaming or name-calling, insults or slurs about gay, lesbian or bisexual persons by the employer, co-workers or even clients.<sup>108</sup> According to the Explanatory Memorandum attached to the Commission's proposal for the Employment Equality Directive, harassment may take different forms 'from spoken words and gestures to the production, display or circulation of written words, pictures or other material', as long as it is of a serious nature.<sup>109</sup> It has been argued that there is a fine line between expressing opinions about homosexuality as protected speech and harassment, and many cases may require 'a sensitive balancing act of those responsible for enforcing the rules of the directive'.<sup>110</sup> There is no CJEU case law on this matter yet.

In the context of sexual orientation, harassment cases typically concern an employee who is subjected to humiliation or scornful comments in the workplace after revealing his or her sexual orientation to fellow workers ('coming out'). In recent years, more legal actions seem to have reached the national courts in this context, perhaps showing a new trend for victims to be less afraid to litigate such matters.<sup>111</sup>

### 3.4 Instruction to discriminate

Article 2(2)(4) of the Employment Equality Directive states that an instruction to discriminate is deemed to constitute discrimination. The act of instruction consists in the giving of an instruction, rather than directly engaging in the actual act of discrimination. The Directive does not further define what is meant by this term. It is submitted, however, that the term instruction should not be understood narrowly so as to require the author of the instruction to have the requisite authority and for the instruction to actually have the effect desired. Rather, it should include situations where the quality of an instruction to discriminate is contextual and springs from an expressed preference or an encouragement to treat other individuals less favourably on grounds of sexual orientation. This is an area that might evolve through the jurisprudence of the courts.

## 4. Sexual orientation as a ground for discrimination

### 4.1 The term 'sexual orientation'

The Employment Equality Directive does not define the meaning of the term 'sexual orientation.' Whilst the acknowledged aim of the Directive is to protect persons who are not heterosexual, the personal characteristic of sexual orientation is to be considered to apply to persons of a homosexual, a heterosexual or a bisexual orientation, understood specifically as the sexual aspect of the human condition. Given the absence of CJEU case law on the matter, the question remains open

<sup>108</sup> Bell M. (2001), 'Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union', in: Wintemute R., Andenaes M. (eds.), *Legal Recognition of Same-Sex Couples. A Study of National, European and International Law*, Oxford and Portland: Hart Publishing, p. 661.

<sup>109</sup> Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(1999) 565 final, p. 9.

<sup>110</sup> Bonini-Baraldi M. (2004), 'European Law', in: Waaldijk K., Bonini-Baraldi M.T., Littler A.D. (2004), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states. Report of the European Group of Experts on Combating Sexual Orientation Discrimination about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, Leiden: Leiden University, p. 38.

<sup>111</sup> Thien Uyen Do (2011), '2011: A case odyssey into 10 years of anti-discrimination law', *European Anti-Discrimination Law Review*, No 12, 11-20, p. 20.

whether the Directive also covers broader issues of non-heterosexuality, such as dress style, manners of expression or behaviour that are different from stereotypical social sex roles or social expectations attached to heteronormativity.

From the Court's case law to date, it is clear only that gender identity is covered to some extent by EU sex equality law. According to the Court, unfavourable treatment because a transsexual person has undergone, or plans to undergo, gender reassignment amounts to discrimination on grounds of sex.<sup>112</sup> The relevant cases concerned dismissal (namely the already mentioned case of *P v S*), a survivor's benefit (*K.B.*)<sup>113</sup> and the pension age (*Richards*).<sup>114</sup> It is debatable whether in the future the Court will be willing to take a similarly broad approach with respect to transsexual and/or intersex people who have not undergone gender assignment, or who do not plan to do this.

The Explanatory Memorandum<sup>115</sup> accompanying the Commission's proposal for the Employment Equality Directive is particularly unhelpful in this regard, stating that with regard to sexual orientation 'a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not.' This has been criticised in academic writing as potentially limiting the protection against discrimination.<sup>116</sup> It is submitted that there is no argument to sustain the proposition that the ground of sexual orientation can be narrowly construed so as to be limited to *lawful* conduct of a sexual nature and to emotional activities directed to another person. Indeed, the complexity of human personality and conduct and the fluidity of sexuality do not always correspond to stereotypical social expectations. Indeed, such expectations may give rise to discrimination.

## 4.2 Actual sexual orientation

There is no doubt that protection from discrimination on the grounds of sexual orientation benefits persons who themselves are characterised by a particular sexual orientation. The Employment Equality Directive thus applies to persons who are, were or might be unfavourably treated because of their own heterosexuality, homosexuality or bisexuality. For the protection to apply, it is not necessary to give actual proof of the sexual orientation in question. It is difficult to imagine a court or another institution requiring evidence concerning the sexual orientation of the applicant without violating such fundamental values as the privacy or dignity of the person in question. Indeed, this is confirmed by CJEU case law in the context of EU asylum law in relation to the methods by which national authorities may assess the credibility of the sexual orientation declared by applicants for asylum. In the *A, B and C* case,<sup>117</sup> the Court held that the methods used by the competent authorities to assess the statements and the evidence submitted in support of applications for asylum must be consistent with EU law and, in particular, the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity and the right to respect for privacy and family. The Court offered guidance as to the methods that may be used (in this case by national authorities to carry out an assessment of the veracity of declarations made by an applicant for asylum as to his or her sexual orientation) in a way that does not undermine fundamental rights.

<sup>112</sup> Agius S. and Tobler C. (2012), *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, Luxembourg: Publications Office of the European Union, p. 43.

<sup>113</sup> CJEU, Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585.

<sup>114</sup> CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541.

<sup>115</sup> Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(1999) 565 final, p. 566.

<sup>116</sup> Cf. Waaldijk K., Bonini-Baraldi M.T., Littler A.D. (2004), *Combating sexual orientation and discrimination in employment: legislation in fifteen EU member states, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, Leiden: Leiden University, p. 25.

<sup>117</sup> CJEU, Joined Cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, Judgment of 2 December 2014, n.y.r., paras. 53 *et seq.*

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Further, it is irrelevant whether the sexual orientation of an employee is apparent in the workplace. In certain contexts, particularly in those EU Member States with legal recognition of same-sex partnerships, where labour law attaches certain privileges or rights of the employee to the fact of being married or otherwise registered as partners, the sexual orientation of the employee may not be a secret within the workplace. However, there are no grounds to compel the employee to disclose his or her sexual orientation. Rather, information concerning sexual orientation is the preserve of the employee. No less favourable treatment can result from the decision to either disclose it to superiors, co-workers and clients or to keep it a secret.

### 4.3 Assumed sexual orientation

The Employment Equality Directive also grants protection against discrimination on the grounds of sexual orientation to persons who do not themselves have the sexual orientation in question but are perceived in the workplace to do so. This is confirmed by the Court's approach in the case *ACCEPT*,<sup>118</sup> which concerned homophobic speech with regard a professional footballer and the supposed sexual orientation of that player.

Indeed, for the victim there is no difference in terms of the effect whether discrimination in employment is based on actual and real or 'merely' assumed sexual orientation. Rather, the victim must be protected from discrimination regardless of his or her factual sexual orientation. It is therefore sufficient to prove that the victim is perceived to be a member of the group that is discriminated against or is associated with such a group so as to be considered a member of the group.

A further example of discrimination on grounds of an assumed sexual orientation might be the situation where a heterosexual employee without an opposite-sex partner has homosexual friends and appears with them in the local gay community bars. If the person is thus rumoured to be homosexual by his co-workers and for this reason is subject to harassment or other forms of discrimination, he or she will be protected against discrimination based on homosexuality regardless of the actual sexual orientation.

### 4.4 Associated sexual orientation

The concept of discrimination by association is based on the judgment in the disability discrimination case of *Coleman*,<sup>119</sup> in which the Court, in the tenor of the judgment, held that the Employment Equality Directive must be interpreted as meaning that:

[...] the prohibition of direct discrimination [...] is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).

2. [...] the prohibition of harassment [...] is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).

<sup>118</sup> CJEU, Case C-81/12 *Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării*, Judgment of 25 April 2013, n.y.r.

<sup>119</sup> CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

The *Coleman* judgment thereby extended the reach of the prohibition of discrimination under the Employment Equality Directive, including with respect to discrimination on grounds of sexual orientation.

In practice, an example might be the case where an employee is put at a disadvantage after it is made known that his or her child is homosexual, or where an employee is subject to harassment and ridicule based on his or her involvement in an LGBT organisation as a volunteer. There are already some positive examples of effective use of the concept of discrimination by association with regard to sexual orientation by national courts.<sup>120</sup>

## 5. Exceptions or derogations

### 5.1 Introductory remarks

The Employment Equality Directive provides for a number of statutory exceptions to the prohibition of discrimination, namely a general exception related to public security, public order, the prevention of criminal offences and the protection of health and of the rights and freedoms of others, and further specific exceptions related to genuine and determining occupational requirements and positive action. There is also a provision on the position of churches and ethos-based organisations in relation to their employment policies, which is sometimes misunderstood. In fact, it does not allow for derogations to the prohibition of discrimination on grounds of sexual orientation. In the following, these derogations are discussed. For all of them, the general standards developed by the CJEU with respect to derogations apply. Firstly, any exception must be narrowly construed and must not be taken to allow for a generalised exclusion of persons with a certain sexual orientation from certain vocational activities. Secondly, the requirements in question must be identified at the beginning of the recruitment process and must be clearly stated in the recruitment material.

Further, in the specific context of sexual orientation it is important to note that it is not a defence to a claim of discrimination that the claimant voluntarily disclosed his or her sexual orientation. As the CJEU stated in the context of EU asylum law, the concept of sexual orientation applies not only to acts in the private life of the person concerned but also to acts in his or her public life. The Court emphasised fundamental human rights standards in this respect, stating that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it. Accordingly, applicants for asylum cannot be expected to conceal their homosexuality in their country of origin in order to avoid persecution (*X, Y and Z* case).<sup>121</sup> The same approach must apply in the different context of Directive 2000/78: people cannot be expected to conceal their sexual orientation in order to avoid discrimination. Accordingly, a discriminator cannot avoid a finding of discrimination based on the argument that the victim might have been able to avoid the discrimination by not disclosing his or her sexual orientation.

### 5.2 The general exception of Article 2(5)

According to Article 2(5), the Directive:

[...] shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

<sup>120</sup> See section V.3.3. of this report.

<sup>121</sup> CJEU, Joined Cases C-199/12 to C.201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, Judgment of 7 November 2013, n.y.r., paras. 65 *et seq.*

The provision is clearly inspired by similar provisions in international human rights acts. In EU law, there is no CJEU case law on this derogation yet specifically in the context of sexual orientation. In *Prigge*, an age discrimination case, the Court explained:

In adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of the Directive, the principles set out by that latter do not apply to measures containing differences in treatment on one of the grounds referred to Article 1 of the Directive, on condition, however, that those measures are ‘necessary’ for the achievement of the abovementioned objectives. Moreover, as Article 2(5) establishes an exception to the principle of the prohibition of discrimination, it must be interpreted strictly [...].<sup>122</sup>

### 5.3 Sexual orientation as a genuine and determining occupational requirement

According to Article 4(1) of the Employment Equality Directive:

[...] Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds [...] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

In academic writing, it has been noted that this does not relate to an absolute impediment in respect to a particular occupation but rather relates to the ability of a person to perform the job effectively in comparison with other persons.<sup>123</sup> In sex equality cases on employment in the armed forces, the Court emphasised the importance of the facts of the individual case. On the one hand, the Court accepted that a margin of appreciation is afforded to the Member States when specifying particular characteristics requisite for effective performance of particular tasks in the army.<sup>124</sup> On the other hand, it set very exacting standards for the exercise of this margin of appreciation by finding requirements relating to all activities in the army to violate the principle of non-discrimination.<sup>125</sup> In a much older judgment concerning the exclusion of men from the profession of midwife, the Court also considered the factor of personal sensitivity in relations between people of different sexes.<sup>126</sup> However, in that case the time element and changes in societal views

<sup>122</sup> CJEU, Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* [2011] ECR I-8003, para. 55 and 56.

<sup>123</sup> E.g. Schiek D., Waddington L., Bell M. (2007), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart Publishing, p. 276.

<sup>124</sup> In CJEU, Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403, the Court found the general exclusion of women from the British Royal Navy to be justified by an objective argument considering the principle of proportionality based on the need to maintain operational capability and interoperability.

<sup>125</sup> CJEU, Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69. In this case, the Court did not admit the argument according to which the obligation to bear arms was relevant as a justification for excluding women from military positions involving the use of arms (and which allow them access only to the medical and military-music services). As regards differences of treatment allowed out of a concern to protect women, the total exclusion of women from all military posts involving the use of arms was considered not to be one of the differences of treatment permissible.

<sup>126</sup> CJEU, Case C-165/82 *Commission v UK* [1983] ECR I-3431. The decision stated that restricting men from becoming midwives was consonant with the justified exceptions to the principle of non-discrimination accepting that ‘at the present time personal sensitivities may play an important role in relations between midwife and patient’.

were important; subsequently, the European Commission found that midwifery was effectively open to men in the year 2000.<sup>127</sup>

With respect to sexual orientation, there appear to be very few professional or vocational activities where this characteristic could be considered to fall under the notion of a genuine and determining occupational requirement. A rare actual example concerns the position of a counsellor for men who have sex with other men in Sweden.<sup>128</sup> Conversely, with respect to faith-based schools, the European Commission stated in response to a parliamentary question that it failed to see how a teacher's sexual orientation could reasonably constitute a genuine and determining occupational requirement.<sup>129</sup>

It might be argued that a somewhat particular situation of genuine occupational requirement would apply in the case where the employer conducts activities through subsidiaries located in foreign countries where homosexuality is criminalised and punished by prison terms or the death penalty. In such a situation, the employer might refuse to delegate a particular employee to work in such a subsidiary, thus refusing some financial privileges as well as professional advancement opportunities arising.

## 5.4 Positive action

Article 7(1) of the Employment Equality Directive states:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

This 'positive action exception' is one of the instruments of EU law intended to allow non-discrimination policy to reach beyond formal equality. It provides for one of the key elements of equality in as much as equality standards require affirmative provision of equality of opportunity in law as well as in fact. In academic writing, it has been noted that positive action is associated with the idea of protecting persons affected by some intrinsic fragility associated with characteristics that are perceived as a handicap in a given society compared to other persons in view of a socially-determined interpersonal situation.<sup>130</sup>

There is no CJEU case law on positive action in the context of sexual orientation yet. A practical example of action aimed at levelling the playing-field for non-heteronormative employees could involve the situation where the employer, in the framework of the employment conditions, facilitates or sets up a support group aimed at alleviating a homophobic atmosphere in the workplace, e.g. by assigning premises to that end or by appointing or paying a coordinator or a professional psychologist. Another example could be formulating job advertisements specifically in such a manner as to encourage LGB candidates, in particular in relation to vacancies in an environment that is deemed as potentially homophobic (e.g. the army or police forces).

<sup>127</sup> Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, COM(2000) 334 final, p. 8.

<sup>128</sup> See section V.4 of this report.

<sup>129</sup> Commissioner Reding, speaking for the European Commission, in response to the question by MEP Cashman concerning the possibility of limiting the rights of homosexual persons to access the vocation of teacher [2011] OJ C 243 E.

<sup>130</sup> Cf. Safjan M., Mikłaszewicz P. (2011), *Granice uprzywilejowania wyrównawczego [The Limits of Compensatory Privileges]*, Warsaw: Przegląd Sejmowy, vol. 6 (107), pp. 31-45.

## 5.5 No derogation from the prohibition of discrimination on grounds of sexual orientation for churches and ethos-based organisations under Article 4(2)

Article 4(2) of the Employment Equality Directive provides:

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, **a difference of treatment based on a person's religion or belief** shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and **should not justify discrimination on another ground.** [...] (emphasis added)

Like Article 2(5) of the Directive, Article 4(2) reflects the EU's attempt to reconcile two fundamental values enshrined in primary EU law that may conflict in particular situations, namely the guarantees of freedom of thought, conscience and religion and the autonomy of churches and other confessional and philosophical organisations on the one hand and equality and non-discrimination on the other hand.<sup>131</sup>

In the present context, it is important to note that the exemption under Article 2(5) of the Directive is not related to the ground of sexual orientation but only to religion or belief. The subjective scope of the exception covers churches, confessional organisations and organisations operating on the basis of an ethos of a religion or a belief. They are allowed to derogate from the obligation of non-discrimination of employees in respect to their employees' religion or belief. Therefore, the Directive does not allow religious organisations to discriminate on the ground of sexual orientation. In particular, there is no derogation based on the fact that a particular understanding of a confession, religion or belief considers some characteristic (e.g. homosexuality) as inconsistent with the precepts of such a belief.

The exception under Article 4(2) of the Employment Equality Directive has not yet been considered in CJEU case law. Only few examples of judicial interpretation can be drawn from national courts.<sup>132</sup> According to Bribosia,<sup>133</sup> the specific conflicts arising in the implementation of the various Equality Directives should be discussed (and resolved, in the authors' belief) using the instruments of international and European human rights law, including in particular ECtHR case law, and also using good practice examples from the EU Member States. Malik<sup>134</sup> suggests that where there is a conflict between religion or belief or culture and sexual orientation discrimination, a dual track approach should be taken: whilst discriminatory *belief* may be given a wider latitude because it is protected as the individual right to religion or belief, discriminatory *conduct* should be strictly regulated. In this context, the approach of the ECtHR in *Eweida and Others v UK*, discussed above,<sup>135</sup> shows that not every behaviour that is motivated or inspired by religious belief is automatically covered by the Convention. This is an important signal, indicating that the sole reference to religious sensitivity may not always be the main argument to justify the need to exempt it from the obligation to comply with the non-discrimination principle.

<sup>131</sup> Generally on religion and homosexuality under the law, see Johnson P., Vanderbeck R. (2014), *Law, Religion and Homosexuality*, Abingdon: Routledge.

<sup>132</sup> E.g. the Hamburg Labour Court's Judgment of 21 January 2008 in the case *Diakonisches Werk Hamburg*, <http://www.opensocietyfoundations.org/press-releases/justice-initiative-hails-german-court-judgment-religious-discrimination>.

<sup>133</sup> Bribosia E. (2009), *Discussion paper: Balancing equality of treatment and other fundamental rights*, [http://www.non-discrimination.net/content/media/EN-Fundamental%20Rights\\_discussion\\_paper.pdf](http://www.non-discrimination.net/content/media/EN-Fundamental%20Rights_discussion_paper.pdf).

<sup>134</sup> Malik M. (2009), *Conflicts in equality law and policy*, [http://www.non-discrimination.net/content/media/Maleiha%20Malik\\_equality%20and%20other%20fundamental%20rights\\_PPT.pdf](http://www.non-discrimination.net/content/media/Maleiha%20Malik_equality%20and%20other%20fundamental%20rights_PPT.pdf).

<sup>135</sup> See section I.2.2.1 of this report.

## 6. Burden of proof

Matters related to the burden of proof in court proceedings on discrimination are subject to explicit regulation by the Union's anti-discrimination directives. There is rich CJEU jurisprudence from the field of sex equality law that predates and informed regulation by the Directive.<sup>136</sup> According to the Article 10(1) of the Employment Equality Directive:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

The wording of the Directive suggests that any court procedure concerning discrimination is to be based on the principle that, once the applicant has established facts from which it may be presumed that there has been direct or indirect discrimination, there is a rebuttable presumption of discrimination ('*prima facie* discrimination'). The burden of proof then shifts to the respondent, who then has to show that there has been no breach of the principle of equal treatment. The European legislator thus explicitly departs from the general principle governing civil proceedings (in the Latin legal saying: *actori incumbit probatio*). The shift in the burden of proof facilitates the plaintiff's efforts to seek judicial protection against discrimination by requiring no more than the making of a *prima facie* ('first sight') case of discrimination.<sup>137</sup> In this manner, the standard of protection is enhanced.

However, there may be limits in situations where, in order to make a *prima facie* case, the applicant needs information from the employer. This was the issue in the case of *Meister*,<sup>138</sup> concerning alleged discrimination on grounds of sex, age and ethnic origin. The Court held that the law on data protection may allow the employer to refuse access to the information needed. However, the Court added that it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the national court to determine whether that is the case, taking into account all the circumstances of the case before it.<sup>139</sup>

Similarly, the Court held in the sexual orientation case of *ACCEPT* that the rebuttal of the presumption of discrimination in recruitment proceedings, where an alleged homosexual was refused employment, does not require the respondent to show that homosexuals had been actually hired in the past, as this might violate the right to privacy of the employees concerned. However, the Court noted that there are other ways of proving non-discrimination, for example by showing that the recruitment policy is in fact based on parameters that have nothing to do with sexual orientation.

## 7. Remedies and sanctions

According to Article 17 of the Employment Equality Directive:

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The

<sup>136</sup> Cf. among other authorities, the judgments in CJEU, Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening acting on behalf of Danfoss* [1989] ECR I-3199 and in Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE* [2005] ECR I-1789.

<sup>137</sup> Moysé F. (2011), *The Burden of Proof in Discrimination Cases*, presentation at the seminar of the Academy of European Law in Trier on 26 September 2011, [http://www.era-comm.eu/oldoku/Adiskri/03\\_Burden\\_of\\_proof/2011\\_09\\_Moyse\\_EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/2011_09_Moyse_EN.pdf).

<sup>138</sup> CJEU, Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH*, Judgment of 19 April 2012, n.y.r.

<sup>139</sup> *Meister*, para. 47.

sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. [...]

Accordingly, there must be a regime of protection based on remedies for the harms of unjustified discrimination. However, in principle Member States are free to choose the type of remedies and sanctions for the purposes of their law.

Member States are obligated to take any necessary steps to ensure that the sanctions are actually enforced. It has been noted that this requirement can be effectively met by the introduction of pecuniary penalties, prison sentences, prohibitions of engaging in certain activities, disbandment of organisations, confiscation of assets, the obligation of compensation as well as measures consisting in the state refusing to award contracts or cooperate with an entity found to violate the standard of non-discrimination.<sup>140</sup> It has also been noted that the term ‘dissuasive’ entails the idea that the employer is effectively induced to take all necessary measures aimed at combating discrimination by the knowledge that any discriminatory measures or deeds give rise to a full compensation claim by the victim of discrimination.<sup>141</sup>

Article 17 of the Employment Equality Directive is a codification of general CJEU case law on the protection of individuals’ rights under EU law and of sex equality case law.<sup>142</sup> In the latter context, the Court has emphasised the margin of appreciation accorded to the Member States in determining the sanctions and remedies attached to the violation of the principle of non-discrimination. However, it also noted the obligation to guarantee effective and real protection of the right to equality. The Court found that compensatory remedies limited to the reimbursement of transport costs incurred by a victim of sex discrimination in connection with an unsuccessful job application do not meet these requirements.<sup>143</sup> The Court further held that a statutory cap on compensation, e.g. at the value of six months’ salary, is not sufficient to count as effective and real protection against discrimination.<sup>144</sup>

In the sexual orientation case of *ACCEPT*, the Court reiterated that purely symbolic penalties cannot be regarded as correct and effective implementation of Directive 2000/78. At the same time, the mere fact that a specific sanction is not pecuniary (e.g. a written warning) in nature does not necessarily mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages. The Court also noted that in proceedings in which an association empowered by law to that effect seeks a finding of discrimination and the imposition of a sanction, the sanctions must be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim.<sup>145</sup>

Further, a sex equality case at present pending before the CJEU, *Arjona Camacho*,<sup>146</sup> has raised the question of whether the requirement of dissuasive sanctions enables the national court to award punitive damages, i.e. damages that are additional to the full reparation of the actual loss and damage suffered by the victim.

<sup>140</sup> Cf. Niessen J. (2003), ‘Making the Law Work. The Enforcement and Implementation of Anti-Discrimination Legislation’, *European Journal of Migration and Law*, vol. 5, pp. 41 *et seq.*

<sup>141</sup> Cf. Epstein P. (2012), *Applying EU Anti-Discrimination Law. The role of the national judge in judging a discrimination case: Remedies and sanctions*. [http://www.era-comm.eu/oldoku/Adiskri/O4\\_Remedies/2012\\_Epstein\\_EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/O4_Remedies/2012_Epstein_EN.pdf).

<sup>142</sup> Tobler C. (2005), *Remedies and Sanctions in EC non-discrimination law. Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination* (produced for the European Commission), Luxembourg: Office for Official Publications of the European Communities.

<sup>143</sup> CJEU, Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>144</sup> CJEU, Case C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367 and Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195, respectively.

<sup>145</sup> *ACCEPT*, paras. 64 *et seq.*

<sup>146</sup> CJEU, Case C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España*, pending.



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# Part IV

## CJEU case law with regard to sexual orientation discrimination

To date, there is only a very limited number of CJEU judgments regarding discrimination on grounds of sexual orientation under Directive 2000/78. In terms of the highest number of cases by protected ground, age ranks first. With respect to sexual orientation, the Court has so far considered three important cases concerning employment-related benefits in *Maruko*, *Römer* and *Hay*. The Court ruled that excluding unmarried homosexual employees from certain work-related benefits constitutes direct discrimination on grounds of sexual orientation. In this context, the Court's approach evolved from vaguely structuring the delimitation between direct and indirect discrimination to a much more explicit approach and a robust stand on comparability in the most recent *Hay* case. The Court also gave judgment in the case of *ACCEPT*, concerning homophobic hate speech. All of these judgments are preliminary rulings under Article 267 TFEU on the interpretation of the terms of Directive 2000/78, which means that the actual decision about the case underlying the request for a preliminary ruling is for the national court.

## 1. Employment benefits: the *Maruko*, *Römer* and *Hay* judgments

### 1.1 Maruko

The first case in which the Court interpreted the Employment Equality Directive in relation to discrimination on grounds of sexual orientation was *Maruko*. Mr Maruko was the registered same-sex partner of an employee who used to work as a designer of theatrical costumes. For more than 40 years, the employee had contributed to the compulsory pension scheme of his employer, the *Versorgungsanstalt der deutschen Bühnen* (the German Theatre Pension Institution, 'Vddb'). When he died in 2005, Mr Maruko applied to the Vddb for a widower's pension. However, the scheme provided for the grant of such a pension only in the case of married couples. At the same time, only opposite-sex couples are allowed to marry under German law. Same-sex partners may enter into registered partnerships. According to Mr Maruko, the refusal to grant him the survivor's benefit on the same conditions as a surviving spouse was discriminatory on grounds of his late partner's sexual orientation. He therefore filed an action with the Bavarian Administrative Court in Munich, which referred the case to the CJEU for a preliminary ruling, asking whether the Employment Equality Directive obligated Member States to ensure that in such cases the surviving same-sex partner enjoys the same rights as a surviving spouse.

The CJEU ruled in Mr Maruko's favour. It found, first, that a survivor's benefit under an occupational social security system falls under the concept of pay, rather than being a social security benefit that is excluded from the scope of the Directive.<sup>147</sup> This was decisive, as otherwise Mr Maruko would not have been able to invoke the Directive in order to claim a pension.

Second, with respect to discrimination the Court held that in relation to matters falling within the scope of Directive 2000/78 the Member States are obliged to treat married opposite-sex partners and registered same-sex partners in the same way if they are in a comparable situation. The Court stated that it is for the national court to determine whether that is the case.<sup>148</sup> In fact, when making its reference the national court had observed that in Germany there had been a gradual harmonisation of the regime put in place for life partnerships with that applicable to marriage. Under the German law in force at the material time of the *Maruko* case, life partnership was to be treated as equivalent to marriage as regards the widow's or widower's pension. The national court therefore considered that a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings.

<sup>147</sup> See above under section III.2.2.2 of this report.

<sup>148</sup> *Maruko*, paras. 72 and 73.

The CJEU further found that, in the event of comparability, restricting the entitlement to the survivor's benefit to surviving spouses amounts to direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78. It is noteworthy that the CJEU decided the case referring to the concept of direct discrimination even though Mr Maruko, the Commission and the Advocate General relied on the argument of indirect discrimination. Commentators at the time noted that the reason for this approach appeared to be the fact that, as a result of the national law, the group of homosexual persons was totally excluded from the benefit in question.<sup>149</sup> The Court would be more explicit on this issue in the third case on employment benefits and discrimination on grounds of sexual orientation, namely *Hay*.<sup>150</sup>

In *Maruko*, the Court did not have to address the issue of justification, as the national court had not asked any question in this regard. In academic comments, it was argued that the Court's finding of direct, rather than indirect, discrimination, served to exclude reliance on a German constitutional provision on the protection of the family and marriage. Again, this issue would be raised explicitly in the subsequent case of *Hay*.<sup>151</sup>

Finally, the national court in *Maruko* also inquired whether discrimination on grounds of sexual orientation is permissible by virtue of Recital 22 of the Preamble to Directive 2000/78. According to this Recital, the Directive 'is without prejudice to national laws on marital status and the benefits dependent thereon'. In its answer, the Court acknowledged that civil status and the benefits flowing therefrom are matters falling within the competence of the Member States. However, it also recalled that in the exercise of that competence the Member States must comply with Union law and, in particular, with the provisions relating to the principle of non-discrimination.<sup>152</sup> Here, as in other areas of EU law, the Court in effect made a distinction between the existence of a competence of the Member States, on the one hand, and its exercise in fields that are covered by Union law, such as employment and occupation, on the other hand. In the latter context, the Member States must respect Union law such as the Employment Equality Directive.

## 1.2 Römer

The second CJEU sexual orientation case on employment benefits, *Römer*, concerned a supplementary occupational retirement pension. Mr Römer worked for the City of Hamburg from 1950 to 1990. From 1969, he lived continuously with his same-sex companion, with whom he entered into a civil partnership under German law. When calculating the amount of Mr Römer's supplementary retirement pension in 2001, the City of Hamburg refused to base the calculation on the more favourable basis provided for under the applicable rules, namely a particular tax category, because under the law of the *Land* of Hamburg on supplementary retirement and survivors' pensions for employees of the City of Hamburg, only married, not permanently separated, pensioners and those entitled to claim child benefit or equivalent benefit were entitled to have their retirement pension calculated on the basis of the more favourable tax category. The case went to the Hamburg Labour Court, which turned to the Court of Justice with questions on the interpretation of Directive 2000/78.

The Court of Justice, relying on the precedent of *Maruko*, ruled in favour of Mr Römer. Again, the Court held that the benefit at issue fell within the concept of pay and that the differentiation between married and registered partners at issue involved direct, rather than indirect, discrimination on grounds of sexual orientation, if the situations fulfilled the requirement of comparability. As in *Maruko*, the Court did not elaborate on the reasons why the discrimination at issue was direct, rather than indirect, discrimination on grounds of sexual orientation. Also as in *Maruko*, the

<sup>149</sup> Tobler C., Waaldijk K. (2009), 'Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008', *Common Market Law Review*, vol. 46, 723-746, pp. 735 *et seq.*

<sup>150</sup> See below under section IV.1.1.3 of this report.

<sup>151</sup> *Ibidem.*

<sup>152</sup> *Maruko*, paras. 58 *et seq.*

decision on comparability was left to the national court. That court had indicated in its reference that it saw no significant legal difference between the two types of status of persons as understood in German law, the main remaining difference being the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same sex. However, the Court of Justice pointed out that the comparability test does not rely on a general but rather on a specific comparison. The assessment of that comparability:

[...] must be done not in a global and abstract manner but in a **specific and concrete manner** in the light of the benefit concerned. Thus, the comparison of the situations must be based on an **analysis focusing on the rights and obligations of the spouses and registered life partners** as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and **must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.**<sup>153</sup> (emphasis added)

In other words, the issue in a case like *Römer* is not whether a registered partnership is generally comparable to marriage but rather whether it is so with respect to the specific matter at issue, namely in *Römer* the calculation of supplementary retirement and survivors' pensions.

Finally, the national court in *Römer* also asked about justification. In particular, it wanted to know whether a directly discriminatory legislative provision can be justified – notwithstanding the wording of the Directive – because it has an aim that is a component of the national legal order of the Member State in question, namely in the case of Germany Article 6(1) of the German Federal Constitution, according to which marriage and the family enjoy the special protection of the State. Indeed, at the time when *Maruko* was pending, the German Constitutional Court relied on this provision in order to find that preferential treatment of married officials, to the exclusion of officials in a registered partnership, does not amount to discrimination.<sup>154</sup> In *Römer*, the Court of Justice, which found *direct* discrimination under EU law, did not address justification in its judgment, possibly because it considered the issue to be obvious.<sup>155</sup> As Advocate General (AG) Jääskinen pointed out in his opinion, the concept of direct discrimination as defined in the Directive does not include an element of objective justification. Noting that marriage and the family also appear in the Charter of Fundamental Rights, the AG added that 'it seems to me to go without saying that the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it.'<sup>156</sup>

### 1.3 Hay

In its third case concerning employment benefits, *Hay*, the Court issued a more explicit judgment compared to *Maruko and Römer*, in particular with respect to the finding of direct discrimination. The claimant, Mr Hay, worked for the French Caisse Régionale de Crédit Agricole Mutuel de Charentes-Maritimes et des Deux-Sèvres (Crédit Agricole). In July 2007, he entered into a registered partnership under French law, known as a PACS (*pacte civil de solidarité*), with a person of the same sex. On that occasion, Mr Hay applied for days of special leave and a marriage bonus granted to employees who got married, in accordance with Crédit Agricole's national collective agreement. However,

<sup>153</sup> *Römer*, paras. 42 and 43.

<sup>154</sup> See on this issue Pärli K. (2007), 'Anspruch auf Hinterbliebenenrente für Partner aus gleichgeschlechtlicher Partnerschaft', *European Law Reporter*, 455-458, p. 458.

<sup>155</sup> Pech L. (2012), 'Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*', *Common Market Law Review*, vol. 49, 1841-1880, p. 1848.

<sup>156</sup> Opinion of AG Jääskinen in *Römer*, para. 175.

Crédit Agricole refused those benefits to Mr Hay on the ground that under the relevant collective agreement the benefits were granted only upon marriage. When the matter was litigated, the French Cour de cassation (Supreme Court) decided to refer to the CJEU for a preliminary ruling.

The CJEU ruled in favour of Mr Hay. First, it noted that Directive 2000/78 is applicable to a situation such as that of Mr Hay, which concerns a collective agreement. The Court in this context recalled standing age discrimination case law according to which management and labour (i.e. the social partners), where they adopt measures which fall within the scope of Directive 2000/78, must respect that directive. Further, the Court held that the benefits at issue fall within the concept of pay.<sup>157</sup>

In contrast with the German registered life partnership which was at issue in *Maruko* and *Römer*, the French PACS is available to heterosexual and homosexual persons alike. In the *Hay* case, this raised questions with respect to whether the discrimination was direct or indirect. One of the questions posed by the national court to Court of Justice shows that the former considered *Hay* as a case of *indirect* discrimination on grounds of sexual orientation (it asked whether Article 2(2)(b) of Directive 2000/78 must be interpreted ‘as meaning that the choice of the national legislature to allow only persons of different sexes to marry can constitute a legitimate, appropriate and necessary aim such as to justify indirect discrimination resulting from the fact that a collective agreement which restricts an advantage in respect of pay and working conditions to employees who marry, thereby necessarily excluding from the benefit of that advantage same-sex partners who have entered into a [PACS]’). However, again the CJEU ruled that such discrimination is directly on the basis of sexual orientation.

With respect to comparability the Court itself assessed this issue, rather than leaving it to the national court as in *Maruko* and *Römer*. The Court stated:

It is apparent from the order for reference and the file submitted to the Court that persons of the same sex may conclude a PACS in order to organise their life together by committing, in the context of that life together, to providing material aid and assistance to each other. The PACS, which must be the subject of a joint declaration and registration with the Registry of the court within whose jurisdiction the persons concerned establish their common residence, constitutes, like marriage, a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties. Although the PACS may also be concluded by persons of different sexes, and although there may be general differences between the systems governing marriage and the PACS arrangement, the latter was, at the time of the facts in the main proceedings, the only possibility under French law for same-sex couples to procure legal status for their relationship which could be certain and effective against third parties. Thus, as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee’s marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS **are in a situation which is comparable** to that of couples who marry.<sup>158</sup> (emphasis added)

With respect to the finding of direct, rather than indirect, discrimination, the Court explained:

The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in *Maruko* and *Römer*, is not restricted only to homosexual couples is irrelevant and, in particular,

<sup>157</sup> *Hay*, paras. 27 *et seq.*

<sup>158</sup> *Hay*, paras. 36 and 37.

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does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.<sup>159</sup>

With regard to justification, the Court stated that as the discrimination at issue was direct, it might be upheld, not on the basis of a 'legitimate aim' within the meaning of Article 2(2)(b) of Directive 2000/78, as that provision covers only indirect discrimination, but only on one of the statutory grounds listed in the Directive.<sup>160</sup> The Court added that no such ground had been relied on in the case at hand.

The CJEU's reasoning on the comparability of couples in registered partnerships with married couples in *Hay*, which is explicitly in favour of a finding of comparability of registered partnership with marriage under French law, stands in marked contrast to the perspective adopted by the ECtHR in cases such as *Manenc v France* and *Gas and Dubois v France*. In *Manenc v France*, the ECtHR dealt with a similar problem to the one in *Maruko*. Mr Manenc applied for a survivor's benefit after the death of his same-sex PACS, which was refused to him because he did not fulfil the condition of being married to the deceased. In this case, the Court made an abstract comparison of the PACS and marriage, and noted that marriage differs from the PACS with respect to the conditions for its conclusion, scope, succession rights and dissolution. The ECtHR pointed out that the obligation of financial solidarity provided for by the Civil Code concerns only spouses. Moreover, in contrast to the CJEU in *Hay*, the ECtHR focused on the fact that the PACS is also open to heterosexual couples. In this context, the Court noted that the majority of partners who concluded a PACS were of a different sex. Conversely, for the CJEU it was decisive that homosexual partners are totally excluded from the benefit in question.

Similarly, in *Gas and Dubois v France* – which was the first judgment addressing the differential treatment of same-sex and opposite-sex couples in respect of the adoption of a child – the ECtHR held that excluding same-sex couples in civil partnerships who have no legal right to marry from the ambit of adoption provisions available to married opposite-sex couples does not violate rights guaranteed by the ECHR. The ECtHR pointed out that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 ECHR and gives rise to a complex web of social, personal and legal consequences. Accordingly, the Court considered that for the purposes of second-parent adoption the applicants' legal situation cannot be said to be comparable to that of a married couple.<sup>161</sup>

However, in the more recent case of *Vallianatos v Greece*, the ECtHR held that the situation of same-sex couples is comparable to that of different-sex couples as regards their need for legal recognition and protection of their relationship. Accordingly, the Court considered that the Greek law that provides for civil unions for different-sex couples only, thereby automatically excluding same-sex couples from its scope, was in violation of Article 14 in conjunction with Article 8 ECHR. Based on this judgment, it would appear that the ECtHR too is developing a more progressive approach to comparability in the context of sexual orientation. More generally, the question whether marriage is accessible to same-sex couples or not is important when assessing whether the status of being in a same-sex civil partnership is comparable to the status of marriage.

## 2. Hate speech and the burden of proof: the *ACCEPT* judgment

The latest sexual orientation case to date, *ACCEPT*, concerns sexual orientation discrimination in the context of hate speech. The Court's judgment builds on the earlier case of *Feryn*,<sup>162</sup> which fell under the Racial Equality Directive. The

<sup>159</sup> *Hay*, para. 43.

<sup>160</sup> *Hay*, para. 46.

<sup>161</sup> *Gas and Dubois v France*, para. 68.

<sup>162</sup> CJEU, Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECR I-5187.

*ACCEPT* case concerns a claim brought by a Romanian non-governmental organisation promoting LGBT rights by the name of Asociația Accept (ACCEPT). The organisation lodged a complaint before the National Council for Combating Discrimination against the football club Steaua București SA (FC Steaua) and its sponsor Mr Becali, who in public presented himself as being the patron of that club. In an interview concerning the possible transfer of a professional footballer to FC Steaua and the supposed sexual orientation of that player, Mr Becali publicly stated, among other things, that he would rather close the club or employ a junior player than accept a homosexual on the team.

In the proceedings before the national court, both FC Steaua and Mr Becali were defendants. However, the national court found that the previous CJEU judgment *Feryn* did not provide it with sufficient clarification in view of the situation before it, i.e. where the discriminatory statements come from a person (i.e. Mr Becali) who, in law, cannot bind the company which recruits the employees (i.e. FC Steaua), but who, given his close links with that company, may exert a decisive influence on its decision or, at least, may be perceived as being capable of exerting a decisive influence on that decision. The national court therefore turned to the CJEU with a request for a preliminary ruling on the interpretation of various aspects of the Employment Equality Directive, in particular of the burden of proof and the concept of establishing facts from which it may be presumed that there has been discrimination on the side of the employer.

The CJEU ruled that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters. Rather, in a situation such as that at issue in *ACCEPT*, the fact that the employer might not have clearly distanced itself from the statements concerned that may be taken into account by the national court in the context of an overall appraisal of the facts.<sup>163</sup>

The Court added that in the framework of the rebuttal of a *prima facie* finding of discrimination the defendant may refute the existence of such a breach by establishing, by any legally permissible means, *inter alia*, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation. In this context, 'it is not necessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such requirement is indeed apt, in certain circumstances, to interfere with the rights to privacy'.<sup>164</sup> In a case such as *ACCEPT*, a body of consistent evidence suited to refute the *prima facie* finding of discrimination might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.

Accordingly, the main message of the *ACCEPT* case is that, under certain circumstances, an employer may be held responsible for discriminatory statements made by a third person.<sup>165</sup> At the same time, the judgment confirms that discriminatory (here: homophobic) statements ('speech acts') are capable of constituting acts of direct discrimination in and of themselves. According to Belavusau, this judgment gives the prohibition of homophobic speech an identical status to that of racist speech under the Racial Equality Directive in *Feryn*, thus 'framing a niche for combating hate speech via EU non-discrimination law'.<sup>166</sup>

<sup>163</sup> *ACCEPT*, paras. 49 *et seq.*

<sup>164</sup> *ACCEPT*, para. 57.

<sup>165</sup> Benecke, M., Böglmüller, M. (2013), 'Arbeitsrecht: Anschein diskriminierender Einstellungspolitik eines Profifußballclubs', *Europäische Zeitschrift für Wirtschaftsrecht*, 474-475, p. 474.

<sup>166</sup> Belavusau U. (2013), *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*, Abingdon: Routledge, p. 83.



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Part V  
Implementation of Directive 2000/78 in  
the Member States and further evolution in  
national legislation and case law

The present chapter looks at the implementation of EU standards with respect to the protection from discrimination on grounds of sexual orientation in the Member States.<sup>167</sup>

## 1. Scope

The majority of EU Member States have adopted the model provided by the Employment Equality Directive with respect to the (personal and material) scope of the prohibition of discrimination on grounds of sexual orientation. With respect to the personal scope, only in a few Member States do the anti-discrimination laws explicitly mention physical and non-physical persons as entities to be protected on the ground of sexual orientation. **Poland** is one of them. In contrast, most national anti-discrimination legislations regulate the personal scope at general level without a clear distinction between physical and non-physical persons.

## 2. Forms of discrimination

### 2.1 Direct discrimination

All EU Member States have adopted legislation that reflects closely the definition of direct discrimination found within the Directives. There are several common elements:<sup>168</sup>

- The need to demonstrate less favourable treatment;
- A requirement for a comparison with another person in a similar situation but with a different characteristic (in the present context sexual orientation);
- The possibility to use a comparator from the past (e.g. a previous employee) or a hypothetical comparator; and
- A statement that direct discrimination cannot be justified other than on the basis of statutory exceptions.

These elements can be generally found in the legislation of **Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Sweden**, and the **UK**.<sup>169</sup> National law concerning the use of a comparator appears problematic in some countries in as much as the domestic instruments do not transpose all the relevant elements for determining the comparator or are erroneous. Such is the case in **Ireland**,<sup>170</sup> **Spain**<sup>171</sup> and **Poland**.<sup>172</sup> In **France**, the law provides for a comparison without entering into details about how to establish the comparison.

<sup>167</sup> The information in this chapter is mostly derived from country reports published by the European Network of Legal Experts in the Non-discrimination Field. For a general overview of the most recent reports, see <http://www.non-discrimination.net/home/country-reports-measures-combat-discrimination>.

<sup>168</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, p. 44.

<sup>169</sup> *Ibidem*, p. 44.

<sup>170</sup> Not providing for the hypothetical comparator in employment cases.

<sup>171</sup> The law only refers to 'a comparable situation', without determining whether past and hypothetical comparators are covered.

<sup>172</sup> In Article 2(2)(a) of the Employment Equality Directive, the 'hypothetical' nature refers to the behaviour to which the discriminatory treatment is being compared (treatment of another person in a comparable situation) and not to the discrimination itself as in the Polish Labour Code which reads: '§ 3 Direct discrimination takes place when an employee, for one or more reasons listed in § 1, was, is, or may be treated, in a comparable situation, less favourably than other employees.' See Bojarski Ł. (2013), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2012, Poland*, p. 24, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

Although different from the definitions proposed by Directive 2000/78, the **Romanian** Anti-discrimination Ordinance provides a detailed definition that attempts to cover the whole range of actions and omissions leading to discrimination. In **Hungary**, a general objective justification for direct discrimination applies to the grounds covered by the Employment Equality Directive when the act is 'found by objective consideration to have a reasonable ground directly related to the relevant legal relationship'.<sup>173</sup> However, it is unclear whether this general exemption applies in the field of employment, in contradiction to the Employment Equality Directive, or in areas outside of employment only.

As regards case law, Stuttgart Administrative Court in Germany ruled in 2011 that a civil servant living with his partner in a registered same-sex partnership together with his partner's children is entitled to child-related family benefits. Differential treatment of children of spouses and those of life partners living in a joint household constitutes direct discrimination on grounds of sexual orientation under Directive 2000/78.<sup>174</sup>

Another interesting example comes from the UK. The claimant complained of sexual orientation discrimination arising out of the efforts made by his employer to transform what had been a 'gay pub' in decline into a 'gastropub' serving food and drink to all. The employer had intended to place a board outside the pub saying 'this is not a gay pub', although the claimant managed to avert this action. The employer had also encouraged staff to seat customers who did not appear to be gay in prominent places where they could be seen from outside the pub, and had introduced more female staff. A tribunal had dismissed the claims relating to the respondent's efforts to change the pub's clientele. The Employment Appeal Tribunal allowed the claimant's appeal, ruling that while the respondent was perfectly entitled to reposition itself so as to appeal to a wider market, it could not do so by discriminating against its gay clientele, or by treating the claimant less favourably by pressurising him to participate in that process.<sup>175</sup>

## 2.2 Indirect discrimination

A large proportion of EU Member States have introduced a definition of indirect discrimination that generally reflects that of the Employment Equality Directive. This includes **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden** and the **UK**.<sup>176</sup>

National laws differ in the way they regulate the comparison required for establishing indirect discrimination. In the **United Kingdom**, the definition of indirect discrimination requires evidence that the measure placed the complainant as well as the group to which he or she belongs at a disadvantage. Under **Slovenian** law, individuals must be to be in an 'equal or similar situation and conditions', without further details. In **Denmark**, the interpretation provided by national courts seems to be narrower than the definition given in the Directives. **Lithuanian** legislation stipulates an adequate definition of indirect discrimination but its judicial implementation has not been recorded.<sup>177</sup>

<sup>173</sup> Article 7, paragraph (2) of the Equal Treatment Act.

<sup>174</sup> Verwaltungsgericht Stuttgart, 30 March 2011, 8 K 2/11, cited after: Mahlmann M. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Germany*, p. 123, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>175</sup> Employment Appeal Tribunal, 11 January 2011, *Lisboa v (1) RealPubs Ltd (2) Pring (3) Heap*, Reference number: UKE-AT/0224/10/RN, cited after: McColgan A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, p. 172, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>176</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, pp. 46-47.

<sup>177</sup> *Ibidem*.

In contrast with the field of services, where a Dutch case involving a beach club provides an example,<sup>178</sup> it appears to be difficult to find national court decisions on indirect discrimination on grounds of sexual orientation in the field of employment and occupation.

## 2.3 Harassment

Most States have implemented provisions on harassment that are similar to the definition in the Employment Equality Directive.<sup>179</sup> Until recently, **Estonia** was an exception because the unwanted conduct had to be of such a nature as to be directed at a person in a relationship of subordination or dependence.<sup>180</sup> However, the Law on Employment Contracts that encompassed this definition is no longer in force and the Law on Equal Treatment does not presuppose ‘subordination’ or ‘dependence’.<sup>181</sup> The **Dutch** definition of sexual harassment is identical to the definition in the Directive, apart from one single word. The word ‘unwanted’ is left out by the Dutch legislator because the legislation seeks to avoid an evaluation of the facts against the backdrop of the subjective experiences of the victim.<sup>182</sup>

The Directive does not elaborate on the violation of dignity, hostility or offensiveness of environment. Some Member State legislation addresses this and thus seeks to direct the fact-finding and decision-making activities of the courts. For example, the **Slovakian** statute refers to treatment ‘which that person can justifiably perceive’ as harassment, thus requiring that the perception be recognised as rational and average. The **Czech** law covers ‘conduct objectively perceived by the person concerned as unwanted, inappropriate or offensive’ and thus suggests that the courts are directed to establish either that the alleged victim objectively perceived the conduct in question as such or that it can be ‘objectively’ perceived as such (as opposed to deferring to the subjective perceptions verbalised in the complaint). The **British** statute uses a test that is both objective and subjective: conduct is offensive etc. where, ‘having regard to all the circumstances, including in particular the perception of [the victim], it should reasonably be considered as having that effect.’<sup>183</sup>

As regards case law, a Danish court ruled in 2008 in a case of harassment of an apprentice at a bakery. When the apprentice announced that he was homosexual, his employer began to systematically harass him. He slandered the apprentice in front of other employees and customers, and called homosexuals the most disgusting people he knew. Furthermore, he stated that homosexuals were mentally ill. The injured party (the apprentice) claimed that he had been discriminated against on the ground of his sexual orientation and had been harassed with reference to the Act on the Prohibition of Discrimination in the Labour Market. The Western High Court upheld the judgment appealed from the District Court. The employer was ordered to pay around EUR 13,450 to the injured party.<sup>184</sup>

<sup>178</sup> See below under section V.6.6.6.4 of this report.

<sup>179</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, p. 49.

<sup>180</sup> Poleshchuk V (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Estonia*, p. 35, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>181</sup> *Ibidem*, p. 35.

<sup>182</sup> Holtmaat R. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, the Netherlands*, p. 161, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>183</sup> Vickers L. (2006), *Religion and Belief Discrimination in Employment – the EU law*, Brussels: Migration Policy Group, p. 16.

<sup>184</sup> Western High Court [Vestre Landsret], 22 February 2008, *Weekly Law Journal* (U.2008.1353V), cited after: Justesen P., (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Denmark*, p. 123, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

The UK Employment Tribunal in 2012 found a gay employee to have been harassed by a teenager who had falsely alleged to have been harassed by the claimant as well as by colleagues who had produced the false allegations and directed the teenager to file the complaint. In another UK case, the Employment Tribunal upheld a claim of sexual orientation harassment in relation to comments posted on an employee's Facebook page, without his knowledge, by his co-workers. Although the colleagues knew that the employee was not gay, their status update on his page stated that he was, which had the effect of creating an offensive working environment. The Tribunal ruled that the posting of comments including 'gay and proud' on the claimant's Facebook page by his co-workers amounted to unlawful harassment on grounds of sexual orientation. As the postings were made during working hours, the employer was held vicariously liable.<sup>185</sup> It is the employers' responsibility to ensure that the workplace develops a culture of respect.

In this context, it must be recalled that it is not a defence to a claim for discrimination that the claimant voluntarily disclosed his or her sexual orientation. This was disregarded by the courts in a Polish case that illustrates the potential risks related to an employee's voluntary communication of their sexual orientation, here verbal abuse and harassment towards a 31-year-old female intern at a shop.<sup>186</sup> The court ruled that the complainant misunderstood the actions in question and that she was overreacting, and thus the facts of the case could not be considered to fall under the term harassment given that, under Polish law, the term requires that the facts are objectively capable of falling under this notion and excludes perceptions based on special sensitivity of the complainant. Moreover, the court noted that in its view it was inappropriate for the complainant to disclose her homosexual orientation to her colleagues. According to the court, it was only natural that disclosure of the details of the complainant's private life could provoke reactions from her colleagues. The court underlined that the claimant was solely responsible for the discussion about her sexual orientation. Given that the complainant informed her colleagues about her sexual orientation on purpose, she could thus be deemed to have provoked what she alleged to amount to harassment. In the view of the court, the workplace is an appropriate forum for discussing work and not a proper forum for engaging in discussions on 'ethical, psychological, philosophical or medical issues.' This verdict was upheld at second instance.

It is obvious that this approach is not in line with the equality principle under the Employment Equality Directive and that it breaches fundamental human rights standards in terms of freedom and openness in the workplace. It is clear that the prohibition of discrimination on the grounds of sexual orientation in the Employment Equality Directive covers both cases where information on sexual orientation is disclosed against the will of the employee and cases of voluntary coming out.<sup>187</sup> Clearly, the Directive must also cover situations where an employee decides to come out with his/her sexual orientation knowing or supposing that this act could put him/her in a less favourable situation. Although the above Polish case is the only example of such an excessively restrictive interpretation of the ground of sexual orientation by Polish courts, and although it does not reflect a systematic problem, it still creates a dangerous precedent. It is worrying that even though EU equality laws on sexual orientation have been in existence for more than 10 years, one of the biggest challenges in certain countries still appears to be their application in practice based on a proper understanding of the specificity of the characteristic of sexual orientation.

<sup>185</sup> *Otomewo v Carphone Warehouse*, Case No 2330554/11 [2012] EQLR 714, McColgan A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, p. 16, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>186</sup> Judgment of the Regional Court of Zielona Góra, 4<sup>th</sup> Labour and Social Security Division of 14 June 2011, IV Pa 63/11.

<sup>187</sup> This scenario was considered in the UK case *Grant v HM Land Registry & Anor* [2011] EWCA Civ 769, Court of Appeal (Civil Division), 15 April 2010, <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed8748>.

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## 2.4 Instructions to discriminate

A provision on instructions to discriminate has been included in the national legislation of the majority of EU Member States, with a small number of exceptions.<sup>188</sup> Under the **Bulgarian** Protection Against Discrimination Act, a definition of incitement to discrimination encompasses instructions to discriminate where there is an element of intent and the perpetrator is in a position to influence others.<sup>189</sup> Similarly, under the **Croatian** statute, only an intentional instruction to discriminate is regarded as discrimination.<sup>190</sup> However, in both countries the notion of ‘intent’ includes not only ‘direct intent’ but also *dolus eventualis*, awareness of the likely outcome of an action. Accordingly, the requirement of intent can hardly be considered as extremely restrictive. In **France**, such a provision was introduced by Law 2008-496, even though general legal principles governing, in particular, liability for complicity were capable of producing similar results.

The **UK** was late in implementing the Directive in respect of ‘instructions to discriminate’. On 20 November 2009, the European Commission sent a reasoned opinion to the UK regarding its incorrect implementation of the Directive, stating that there was no clear ban on ‘instructions to discriminate’ in national law.<sup>191</sup> Currently, UK law still does not expressly regulate instructions to discriminate but the case law regards less favourable treatment ‘because of’ a protected ground as covering an instruction to discriminate on protected grounds.<sup>192</sup>

The previously mentioned UK case concerning a gay employee who was harassed by his colleagues<sup>193</sup> concerned the filing, in turn, of a harassment complaint against the claimant by a teenager, as instructed by the claimant’s colleagues. This case can also be usefully considered under the heading of ‘instructions to discriminate’ (though that was not the national court’s finding).

## 3. Sexual orientation as a ground for discrimination

### 3.1 The term ‘sexual orientation’

The majority of EU Member States have adopted the model of the Employment Equality Directive by not including a legal definition of ‘sexual orientation’. It is fair to conclude, therefore, that in these States the national legislators delegated to the courts and other authorities the decision on whether a given case concerns sexual orientation and whether the plaintiff is protected under national law from such discrimination. In contrast, sexual orientation

<sup>188</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, p. 49.

<sup>189</sup> Ilieva M., (2013), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC. Country report 2012, Bulgaria*, p. 6, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>190</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, p. 49.

<sup>191</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, pp. 14 and 30.

<sup>192</sup> *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425, cf. Chopin I., Germaine-Sahl C. (2013), *Developing Anti-Discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, p. 49.

<sup>193</sup> Case No 1402154/11.

is defined in the laws of **Bulgaria**,<sup>194</sup> **Sweden**,<sup>195</sup> the **UK**<sup>196</sup> and **Ireland**.<sup>197</sup> In **Germany**, national legislation has replaced sexual orientation with the notion of sexual identity,<sup>198</sup> which implies a protection that is broader than that required under Directive 2000/78.

It may be argued that providing an explicit legal definition of the meaning of ‘sexual orientation’ could have the potential to serve the LGB community in the EU with respect to the protection of their right to equal treatment, in particular in a situation where statistics show that discrimination based on sexual orientation remains a problem in many Member States. However, it has also been suggested that it might be better for there to be no legal definition, as this approach enables a broad interpretation in practice. At the same time, the lack of a legal definition might lead to a limiting and strict construction of the concept by the national courts, leaving some groups with a specific sexual orientation (e.g. asexuality) without protection. This risk exists in particular where the issue of LGB discrimination is a relatively new subject for the national courts and where there is a low level of understanding of the specificity of sexual orientation discrimination even among the enforcement bodies. In these contexts, it is important for the authorities, courts and equality bodies to recall the broad definition of ‘sexual orientation’ under the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, as referring ‘to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’

### 3.2 Actual sexual orientation

As mentioned above, some EU Member States have chosen to clarify the meaning of sexual orientation as a homosexual, bisexual or heterosexual orientation. It is clear that this includes a person’s actual sexual orientation. At the same time, such a definition could imply the risk of a narrow interpretation according to which protection against discrimination is secured only for persons who directly possess these orientations. For those countries that do not provide a legal definition of the ground of sexual orientation, assessment of the specific situation and less favourable treatment is left to the competent authorities and courts. These are then also responsible for making a determination as to whether the less favourable treatment of particular plaintiffs is directly related to the characteristic that can fall within the ambit of the term ‘sexual orientation’.

### 3.3 Assumed sexual orientation

Legislations of the Member States seldom tackle assumed sexual orientation as a ground of prohibited discrimination explicitly. In some cases, the law can be considered to cover assumed sexual orientation on the basis of the explanatory materials (**Austria**) or of preparatory works (e.g. **Belgian** federal law; however, the **Flemish** legislator

<sup>194</sup> Sexual orientation is defined under the Protection Against Discrimination Act, § 1.10 Additional Provision, as ‘heterosexual, homosexual or bisexual orientation’.

<sup>195</sup> According to Ch. 1 Sec. 5 p. 5 of the Discrimination Act, sexual orientation is defined as ‘homosexual, bisexual or heterosexual orientation’.

<sup>196</sup> The Equality Act (Sexual Orientation) Regulations (Northern Ireland) define ‘sexual orientation’ as ‘a sexual orientation towards – (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex’.

<sup>197</sup> Section 2(1) of The Employment Equality Act 1998-2008 states that ‘sexual orientation’ means heterosexual, homosexual or bisexual orientation.

<sup>198</sup> The German antidiscrimination law refers to sexual identity (*sexuelle Identität*) rather than sexual orientation. Apparently, the Federal German Constitutional Court refers to both as aspects of the human autonomous personality. The latter is said to encompass homosexuality and trans-sexuality and any other orientation imaginable. Cf. Mahlmann M. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Germany*, p. 33, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

expressly includes assumed sexual orientation).<sup>199</sup> Discrimination on the ground of assumed sexual orientation is explicitly prohibited in **Bulgaria**,<sup>200</sup> **Croatia**,<sup>201</sup> the **Czech Republic, Hungary, Ireland**<sup>202</sup> and **Portugal**.<sup>203</sup> In **Sweden**,<sup>204</sup> the definition of (direct) discrimination is related to the ground itself and is thus to be construed as covering assumed discrimination. **Northern Ireland**'s law regulates discrimination 'on grounds of' the protected characteristic, a formulation which is understood as covering perceived or assumed characteristics.<sup>205</sup>

As regards case law, the potentially negative effects of a legal requirement of causation between the discriminatory action and the prohibited ground is usefully illustrated by the case *English v Thomas Sanderson Blinds Ltd*.<sup>206</sup> In this case, the UK Employment Appeals Tribunal dismissed a claim for harassment brought by a man who was not gay, and who was known by his harassers not to be gay, but who was nevertheless subject to homophobic abuse. The Tribunal took the view that the claimant was not subject to harassment 'on the grounds of' his actual or assumed sexual orientation, as required by the Regulations, because (a) he was not gay; (b) he was not perceived or assumed to be gay by his fellow workers; and (c) he accepted that they did not believe him to be gay. The Court of Appeal subsequently overturned the decision.<sup>207</sup>

In the Polish case *A.T.*,<sup>208</sup> the complainant was dismissed from his work after he was seen taking part in the Gay Pride Parade. The court, besides discrimination by association,<sup>209</sup> also identified an assumption of the homosexual orientation of the complainant, based on the statement that 'faggots can't work for our company.' The case is an example of effective use of the standards of protection against assumed sexual orientation discrimination. It shows that even absent an explicit definition of discrimination by assumption, protection is possible if the focus is put on the particular characteristic of sexual orientation and its role in the less favourable treatment at issue in a given case.

<sup>199</sup> The Flemish Framework Decree of 10 July 2008.

<sup>200</sup> The Protection Against Discrimination Act prohibits this form of discrimination in stipulating that discrimination 'on grounds of the actual, past or present, or presumed fact of one or more of these characteristics' is prohibited.

<sup>201</sup> The Croatian Anti-discrimination Act prohibits discrimination based on a misconception (i.e. a perception that turns out to be wrong) of the existence of a prohibited ground of discrimination.

<sup>202</sup> Both the Employment Equality Act and the Equal Status Act prohibit discrimination on the basis of a discriminatory ground that is imputed to an individual.

<sup>203</sup> In Portugal, civil, administrative and penal laws prohibit discrimination based on perceived or assumed characteristics.

<sup>204</sup> The wording of the prohibition in Ch. 1 Sec. 4 p. 1 of the Discrimination Act, states that it applies 'if this disadvantaging is associated with [...] sexual orientation [...]' (emphasis added).

<sup>205</sup> Section 3 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 provides that 'For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if – (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons; or (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but – (i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons, (ii) which puts B at that disadvantage, and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim'.

<sup>206</sup> *English v Thomas Sanderson Ltd* [2008] EWCA Civ 1421 [2009] IRLR 206, [2009] ICR 543, [2009] 2 All ER 468, [2009] 2 CMLR 18, <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html>.

<sup>207</sup> McColgan A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, p. 36, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>208</sup> Judgment of Warsaw District Court of 9 July 2014 (VI C 402/13).

<sup>209</sup> See immediately below under section V.3.3.3 of this report.

### 3.4 Associated sexual orientation

Most of the EU Member States have not expressly included the concept of discrimination by association in equality laws. Those who do include **Austria**,<sup>210</sup> **Bulgaria**,<sup>211</sup> **Croatia**,<sup>212</sup> **Ireland**<sup>213</sup> and **Northern Ireland**. **Hungarian** legislation prohibits discrimination by association implicitly.<sup>214</sup> The **Dutch, Lithuanian, Slovakian, Polish, Latvian** and **Portuguese** legislation is problematic to the extent that it is impossible to tell if discrimination by association is covered because the terms of the statutes are imprecise, their meaning is underdetermined and no tangible case law seems to allow for a meaningful discussion. In **Sweden**,<sup>215</sup> the definition of direct discrimination is related to the prohibited ground and not to the person, thus it is interpreted as covering discrimination by association. This is also the case in **Great Britain**.<sup>216</sup> In **Belgium**, discrimination by association is not expressly forbidden in the General Anti-discrimination Federal Act. However, the question was raised during preparatory works and it was noted that the CJEU was considering a reference for a preliminary ruling on this issue (namely *Coleman*) and that the federal legislation would have to be construed in accordance with this decision. In addition, in one of the Belgian regional laws, namely the Flemish Framework Decree of 2008, the definition of direct discrimination expressly states that it is applicable in case of discrimination by association.

As regards case law, among the few examples of decisions on discrimination by association on the ground of sexual orientation is the Polish case of *Mirosław S*.<sup>217</sup> Mr S was dismissed from his position as director of a teacher training centre by the Minister of National Education on the grounds that he published the Polish translation of the Council of Europe guide for teachers entitled *Compass: A Manual on Human Rights Education with Young People*. The book devoted one page to the issue of discrimination of LGBT people. The reason for the dismissal (as expressed by the Minister) was that, in the opinion of the Ministry, the manual included statements that could be regarded as promotion of homosexuality. Warsaw District Court found discrimination in employment and unfair dismissal and awarded Mr S damages (approx. EUR 5,700 i.e. EUR 4,800 for discriminatory treatment on the basis of political views and EUR 900 for unfair dismissal). The Minister of National Education appealed to Warsaw Regional Court. There, an LGBT organisation argued in an *amicus curiae* brief (convincingly, it is submitted) that Mr S was discriminated against by association on the ground of sexual orientation since the real reason for his dismissal was sexual orientation as a concept. However, the Regional Court<sup>218</sup> upheld the finding of discrimination on grounds of political views (and it lowered the amount of compensation).

<sup>210</sup> Discrimination by association is now explicitly covered by the Federal Equal Treatment Act: 'It is also to be deemed discrimination if a person is discriminated against on the ground of a close relationship (or affiliation) with a person on the ground of his/her (according to the respective context of the law: sex, ethnic affiliation, disability, religion or belief, age, sexual orientation)'. *Länder* legislators are required to amend their laws according to this standard.

<sup>211</sup> The Protection Against Discrimination Act provides that discrimination is prohibited 'on grounds of the actual, past or present, or presumed fact of one or more of these characteristics in the person discriminated against, or in another person who is, actually or presumed, associated with the person discriminated against, where this association is a cause of the discrimination'.

<sup>212</sup> The Croatian Anti-discrimination Act states that placing any person, or a person related to that person by kinship or other relationship, in a less favourable position on the prohibited grounds is considered discrimination.

<sup>213</sup> The Employment Equality Act and the Equal Status Act both prohibit discrimination by association.

<sup>214</sup> The Hungarian Equal Treatment Act does not expressly prohibit discrimination based on association with persons with particular characteristics. Nonetheless, Article 8 point t) (other situation, attribution or condition) provides protection for those discriminated against on the basis of association with members of a particular group.

<sup>215</sup> The wording of the prohibition in Ch. 1 Sec. 4 p. 1 of the Discrimination Act, states that it applies 'if this disadvantaging is *associated* with [...] sexual orientation [...]' (emphasis added).

<sup>216</sup> The Explanatory Notes to the Equality Act provide an explanation that the law has the effect of covering, discrimination by association.

<sup>217</sup> The case was litigated by the Helsinki Foundation for Human Rights, [www.hfhr.org.pl](http://www.hfhr.org.pl).

<sup>218</sup> Judgment of the Regional Court of Warsaw of 31 March 2008 (XII Pa 681/07) and Judgment of the District Court of Warsaw of 5 June 2007 (VIII P 1028/06).

Another example is the above-mentioned Polish case of *A.T.*, concerning an employee who was dismissed after he was seen taking part in the Gay Pride Parade. The court of first instance stated that the complainant was subject to discrimination by his association with the LGBT movement and its demands and awarded approximately EUR 600 in compensation.<sup>219</sup>

## 4. Exceptions

### 4.1 Sexual orientation as an occupational requirement

The majority of EU Member State legislation provides for a derogation based on a genuine and determining occupational requirement in wording that is identical or non-distinguishable from the language of the Employment Equality Directive. There also appears to be legislation addressing specifically and explicitly the issue of genuine occupational requirements as linked to sexual orientation.

As regards case law, this exception was relied upon by the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation in a decision of 2006. The Swedish national LGBT rights organisation was looking for a person to do safer-sex outreach work among men who have sex with other men. The work was to be carried out in the framework of a project that sought to use the technique of peer education and thus inherently required that the person responsible for the outreach be a member of the community to which the people targeted by the project belonged, i.e. a man who had sex with men. A heterosexual woman who contacted the organisation expressing her interest in this job vacancy was told that she did not qualify. The Ombudsman came to the conclusion that refusing to hire her came within the exception for genuine and determining occupational requirements. The very nature of the work and the context in which it was to be carried out made it necessary that the prospective employee be a man who had sex with other men.<sup>220</sup>

### 4.2 Positive action

The majority of EU Members States has general legislation on positive action. Only **Northern Ireland** has a sexual orientation-specific provision,<sup>221</sup> though there appears to be no single statute in the European Union that would establish a regime of particular and specific regulation of positive action in respect of sexual orientation. In **Germany**, the legislation on positive action is subject to a possible challenge under constitutional law.<sup>222</sup> Among the few countries where anti-discrimination law does not provide for positive action is **Latvia**. In some countries there are important limitations that are contrary to EU law. In **Denmark**, positive action legislation does not apply

<sup>219</sup> The judgment was appealed by both parties and there is no final ruling yet.

<sup>220</sup> Information provided by H. Ytterberg, former Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation, in a conversation/interview.

<sup>221</sup> According to Northern Ireland's Sexual Orientation Regulations (reg. 29): 'Nothing... shall render unlawful any act done in or in connection with – 1) affording persons of a particular sexual orientation access to facilities for training which would help fit them for particular work; or 2) encouraging persons of a particular sexual orientation to take advantage of opportunities for doing particular work, where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to sexual orientation suffered by persons of that sexual orientation doing that work or likely to take up that work.'

<sup>222</sup> Mahlman M. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Germany*, p. 92, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

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to private employers.<sup>223</sup> In the **Netherlands**, positive action applies only to the grounds of sex, race and disability, and sexual orientation is excluded. **Slovakian** legislation does not provide for sexual orientation exceptions either. Conversely, some legislations go beyond EU law and provide for positive action not as a derogation from the principle of non-discrimination but as a positive obligation in order to equalise opportunities for disadvantaged groups, e.g. in **Bulgaria**.<sup>224</sup>

### 4.3 Exception for churches and ethos-based organisations

Of those Member States that grant a separate exception for religious and confessional organisations, only in the **Netherlands** does anti-discrimination legislation explicitly state that it is not possible to rely on the religious organisation exception in order to justify differential treatment on the basis of sexual orientation. The laws of most other Member States do not state this limitation (**Austria**, the **Czech Republic**, **Estonia**, **Hungary**, **Ireland**, **Luxembourg**, **Malta**, **Poland** and **Slovenia**).

**France**, **Portugal**, **Romania** and **Sweden** do not allow a separate exception for religious and confessional organisations at all. In **Finland**, the Non-Discrimination Act does not provide for specific regulation of this issue but includes it in the general provision on occupational requirements. Whilst the law does not refer to the ‘context’ in which occupational activities are carried out but only to the ‘specific type’ and the ‘performance’ of occupational activity,<sup>225</sup> Finnish case law warrants protection from discrimination on the ground of sexual orientation in religious and church organisations. For example, the Finnish Vaasa Administrative Court<sup>226</sup> annulled the decision of the Cathedral Chapter of the Evangelical Lutheran Church that an applicant was not eligible to be appointed as a chaplain (assistant vicar) because she was known publicly to live in a same-sex relationship and had announced that she would officially register the said relationship. A same-sex relationship was found to fall under the ground of ‘other reason related to a person’, under which the Finnish law prohibits discrimination. The Administrative Court stated that the decision of the Cathedral Chapter would only be justified if the statute provided for an exception to the applicability of non-discrimination norms. However, no such exception was provided for by the non-discrimination laws or laws on churches.<sup>227</sup> Nevertheless, even though the result of the court’s ruling was in favour of the complainant, the Finnish example is not fully satisfactory as using ‘other status’ should be a subsidiary approach, rather than the primary legal basis, for a finding of discrimination.

Compared to that Finnish case, a Hungarian case may serve to illustrate the sometimes very considerable differences in the approaches taken by different Member States. More specifically, it illustrates the problem of omitting the limitation in the final limb of Article 4(2) of the Employment Equality Directive. After expelling a theology student

<sup>223</sup> Justesen P. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Denmark*, p. 73, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>224</sup> In Bulgaria there is a specific conflict between the case law of the Constitutional Court and the standard of protection set forth in the Protection Against Discrimination Act. The Constitutional Court considered all positive action in respect of all constitutionally protected grounds (including race and ethnicity, sex, as well as religion and belief) unconstitutional in Ruling No 14 of 1992. It has been argued therefore that the grounds that are not constitutionally protected can be covered by positive action under the statute. Ilieva M. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Bulgaria*, p. 71, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>. It might be argued, however, that this observation holds valid until the statute’s dispositions enabling positive action are challenged before the Constitutional Court.

<sup>225</sup> Cf. Hiltunen R. (2013), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2012, Finland*, p. 66, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>226</sup> Decision from 27 August 2004, Ref. No 04/0253/3.

<sup>227</sup> Cf. Hiltunen R. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Finland*, p. 68, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

who had announced that he was homosexual to one of his professors, the Faculty Council of the Károli Gáspár Calvinist University's Theological Faculty (a church-maintained university that also receives state funding) published a general declaration claiming that 'the church may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life.' Both the court of first and second instance as well as the Hungarian Supreme Court rejected the complaint and decided that, in the case of a denominational university, it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking into consideration the fact that later on they may become pastors.<sup>228</sup> Should this reasoning be transposed from the field of education to the employment of homosexual pastors, it would mean that the national law gives *carte blanche* to discriminate against homosexuals in employment situations in religious institutions, which would be in breach of the Employment Equality Directive.

In Poland, a lack of understanding of the limits of Article 4(2) of the Employment Equality Directive has also been visible at the highest political level. While taking part in a televised public debate in 2010, the Polish Minister for Equality (!) argued that Directive 2000/78 contained provisions allowing faith-based schools to discriminate against teachers on grounds of their sexual orientation. She further expressed the opinion that schools would be right in doing so. These statements led to formal questions put by Members of the European Parliament to the European Commission. The Commission responded by pointing to the final limb of Article 4(2) of Directive 2000/78: 'That paragraph makes it clear, however, that any difference in treatment should not justify discrimination on grounds other than of religion or belief.' The Commission further noted that only the general exception under Article 4(1) of the Directive on genuine occupational requirements allows requirements relating to other characteristics, adding, however, that it failed to see how a teacher's sexual orientation could reasonably constitute a genuine and determining occupational requirement.<sup>229</sup>

Such instances illustrate that failing to implement fully the limits of Article 4(2) of the Employment Equality Directive creates a potential threat to the non-discrimination principle with regard to sexual orientation. This could be especially detrimental with relation to LGB people from EU Member States where sexual orientation as a protected ground still stimulates homophobic social debate and where the position of traditionally minded churches remains influential on the political level as well. It is submitted that relying solely on the exception of genuine occupational requirement as protection against sexual orientation discrimination by churches and ethos-based organisations does not solve all potential problems.

There are, however, also positive examples of national case law. In 2011, a Dutch civil court for the first time gave a decision<sup>230</sup> in a case where the exception clause on churches and ethos-based organisations was invoked by a school board. It concerned a homosexual teacher who was dismissed by a (fundamentalist) Protestant school after he had announced that he had left his wife and children and had gone to live with his new male partner. In that case, the court found that the school board could not rely on the exception and therefore had violated the prohibition of discrimination.<sup>231</sup> Similarly, in Germany the Federal Constitutional Court held that the autonomy of the churches and religious organisations does not allow for arbitrariness, the violation of *bona fide* principles, the *ordre public* or the objective order of values, including the application of fundamental rights.<sup>232</sup>

<sup>228</sup> Decision of 8 June 2005, Supreme Court of Hungary, BH 2006. 14.

<sup>229</sup> Commissioner Reding, speaking for the European Commission, in response to the question by MEP M. Cashman, Member of the European Parliament, concerning the possibility of limiting the rights of homosexual persons to access the vocation of teacher [2011] OJ C 243 E.

<sup>230</sup> Cantonal Court of The Hague, Decision of 2 November 2011, LJN: BU3104.

<sup>231</sup> Holtmaat R. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, The Netherlands*, p. 88, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>232</sup> Mahlmann M. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Germany*, p. 83, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

Finally, in one Member State the legislation contains a more general provision on the potential conflict of values between the freedom of religion, confession and belief, on the one hand, and the principle of non-discrimination, on the other. In **Great Britain**,<sup>233</sup> the Equality Act, Schedule 1, Part 1, paragraph 2 deals with 'Religious requirements relating to sex, marriage etc., sexual orientation'. According to this provision, a person does not contravene any of the Act's prohibitions on discrimination in relation to employment because of sexual orientation (sex, marriage or civil partnership) if this person shows that:

- (1) [...] (a) the employment is for the purposes of an organised religion,
- (b) the application of the requirement engages the compliance or non-conflict principle, and
- (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it). [...]
- (5) The application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion.
- (6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

This provision indicates concrete criteria that should be employed when assessing the unlawfulness of particular actions. However, it remains open whether it is sufficient to guarantee compliance with the Employment Equality Directive.

#### 4.4 Burden of proof

All EU Member States have legislative provisions on the shifting of the burden of proof in discrimination cases, though there is a noticeable tendency to transpose the obligation to reverse the burden of proof in different wording than the Directive, which may be due to the domestic legal culture and conventional language of procedural law of the different countries. In **Ireland**, the law specifies that the shifting of the burden of proof also applies to proceedings of the Equality Authority, i.e. the national equality body.

As regards case law, **Austria**, **Latvia** and **Poland** provide examples of the courts' ability to reinforce the domestic transposition of the burden of proof mechanism adopted from the Directive but expressed in domestic terms best suited to reaching the Directive's aims. Conversely, **Belgium**, **Bulgaria** and **Hungary** still have a great deal of problems in complying with the EU standard, and many decisions of their courts, even their Supreme Courts, show that proper implementation might be compromised by innate inertia of the legal culture. For example, in its decisions issued in 2009 on several actions for the annulment of the 2007 Federal Anti-discrimination Act, the Belgian Constitutional Court gave a misleading interpretation of the burden of proof mechanism by referring to the judge's power as if the judge had discretion to allow such a shifting of the burden of proof.<sup>234</sup>

In a Spanish case that usefully demonstrates the application of the reversal of the burden of proof, the High Court of Justice of Galicia<sup>235</sup> confirmed the invalidity of the dismissal of a lesbian employee of the radio station overseen by the Spanish Bishops' Conference. The dismissal was directly related to the employee's marrying another woman. The court found that there were facts justifying a reasonable suspicion that a fundamental right had been

<sup>233</sup> The text of the law is taken from McColgan A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, p. 109, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>234</sup> Bribosia E., Rorive I. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Belgium*, p. 141, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>235</sup> Judgment of 17 July 2008, 3041/2008.

infringed. The respondent company was unable to demonstrate that it had not infringed its employee's right not to be discriminated against on the ground of her sexual orientation.

## 4.5 Remedies and sanctions

Anti-discrimination statutes in most EU Member States regulate the remedies and sanctions attached to violations of the prohibition of discrimination on the ground of sexual orientation among others. However, no EU Member State provides for sanctions that are tailored specifically to acts of discrimination on the ground of sexual orientation.

The remedies and sanctions chosen under national law reflect the legal traditions of the particular States and may be made available under civil, administrative or criminal law. Most of the Member States leave the decision concerning the level and form of the sanction to the national courts as well as to the complainant.

Where the sanction takes the form of compensation, some statutes (e.g. **Croatia** and **Poland**) do not provide any explicit framework for the calculation of compensation and thus court proceedings are governed by general rules applicable to compensation for harm. Other statutes set out the caps and define specific parameters for the calculation of the amount payable (e.g. a multiplication of weekly wages and number of weeks in **Ireland**) or even directly set the amount of compensation (e.g. in **Hungary** and in **Poland**). For example, in Poland the pecuniary penalty (administrative sanction) for an employment agency formulating a discriminatory job advertisement or for refusing to accept a candidate for a vacancy on a prohibited ground is set at PLN 3,000 (ca. EUR 730).<sup>236</sup> This is in line with the average level of pecuniary penalty that might be applied by a labour inspector in cases of violation of labour law but it is contrary to the Directive.

Most statutes do not explicitly reflect the Equality Employment Directive's general standard according to which the sanctions are to be effective, proportionate and dissuasive. Neither do the courts seem to consider explicitly what constitutes effective, proportionate and dissuasive sanctions, which is problematic. Also, there are no official records and surveys capable of giving evidence of the average amounts adjudicated as compensation by the courts. **Great Britain** seems the only exception. In the period from 2011 to 2013, the Employment Tribunals granted an average of GBP 14,623 in compensation, whereas maximum compensation reached GBP 27,473.<sup>237</sup>

A Polish case<sup>238</sup> can illustrate the importance of awareness of EU standards. It concerned a gay shop assistant harassed at his workplace (a supermarket) due to his sexual orientation. The complainant's sexual orientation was widely known by the rest of the staff and most of them were completely neutral about this fact. The most hostile person was the manager of the shop who publicly offended the complainant several times by calling him 'faggot' and 'male whore'. The first instance court found for the complainant and awarded PLN 4,500 (approx. EUR 1,110) in compensation. At second instance, a Polish equality NGO<sup>239</sup> joined the proceedings and provided an *amicus curiae* brief which presented EU standards for sanctions. As a result of the appeal, the second instance court took into consideration arguments provided by the NGO and raised the amount of compensation to PLN 18,000 (approx. EUR 4,400).

An Austrian case involved a victim of harassment who consciously sought no more than limited sanctions for the sake of protecting a sense of self-respect and dignity. The case concerned an openly homosexual truck driver who

<sup>236</sup> The norms cover discrimination on grounds of sexual orientation. Cf. Article 121.3 of the Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Employment Market, as amended.

<sup>237</sup> Employment Tribunal and EAT statistics 2011-12 (GB), <http://www.justice.gov.uk/downloads/statistics/tribs-stats/employment-trib-stats-april-march-2011-12.pdf>.

<sup>238</sup> District Court of Słubice, 4th Labour Division, IVP 30/11, 18 June 2012, Regional Court of Gorzów Wielkopolski, VI Pa 56/12, 27 November 2012.

<sup>239</sup> The Polish Society of Anti-Discrimination Law, [www.ptpa.org.pl](http://www.ptpa.org.pl).

had been harassed by two employees of a cargo company. The harassers were not direct co-workers of the victim but worked for the biggest client of the cargo company that employed the victim. The two respondents had been harassing the victim for a period of more than two years with intimidating verbal assaults. When they started to ask everybody whom they found talking to the victim whether they were also gay, the truck driver became more and more isolated and decided to complain. He was backed in this by his employer, who even intervened on his behalf, though with no permanent positive effect. The Litigation Association of NGOs against Discrimination intervened in support of the claim. The victim was awarded compensation of EUR 400 from each of the harassers, which is the minimum amount set by the Equal Treatment Act. The court stated clearly that he would have deserved much more than this, but it was the victim's own decision to go for the minimum amount as he only wanted a 'decision of principle'.<sup>240</sup> However, it should be noted that such low amounts always raise the question of whether a given sanction meets the requirement under Union law of being dissuasive.

Conversely, in 2009 the Irish Equality Tribunal granted exceptional compensation of nearly EUR 50,000 to an employee of a construction company who complained that his employer had not only treated him less favourably because of his sexual orientation but also victimised him by changing his conditions of employment, placing him on sick leave and ultimately making him redundant. The Equality Officer ruled that the complainant was discriminated against, sexually harassed and victimised on grounds of his sexual orientation.<sup>241</sup>

In the practice of compensation, differences in the amounts awarded might also reflect differences in the loss suffered, for example material loss through dismissal as compared to serious psychological injury. It is therefore not easy to compare levels of compensation on a general level, and it may be difficult to assess whether the national approaches are effective. In any case, it is submitted that further interpretation of the requirements with respect to sanctions specifically for sexual orientation discrimination is needed. Firstly, for many national courts the issue of sexual orientation discrimination is still a new topic compared to, for example, complaints about sex or racial discrimination. Secondly, in many cases the issue of compensation for the violated dignity of LGB people is at the core of the proceedings. Therefore, it would be of great importance to have clearer indications of what it means for a sanction to be effective, dissuasive and proportionate in relation to individuals suffering discrimination on the ground of sexual orientation. At present, no EU Member State has explicit provisions in this area.

## 5. Equality bodies

In contrast to the Racial Equality Directive 2000/43 and the Sex Equality Directives 2004/113<sup>242</sup> and 2006/54,<sup>243</sup> the Employment Equality Directive does not obligate the Member States to establish an independent agency or authority

<sup>240</sup> Landesgericht Salzburg, 14 July 2006, Case No 18Cga120/05t, cited after: Schindlauer D. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Austria*, p. 113, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>241</sup> Equality Tribunal, 11 September 2008, *A Construction Worker v A Construction Company*, Reference number: DEC-E2008-048. See O'Farrell O. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2012, Ireland*, p. 67, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>, p. 32.

<sup>242</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

<sup>243</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.

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for the promotion of equal treatment related to sexual orientation among other grounds.<sup>244</sup> Nevertheless, many Member States have set up such bodies. In some countries, such institutions existed before the Employment Equality Directive was adopted or implemented. In others, the agenda set by the implementation of the Racial Equality Directive left room for domestic policy going beyond the obligations under the Employment Equality Directive.

In most EU Member States, it is the general equality bodies that are also empowered to deal with discrimination on grounds of sexual orientation. Whilst the powers are wide and generous, the institutions seldom have *carte blanche* in the areas of intervention. In **Austria**,<sup>245</sup> **Denmark**<sup>246</sup> and **Greece**<sup>247</sup> the equality bodies are only mandated to intervene in employment matters as far as discrimination on grounds of sexual orientation is concerned. Conversely, in **Belgium**,<sup>248</sup> **Bulgaria**,<sup>249</sup> **Cyprus**,<sup>250</sup> the **Czech Republic**,<sup>251</sup> **France**,<sup>252</sup> **Germany**,<sup>253</sup> **Hungary**,<sup>254</sup> **Ireland**,<sup>255</sup> **Latvia**,<sup>256</sup> **Lithuania**,<sup>257</sup> **Luxembourg**,<sup>258</sup> the **Netherlands**,<sup>259</sup> **Romania**,<sup>260</sup> **Slovakia**,<sup>261</sup> **Slovenia**,<sup>262</sup> **Sweden**,<sup>263</sup> **Great Britain**<sup>264</sup> and **Northern Ireland**,<sup>265</sup> the equality bodies have a wide mandate and powers of intervention beyond matters of employment. In **Poland**,<sup>266</sup> the equality authority has the power to intervene in any area but only in situations where the violation of the principle of non-discrimination on grounds of sexual orientation took place in the relationship between the individual and the State.<sup>267</sup>

Today, there is no EU Member State with an equality institution established solely to tackle problems of discrimination on grounds of sexual orientation. Formerly, the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation (HomO) was the only example of such an institution. Subsequently, it was merged with the other

<sup>244</sup> Cf. Śmiszek K. (2010), *A Bird's Eye View of Equal Treatment Bodies Across Europe in Light of EU Legislation. In What Circumstances Can They Act and with what Measures?*, in: Forder C.J. (main ed), *Gelijke behandeling: oordelen en commentaar 2009*, Utrecht: Wolf Legal Publishers, 271-285.

<sup>245</sup> The Austrian Ombudsman for Equal Treatment.

<sup>246</sup> The Danish Institute for Human Rights and the Board of Equal Treatment.

<sup>247</sup> The Greek Ombudsman.

<sup>248</sup> The Interfederal Centre for Equal Opportunities.

<sup>249</sup> The Commission for Protection Against Discrimination.

<sup>250</sup> The Office of the Commissioner for Administration.

<sup>251</sup> The Public Defender of Rights (Ombudsman).

<sup>252</sup> The Defender of Rights.

<sup>253</sup> The Federal Anti-Discrimination Agency.

<sup>254</sup> The Equal Treatment Authority.

<sup>255</sup> The Equality Authority.

<sup>256</sup> The Office of the Ombudsman.

<sup>257</sup> The Office of the Equal Opportunities Ombudsperson.

<sup>258</sup> The Centre for Equal Treatment.

<sup>259</sup> The Netherlands Institute for Human Rights.

<sup>260</sup> The National Council for Combating Discrimination.

<sup>261</sup> The Slovak National Centre for Human Rights.

<sup>262</sup> The Advocate of the Principle of Equality.

<sup>263</sup> The Equality Ombudsman.

<sup>264</sup> The Equality and Human Rights Commission.

<sup>265</sup> The Equality Commission for Northern Ireland.

<sup>266</sup> The Human Rights Defender.

<sup>267</sup> In matters between private parties, the authority can only indicate the laws applicable to the conflict and regulating the alleged infringement.

specialised equality institutions into the (general) Equality Ombudsman.<sup>268</sup> There are different views on the issue of creating multi-ground institutions. On the one hand, it can be useful to have equality bodies dealing with different grounds in order to have a consistent approach. On the other hand, the effectiveness of such a body depends on its freedom and readiness to engage in different topics. This is particularly relevant to the issue of sexual orientation since in some countries equality bodies might be more reluctant to deal with discrimination on that ground than on other grounds that are more generally accepted and thus considered 'safer' for action.

The equality bodies are many and varied. Variations concern their powers, tasks, institutional functions and internal organisation. In terms of organisational structure, some are headed by a single person (e.g. in **Croatia, the Czech Republic, Cyprus, Finland, Latvia, Lithuania, Poland** and **Sweden**) and some by a collegiate board (e.g. **Belgium, Bulgaria, Romania** and **Great Britain**)<sup>269</sup>. With respect to the equality bodies' powers and functions, some are primarily concerned with supporting the victims of discrimination (e.g. in **Austria, Denmark, Hungary** and **Ireland**) or set up as quasi-judicial bodies mandated to take binding decisions (e.g. in **Bulgaria, Cyprus, Hungary, Lithuania, Romania** and the **Netherlands**). Some equality bodies enjoy discretion in supporting victims of discrimination and target areas where strategic litigation is suitable (e.g. in **Finland, Ireland, Northern Ireland** and **Great Britain**). However, depending on the political climate, the effectiveness of the national equality bodies may be subject to financial, organisational and political pressure, in particular in relation to discrimination on the specific ground of sexual orientation (e.g. the political debate in **Poland**).<sup>270</sup>

In the practice of the equality bodies, the number of complaints to, and of proceedings initiated *motu proprio* by, the equality bodies in the area of discrimination on grounds of sexual orientation are insignificant compared to other cases. For example, in **Romania**<sup>271</sup> in the years 2002–2009 the number of sexual orientation cases ranged from one to nine per annum as compared to 134–837 cases in total. Similarly, in **Poland**<sup>272</sup> 65 cases concerned sexual orientation as compared with the total of 845 discrimination cases in 2013. In **Ireland**,<sup>273</sup> of the 1,775 'queries' in the area of employment addressed to the equality body only 22 concerned sexual orientation, and the ratio was 1,815 to 22 in non-employment areas. In **Bulgaria**,<sup>274</sup> 278 complaints were filed and only four concerned sexual orientation in 2008.

The Polish Ombudsman's actions illustrate the role that equality bodies can take in relation to state authorities in matters of human rights, including discrimination. The Commissioner for Citizens' Rights intervened in the case of a

<sup>268</sup> Other institutions merged into the Equality Ombudsman were: the Equal Opportunities Ombudsman (JämO) responsible for gender-based discrimination; the Ombudsman against Ethnic Discrimination (DO) responsible for discrimination related to ethnicity, religion or other belief; and the Disability Ombudsman (HO) responsible for combating discrimination relating to disability.

<sup>269</sup> Subdivision proposed by Yesilkagit K. (2008), *Between Impartiality and Responsiveness. Equality Bodies and Practices of Independence. Report*, Brussels: Equinet – European Network of Equality Bodies.

<sup>270</sup> The Polish Commissioner for Citizens' Rights was criticised in 2014 by public opinion and the right-wing press as the institution was involved in the discussion of 'anti-discrimination education' in schools and kindergartens.

<sup>271</sup> *Annual Report 2009 of the National Council for Combating Discrimination* [http://www.equineteurope.org/IMG/pdf/raport\\_cncd\\_2009\\_en\\_mai\\_mic.pdf](http://www.equineteurope.org/IMG/pdf/raport_cncd_2009_en_mai_mic.pdf).

<sup>272</sup> *Information on the Activities of the Commissioner for Citizens' Rights in 2013 and on Compliance with the Principle of Non-Discrimination in the Republic of Poland*, [http://www.rpo.gov.pl/sites/default/files/informacja\\_o\\_dzialalnosci\\_w\\_obszarze\\_rownego\\_traktowania\\_2013.pdf](http://www.rpo.gov.pl/sites/default/files/informacja_o_dzialalnosci_w_obszarze_rownego_traktowania_2013.pdf).

<sup>273</sup> *Equality Authority Report for 2012*, <http://www.equality.ie/en/Publications/Annual-Reports/Annual-Report-2012-Final-online-web-version-pdf.pdf>.

<sup>274</sup> *Annual Report of the Commission for Protection Against Discrimination of the Republic of Bulgaria*, [http://www.kzd-nondiscrimination.com/images/stories/pdf/Annual\\_Report\\_2008\\_KZD\\_EN.pdf](http://www.kzd-nondiscrimination.com/images/stories/pdf/Annual_Report_2008_KZD_EN.pdf).

homosexual man who was dismissed from his post at a private security firm.<sup>275</sup> He was dismissed over the phone after he had been seen participating in a gay pride parade on TV by his employer. The employer argued that he could not imagine a homosexual working at his company. Given the legal limits of his mandate, the Commissioner could not intervene in the civil law dispute on this matter but could address state authorities responsible for the administration of public law rules governing employment, particularly after the State Labour Inspectorate publicly proclaimed that its powers were limited. The Commissioner addressed the President of the Parliamentary Commission for Social and Family Policy requesting a legislative draft amending Polish legislation. At the time of writing, the matter was pending.<sup>276</sup>

A case of the Northern Ireland Equality Commission<sup>277</sup> relates to strategic litigation. The Commission supported a homosexual male who held a part-time position as a bartender at the respondent's premises. The claimant alleged that he was subjected to homophobic harassment by other employees and by a customer, that he was victimised once he complained (his hours were reduced and then he was removed from working behind the bar and moved to the cloakroom) and that he was constructively dismissed. The claimant met with one of the bar owners to explain why he left and alleged that the owner told him he would not give him a reference to work in any other bar. The respondents paid the claimant GBP 4,000 and reaffirmed their commitment to the principle of equality of opportunity in employment and to ensuring that their practices and procedures complied in all respects with the provisions of the equality legislation.<sup>278</sup>

Besides interventions in individual cases, most equality bodies are competent to promote the principle of non-discrimination more generally. There are many interesting examples on such issues as access to justice, counteracting underreporting or providing information on rights through social campaigns and raising of awareness. For example, the Equality Authority in Ireland and the Equality Commission for Northern Ireland focused on the particular barriers experienced by LGB people in seeking access to justice system when faced with a violation of their right to equal treatment. The campaign was conducted together with representatives of the LGB community, equality body staff and other stakeholder organisations. It gathered feedback on the special needs of this group with respect to access to justice. Another relevant example is the Polish Ombudsman, who responded to complaints lodged by LGB individuals and NGOs and decided to get involved as a partner in the project to enhance the capacity of the healthcare system to cater to the needs of LGBT patients in Poland. The project is carried out together with the national LGBT organisation.

Generally, establishing a long-term working relationship between equality bodies and LGBT organisations is an example of good practice in combating sexual orientation discrimination. Indeed, it is an effective strategy conducted by many equality bodies when planning, carrying out and evaluating their actions. It is of particular importance for building a culture of rights among LGB groups, particularly in view of the fact that LGB individuals appear to be particularly reluctant to make use of equality laws for fear of, for example, social pressure and homophobic exclusion. Against this background, the creation of a safe place and an LGB friendly institution is of high importance. Without gaining the trust of those exposed to discrimination on the ground of sexual orientation, equality laws will remain underused or even unused.<sup>279</sup>

<sup>275</sup> Cf. *Information on the Activities of the Commissioner for Citizens' Rights in 2013 and on Compliance with the Principle of Non-Discrimination in the Republic of Poland*, [http://www.rpo.govpl/sites/default/files/informacja\\_o\\_dzialalnosci\\_w\\_obszarze\\_rownego\\_traktowania\\_2013.pdf](http://www.rpo.govpl/sites/default/files/informacja_o_dzialalnosci_w_obszarze_rownego_traktowania_2013.pdf).

<sup>276</sup> The case is pending at the District Court of Warszawa Śródmieście, VI Civil Division, VI C 402/13; the claimant is represented by the Polish Society of Anti-Discrimination Law.

<sup>277</sup> Sexual orientation proceedings brought in the Industrial Tribunal which were settled on 9 December 2011.

<sup>278</sup> Cf. <http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2011/A-Gay-Man-v-Lesa-McCann-Trevor-McCann-trading-as-The-Cellar-Bar.pdf?ext=.pdf>.

<sup>279</sup> For more information on the good practices of equality bodies in the area of LGBTI (I standing for 'intersexuals'), see EQUINET European Network of Equality Bodies (2013), *Equality bodies promoting equality and non-discrimination for LGBTI people*, Brussels: EQUINET.

## 6. Beyond the material scope of Directive 2000/78

The Employment Equality Directive explicitly allows for more far-reaching protection under national law. In Recital 28, the Preamble states that '[t]he Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions.' Across the EU Member States, there is a significant amount of legislation governing discrimination on grounds of sexual orientation in fields beyond the material scope of the Directive, including issues covered by the Racial Equality Directive. Many countries achieve this by combining the effect of constitutional provisions with area-specific legislation, thus in some cases creating a horizontal effect with respect to social protection, social advantages, education and goods and services.<sup>280</sup>

### 6.1 Social protection including social security and healthcare

Most EU Member State legislation provides protection from discrimination on the ground of sexual orientation as regards social protection<sup>281</sup> (**Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Luxembourg, the Netherlands Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **UK**). The exceptions are **Denmark, Greece, Italy, Latvia, Malta** and **Poland**. In **Italy** and **Latvia**, this protection is offered only with respect to the grounds of religion and belief and disability. It is uncertain whether it is offered in **Lithuania**, as the existing Law on Equal Treatment does not explicitly state that social security and healthcare fall within its scope.<sup>282</sup> In France, sexual orientation is a protected ground in this field only through the application of general principles of public law.<sup>283</sup>

As regards case law, in Sweden a woman in a same-sex relationship made a phone call to her local medical centre with the aim of making an appointment for a medical evaluation necessary with regard to in vitro fertilisation treatment. The person receiving the call denied her treatment at her local centre and asked her to contact a specialist unit. The woman requesting the treatment felt discriminated against since heterosexual couples could get an evaluation at their local medical centre. The District Court granted her SEK 15,000 (approximately EUR 1,650 EUR) as a discrimination award. It considered the requirement to have the evaluation done at a special unit with times reserved for homosexual couples degrading in a way that disadvantaged her. It found that the treatment was directly linked to the woman's sexual orientation. The County Council appealed and so did the Ombudsman (in the latter case in order to raise the discrimination award). The Appeal Court found discrimination on grounds of sexual orientation. It noted that the preparatory works to the new Discrimination Act point towards SEK 40,000 (approximately EUR 4,400) as normal compensation in this kind of case. However, because the local medical centre recognised its mistake and offered treatment as soon as it realised that the woman felt discriminated against, the discrimination award was reduced to SEK 30,000 (approximately EUR 3,300) on the grounds of mitigation of harm by the discriminator. The Equality Ombudsman has appealed to the Supreme Court in order to raise the level of the award to SEK 100,000 (approximately EUR 11,100). At the time of writing of the present report, the case was pending.<sup>284</sup>

<sup>280</sup> McColgan A. (2013), *National protection beyond the two EU Anti-discrimination Directives. The grounds of religion and belief, disability, age and sexual orientation beyond employment*, Brussels: Migration Policy Group, p. 5.

<sup>281</sup> *Ibidem*, p. 80.

<sup>282</sup> For details see Andriukaitis G. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Lithuania*, p. 45, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>283</sup> Latraverse S. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2012, France*, p. 85, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>284</sup> Svea Court of Appeal, 12 November 2012, *Stockholm County Council v The Equality Ombudsman*, Case T 9222-11, cited after: Norberg P. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Sweden*, p. 14, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

## 6.2 Social advantages

Most EU Member State legislation also provides for protection from discrimination on the ground of sexual orientation as regards social advantages (**Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **UK**). The exceptions are **Greece, Italy, Latvia, Malta** and **Poland**. Again, **Italy** and **Latvia** only offer protection on the grounds of religion and belief as well as disability. It is uncertain whether such protection is offered in **Ireland** and **Lithuania**. In Ireland the term ‘social advantages’ is not expressly referred to in any of the equality legislation. However, it has been argued that the prohibition on discrimination in relation to ‘social protection’ would also apply to ‘social advantages’.<sup>285</sup> Similarly, in Lithuania national anti-discrimination law does not explicitly address social advantages and there is a legal controversy about whether social advantages fall under the Law on Equal Treatment.<sup>286</sup>

The meaning of the term ‘social advantages’ is usually not expressly defined in national law. In the **Netherlands**, however, the Explanatory Memorandum to the General Equal Treatment Act proposes that the notion be construed in the light of CJEU case law relating to the former Regulation 1612/68/EEC on the free movement of workers (now recast as Regulation 492/2011/EU).<sup>287</sup> The Dutch government’s position is that term ‘social advantages’ covers any advantages of an economic and cultural nature which might be granted by private or public entities. These include student grants and loans as well as reduced fares for public transport and admission prices to cultural or other events, even in a private context (e.g. cinemas and theatres).<sup>288</sup>

## 6.3 Education

Most EU Member State legislation further provides for protection from discrimination on the ground of sexual orientation as regards education (**Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden** and the **UK** – even though **Denmark** does not offer protection on the ground of sexual orientation in cases of access to social protection and social advantages, it does offer such protection in education). Exceptions are **Greece**,<sup>289</sup> **Italy, Latvia, Malta** and **Poland**. **Italy** and **Latvia** offer protection only with respect to the grounds of religion and belief as well as disability and **Malta** in the case of disability. In **France**, such protection is offered through the application of general principles of public law and by provisions of criminal law.<sup>290</sup>

<sup>285</sup> O’Farrell O. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2012, Ireland*, p. 67, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>286</sup> Andriukaitis G. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Lithuania*, p. 45, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>287</sup> Council Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ English Special Edition Series I Chapter 1968(II), p. 475. This regulation has been replaced with Regulation 492/2011/EU of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

<sup>288</sup> Chopin I., Germaine-Sahl C. (2013), *Developing Anti-discrimination law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, Luxembourg: Publications Office of the European Union, p. 61.

<sup>289</sup> Theodoridis A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2013, Greece*, pp. 48 *et seq.*, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>290</sup> Latraverse S. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2012, France*, p. 87, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

Indirectly, the Polish case of *Mirosław S.* (concerning the claimant's dismissal because of publication of the Council of Europe guide for teachers entitled *Compass: A Manual on Human Rights Education with Young People* in the Polish language) relates to education, though in this case the legal issue was one of employment (namely dismissal).

## 6.4 Goods and services

Most EU Member States provide protection from discrimination on the ground of sexual orientation as regards access to goods and services (**Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden** and the **UK**). The exceptions are **Greece, Italy, Latvia, Malta, Poland** and **Spain**.<sup>291</sup> In **France**, such protection is offered through provisions of criminal law.<sup>292</sup>

The **Romanian** law allows for justifications of direct discrimination in the field of goods and services, if such a 'restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary.'<sup>293</sup> In **Hungary**, the general exemption clause of Article 7(2)(b) of the Equal Treatment Act, referring to 'a reasonable ground directly related to the relevant legal relationship', also applies here.

As regards case law, the applicant in a Slovenian case complained about a tourist brochure which indicated tourist facilities where homosexual couples were unwelcome. The providers of tourist services responded that the remark in the brochure was a mistake and that they wanted to express the opposite, that homosexuals were welcome. The national equality body decided that even if this was true, it is not only necessary to assess the intentions of the service providers but also the effects. The equality body decided that in this case it was undisputable that the effect of the brochure amounted to direct discrimination on grounds of sexual orientation.<sup>294</sup>

In the Netherlands, the Dutch Equal Treatment Commission (as of 2012, the 'Institute for Human Rights') found that a club's house rules denying access to men not accompanied by women particularly affected homosexual clients and constituted indirect discrimination on grounds of sexual orientation. A beach club organised 'parties' and had a house rule that men were allowed to attend only if accompanied by a woman. A complaint was made by an organisation of homosexuals, arguing that this was direct discrimination on the ground of sex and indirect discrimination on the ground of sexual orientation (i.e. multiple discrimination). As for the latter claim, the Equal Treatment Commission concluded that the particular house rule did indeed negatively affect homosexual men who could not attend the party with their partners, while heterosexual men could do so. As an objective justification, the beach club submitted that the house rule contributed to the good atmosphere and to avoiding aggressive behaviour on the part of male visitors. However, since the club did not apply the rule strictly and since other means of achieving the goal of a good atmosphere could be envisaged, this defence was not accepted by the Commission.<sup>295</sup>

<sup>291</sup> *Ibidem*.

<sup>292</sup> Latraverse S. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC. Country report 2012, France*, p. 96, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>293</sup> Article 10, Act 324/2006 on the Amendment of Government Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination (20 July 2006).

<sup>294</sup> Advocate of the Principle of Equality, No 0700-41/2012/2, 12 July 2012 cited after: Kogovšek Šalamon N. (2013), *Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country report 2012, Slovenia*, p. 9, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>295</sup> Equal Treatment Commission, 1 February 2010, Opinion 2010-19, cited after: Holtmaat R. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, the Netherlands*, p. 161, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

In the UK, the Court of Appeal upheld the decision of a lower court that the refusal of the defendants, who ran a public seven-bedroom hotel, to provide a same-sex couple with a double room for occupation, amounted to sexual orientation discrimination. The owners of the hotel put forward the argument that as Christians they only let double rooms to married couples, because to do otherwise would be to promote sinful sexual behaviour. They further argued that, because their policy of restricting double beds to married couples also affected unmarried heterosexual couples, there was no direct discrimination. The court found that, because same-sex couples could not marry in the UK, the restriction of hotel rooms to married couples amounted to direct discrimination on grounds of sexual orientation and was therefore unlawful under the Equality Act (Sexual Orientation) Regulations 2007 (since then replaced by the materially similar Equality Act 2010).<sup>296</sup> In other words, the national court carried the approach defined by the CJEU with respect to the delimitation of direct and indirect discrimination over into the national law in a field outside the scope of present Union law. The hotel owners appealed to the UK Supreme Court, arguing that the policy in question constituted *prima facie* indirect discrimination on grounds of sexual orientation and that this discrimination was justified. The Supreme Court dismissed the appeal and upheld the finding of direct discrimination.<sup>297</sup>

The case also illustrates the potential tension between different fundamental rights under different legal regimes. The owners of the hotel argued that to find discrimination on grounds of sexual orientation would amount to a breach of their rights to manifest their religious beliefs under Article 9 ECHR. In this respect, the court held that to the extent to which under the Regulations the restriction imposed on the owners of the hotel constitutes direct discrimination, and to the extent to which the national law limits the manifestation of their religious beliefs, the limitations were necessary in a democratic society for the protection of the rights and freedoms of others, i.e. the right to equal treatment of the homosexual couple who desired to rent a room.

## 6.5 Specifically: housing

Most EU Member State legislation provides for protection from discrimination on the ground of sexual orientation as regards housing. States that offer such protections are: **Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden** and the **UK**. The exceptions are **Greece**,<sup>298</sup> **Italy, Latvia, Malta, Poland** and **Spain**.<sup>299</sup>

Interesting practice examples come from Austria and Poland. Usually, the surviving family members of a spouse or life partner who lived in the property have the right to take over the apartment of the lessee when the latter dies. Taking over the lease is important for the tenants in order to be able to remain in the property, particularly when the lease is preferential. In Austria and Poland, however, the courts refused to extend this privilege to the surviving partner in a same-sex couple using the argument that the law did not cover such a situation. In the framework of the ECHR, the ECtHR considered such an exclusion an arbitrary discrimination on grounds of sexual orientation and found a violation of Article 14 ECHR in *Karner v. Austria* and in *Kozak v Poland*.<sup>300</sup>

<sup>296</sup> Court of Appeal, 10 February 2012, *Hall & Preddy* [2012] EWCA Civ 83, cited after: McColgan A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, pp. 14-15, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>297</sup> Supreme Court, 27 November 2013, *Bull & Bull v Hall & Preddy* [2013] UKSC 73.

<sup>298</sup> Theodoridis A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, Greece*, p. 56, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>299</sup> McColgan A. (2013), *Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC, Country report 2012, United Kingdom*, p. 80, <http://www.migpolgroup.com/portfolio/country-reports-measures-combat-discrimination-2012/>.

<sup>300</sup> Ringelheim J., Bernard N. (2013), *Discrimination in Housing*, Luxembourg: Office for Official Publications of the European Union, pp. 63-64.

In Poland, the majority of rulings follow the ECHR's ruling in the *Kozak v Poland* case (even though they do not mention it). However, Warsaw Mokotów District Court stated that the law on *de facto* cohabitation (Article 691 § 1 Polish Civil Code) does not cover homosexual relations.<sup>301</sup> The verdict was appealed to Warsaw Regional Court, which decided to ask a legal question to the Supreme Court on this issue.<sup>302</sup> In 2012, the Supreme Court held that the term 'person who was in *de facto* communality of life with the lessee' under Article 691 § 1 of the Polish Civil Code implies the showing of an emotional, physical and economic bond, and the homosexuality of the bond does not preclude such a finding.<sup>303</sup> The fact that the Polish lower court was unwilling to apply *Kozak v Poland* and that it considered it necessary to ask a legal question to the Supreme Court on the matter shows that there might be difficulties in applying equality standards even in cases where there is a clear standard set by the ECtHR.

<sup>301</sup> Case I C 1447/10, 13 October 2011.

<sup>302</sup> SC Case III CZP 65/12, filed on 27 July 2012.

<sup>303</sup> The case was litigated by the Helsinki Foundation for Human Rights, Warsaw, [www.hfhr.org.pl](http://www.hfhr.org.pl).



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# Part VI

## Future developments of protection against discrimination on the ground of sexual orientation in the EU

## 1. Deficiencies in the protection from discrimination on grounds of sexual orientation in present EU law and proposed legislation

As indicated above, even in the absence of a Community competence in the field of sexual orientation discrimination, EU institutions made a great effort to realise the ideal of protection from discrimination on grounds of sexual orientation. Subsequently, the Treaty of Amsterdam was the essential turning point that provided a solid legal basis for taking action in this field. Later, the actual prohibition of discrimination on the ground of sexual orientation, if only in the area of employment and occupation, was a milestone. The Employment Equality Directive was essential in setting off the evolution of policy-making at the national level in certain EU Member States, particularly so in those Member States who joined the EU only after the adoption of the Directive.

The Equality Directives have contributed significantly to the realisation of the vision of the European Union as an area where human rights are effectively protected. In its 2014 Report on the application of Directives 2000/43 and 2000/78,<sup>304</sup> the European Commission notes that the Employment Equality Directive has been transposed into the national laws of all 28 Member States. The report does not indicate any significant deficiencies in the implementation concerning the ground of sexual orientation. However, the Commission indicates that improved judicial practice and the education of the general public and the judiciary is essential for the power of the prohibition of discrimination to be fully exercised, as confirmed by the present report.

As regards the legislation, the scope of protection afforded by the Employment Equality Directive remains limited, particularly when compared to the Union's racial and gender equality instruments, as pointed out by NGOs.<sup>305</sup> Most importantly, Directive 2000/78 applies only to employment and occupation and the Member States are not obligated to establish equality bodies. Bell refers to this situation as 'unfinished business'.<sup>306</sup> In order to equalise the standard of protection, the Commission presented an equality package aimed at combating discrimination outside of the field of employment on 2 July 2008.<sup>307</sup> This blueprint for better fighting discrimination includes developing the legal framework, running social awareness campaigns, introducing new governance mechanisms to address the issue of multiple discrimination, promoting positive action and establishing inter-governmental working groups.

The single most important instrument is the Proposal for a new directive on equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.<sup>308</sup> The proposal has been pending for some time. It has now been given renewed hope of life by the President of the new European Commission, Jean-Claude Juncker, who has made it one of the top political priorities in his Agenda for Jobs, Growth, Fairness and Democratic Change. He has stated: 'Discrimination must have no place in our Union, whether on the basis of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, or with regard to people belonging to a minority.'

<sup>304</sup> Report from the Commission to the European Parliament and the Council, *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')*, 17 January 2014, COM(2014) 2 final.

<sup>305</sup> Cf. the actions of ILGA-Europe in the area, [http://www.ilga-europe.org/home/how\\_we\\_work/european\\_institutions/anti\\_discrimination\\_law/campaign](http://www.ilga-europe.org/home/how_we_work/european_institutions/anti_discrimination_law/campaign).

<sup>306</sup> Bell M. (2009), 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive', *The Equal Rights Review*, vol. 3, 7-18.

<sup>307</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Non-discrimination and equal opportunities: A renewed commitment*, COM(2008) 420 final.

<sup>308</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

I will therefore maintain the proposal for a directive in this field and seek to convince national governments to give up their current resistance in the Council.<sup>309</sup>

If indeed adopted, the new Directive will widen the protection from discrimination to cover social protection, social advantages, education and goods and services. The Proposal thus can be considered a necessary element complementing the Employment Equality Directive by bringing the scope of non-discrimination to the level of the Racial Equality Directive. The draft Directive elaborates on the definitions of discrimination that have already taken root in hearts, minds and courtrooms. Importantly, it includes the obligation of establishing national equality bodies. The Proposal thus consolidates the law as well as good practices already developed in a number of Member States in the field of sexual orientation. The added value of the Proposal is that it will also bring about minimum standards of protection against discrimination on the ground of sexual orientation for countries that do not yet have meaningful instruments in this field. The Directive will enable the Court of Justice to employ its powers of interpretation of particular concepts of sexual orientation discrimination. Additionally, the Directive may be an inspiration for those Member States which decide to go beyond its scope, as has already happened with the Employment Equality Directive.

## 2. Will a new directive deliver full equality?

The Proposal for a new directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation provides a welcome extension of the scope of protection as compared to the present Employment Equality Directive. However, there are also potentially problematic aspects in this respect. The material scope of the Proposal covers social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services, including housing. At the same time, the Proposal provides for a new exemption, hitherto unknown to the Equality Directives and which is particularly relevant in respect to the ground of sexual orientation. The Employment Equality Directive refers to marital status in Recital 22 of the Preamble. The Proposal now mentions this issue in the *body* of the Directive, together with the additional elements of family status and reproductive rights, stating in Article 3(2) that the Directive ‘is without prejudice to national laws on marital or family status and reproductive rights.’

According to Bell, ‘the inherent problem in this part of the Directive is that the blanket language used extinguishes any meaningful attempt to balance equality claims with these competing interests’.<sup>310</sup> The fear expressed is that the proposed Article 3(2) might have a chilling effect on the ambitions of the CJEU when considering equality issues, leading the Court to take a markedly more generous approach to the Member States’ margin of appreciation in the area or to a stricter interpretation by both the Court and Member States. However, there are other areas of EU law where seemingly broad exemptions that are stated in the ‘hard’ law (rather than in preambles) are interpreted in the same manner as Recital 22 of the Employment Equality Directive, i.e. based on the distinction between the existence of a Member State competence and its exercise which must remain within the limits of Union law.<sup>311</sup> Against that background, it may be reasonably expected that the Court will maintain the robust approach that it developed with

<sup>309</sup> Jean-Claude Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission*, opening statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014, p. 9, [http://ec.europa.eu/about/juncker-commission/docs/pg\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf)

<sup>310</sup> Bell M. (2009), ‘Advancing EU Anti-Discrimination Law: the European Commission’s 2008 Proposal for a New Directive’, *The Equal Rights Review*, vol. 3, 7-18.

<sup>311</sup> E.g. Article 345 TFEU: ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.’ According to standing CJEU case law, Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the TFEU; see e.g. CJEU, Joined Cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV and Others*, Judgment of 22 October 2013, n.y.r., para. 36.

respect to Recital 22 in the Employment Equality Directive according to which the Member States must respect EU anti-discrimination law when they act within the scope of that law.<sup>312</sup>

Further, it has been argued that the Commission has not seized the opportunity that comes with any new piece of legislation to propose new regulations that would take anti-discrimination law to a new level of precision.<sup>313</sup> Thus, it is submitted that it is regrettable that the Commission has not taken the chance to provide normative definitions of the concept of sexual orientation and of discrimination by association and by assumption. The Proposal also fails to define multiple discrimination. That matter is particularly important with regard to homosexual women facing simultaneously discrimination on grounds of sexual orientation and sex. Whilst the Commission has acknowledged the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies, it has also stated that these issues go beyond the scope of the proposed Directive and added that nothing prevents Member States from taking action in these areas.<sup>314</sup> The European Parliament has proposed an amendment in this respect.<sup>315</sup>

On the institutional level, the Proposal obliges the Member States to establish equality bodies for the promotion of equal treatment in areas that it covers. However, the Proposal does not amend the Employment Equality Directive, which does not provide for the establishment of equality bodies, in this respect. This will result in a gap in the institutional protection on the level of EU law.

Overall, the statistics produced by national equality bodies and LGB NGOs as well as surveys conducted by EU institutions show that a high level of sexual orientation discrimination still prevails in the field of employment and occupation. For example, a survey by the European Union Agency for Fundamental Rights<sup>316</sup> showed that one in five (20%) of the LGBT respondents who had been employed and/or looking for a job in the 12 months preceding the survey had felt discriminated against in these situations in the past year. Ten years after the adoption of the Equality Employment Directive, this situation proves that clear and specific legal measures are also needed outside the field of employment and occupation. The Employment Equality Directive contributed to a significant change of atmosphere at the workplace, reducing homophobic prejudices and the culture of violence. The proposed Directive, if adopted, will contribute to eradicating harmful practices in these other areas.

<sup>312</sup> See above under section IV.1.1.1 of this report.

<sup>313</sup> For the following, see Bell M. (2009), 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive', *The Equal Rights Review*, vol. 3, 7-18, and the European Commission of Sexual Orientation Law in October 2008, [http://www.sexualorientationlaw.eu/news/2009/080916\\_comments\\_horiz\\_directive-lo.pdf](http://www.sexualorientationlaw.eu/news/2009/080916_comments_horiz_directive-lo.pdf).

<sup>314</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final., p. 4.

<sup>315</sup> European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, P6\_TA(2009)0211.

<sup>316</sup> The survey was launched by EU FRA online on 2 April 2012 and ran until 15 July 2012. 93,079 respondents took part in the research.



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# Conclusion

There is no doubt that the protection from discrimination on the ground of sexual orientation discrimination in employment and occupation under Directive 2000/78 places the EU at a high rank in terms of effective and up-to-date human rights protection in this field. It is only fair to say that, within its field of application, EU anti-discrimination law is most generous in its protection of LGB persons. Nevertheless, the development of a system of protection on the level of primary law (TFEU, Union general principles, Charter of Fundamental Rights), secondary law (so far Directive 2000/78) and soft law instruments has not shielded the system from practical difficulties in implementation and enforcement.

Firstly, the full scope of the prohibition of discrimination on the ground of sexual orientation is not always clear. As has been indicated in the present report, the dispositions of Directive 2000/78 have translated into a complex puzzle of case law by courts at different levels of the EU judicial edifice trying to understand the intention of the EU legislator as to who deserves protection and what scenarios are covered by the prohibition of discrimination. Indeed, in some respects, and absent clarifying CJEU case law, the exact meaning of the notion of sexual orientation remains open.

Secondly, the discrimination ground of sexual orientation interacts with other grounds, such as religion and belief. In this context in particular, derogations such as genuine and determining occupational requirements or the autonomy of churches and ethos-based organisations are a real challenge for authorities and courts at both the national and the European level. The EU institutions should maintain a special focus on whether national systems are transposing the exception provisions correctly, and, even more importantly, on the practice of their use at the national level. The current hot debate around the autonomy of churches and ethos-based organisations as well as around the rights of socially emancipated LGB communities may cause conflicts of values. Precisely designed legal measures may be of help in determining the borderlines of these clashes.

Thirdly, there is a measure of disappointment in the recognition of a vast gap separating different EU Member States when considering the institutional protection from discrimination on the ground of sexual orientation. In the absence of an obligation under EU law to do so, only some Member States have established effective and real institutional protection as part of the domestic systems of human rights protection. Accordingly, it depends on the Member State whether a victim of sexual orientation discrimination enjoys generous and professional support. Precise minimum standards with respect to equality bodies in terms of their competences, independence and basic obligations and powers also need to be worked out in the field of application of Directive 2000/78. More generally, common codes of practice for equality bodies and legal changes in the respective Equality Directives are required in order to make the institutional protection more effective.

Finally, the future development of the standard of protection of sexual orientation-related equality is contingent on the much-awaited new Directive. In order to minimise the risk of ineffectiveness of this new instrument, additional measures should be taken. In February 2014, the European Parliament called on the Commission to adopt an EU roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.<sup>317</sup> Raising awareness and building a culture of rights among LGB communities in Europe and providing guidance to service providers as well as training for judges and other enforcement bodies will contribute to the proper implementation and execution of the new legal measures.

<sup>317</sup> See <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0009&language=EN>.

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