

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

Appendix I

Thematic Study on Discriminatory Partner Benefits

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(http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm).

The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.

The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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1 Introduction

1.1 General introduction to the thematic study

The aim of the study is to consider a specific example of direct sexual orientation discrimination within the field of employment, so as to illustrate the variety and possibly the degree to which such discrimination takes place in the European Union, and the degree to which it is countered.³

The European Community's *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*⁴ (hereinafter the Directive) establishes a prohibition of sexual orientation discrimination in respect to employment benefits, amongst other things, as provided by public and private employers.⁵ Indeed, art. 3(1)(c) states:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(c) employment and working conditions, including dismissals and pay.'

Following case law of the European Court of Justice (hereinafter the ECJ), 'pay' can be understood to have a wide meaning, especially since the case of *R. v. Secretary of State for Employment, ex parte Seymour-Smith & Perez*⁶ where the ECJ stated:

*'the concept of pay, within the meaning of the second paragraph of Article 119 [currently Article 141], comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.'*⁷

An example of a potentially discriminatory partner benefit, that of free travel allowances, has been explicitly recognised by the ECJ as a form of pay in the case of *Garland v. British Rail Engineering*.⁸ This was also the type of benefit over which the challenge was sought in the case of *Grant v. South-West Trains*.⁹ In *Grant* an employee challenged the policy of South-West Trains which provided travel benefits to the married or unmarried spouses of its employees, for the purposes of which 'spouse' was defined as a married partner or a 'common law opposite sex spouse'. Upon the refusal of South-West Trains to provide the travel benefit to her same-sex partner, Ms Lisa Grant claimed that this constituted direct discrimination on the basis of sex. The ECJ considered,

³ The study considers the situation in the fifteen member states of the European Union as prior to 1 May 2004. A few developments after that date have also been taken into account. All references to the legislation of a member state are to national/federal provisions rather than to regional provisions, unless otherwise specified.

⁴ Official Journal of the European Communities L 303/16, 2 December 2000.

⁵ According to art. 3(3) the prohibition does not extend to state sponsored social security benefits.

⁶ ECJ, 9 February 1999, Case C-167/97, *R. v. Secretary of State for Employment, ex parte Seymour-Smith & Perez*, [1999] ECR I-623.

⁷ *Ibid.*, para. 23.

⁸ ECJ, 9 February 1982, Case C-12/81, *Garland v. British Rail Engineering*, [1982] ECR 359, para. 9.

⁹ ECJ, 17 February 1998, Case C-249/96, *Grant v. South-West Trains*, [1998] ECR I-621.

that the condition imposed by South-West Trains did not constitute discrimination based on sex, since it applied equally to both men and women alike. Sexual orientation discrimination was considered to be beyond the boundaries of the Community's sex equality law. That travel benefits constitute pay under Article 141 of the EC Treaty had already been decided by the ECJ in *Garland*. The policy of British Rail Engineering to provide travel benefits to the spouses and dependent children of retired male employees, but not to retired female employees was challenged under the equal pay provision, Article 141 (then Article 119). The ECJ considered that so long as the benefit in question is granted in respect of employment, then the legal nature of the benefit (i.e. not being related to a contractual obligation) is immaterial.¹⁰ Such a wide definition of 'pay' must clearly encompass other partner benefits.

Consequently, this thematic study will illustrate the extent to which the Directive facilitates (albeit within a relatively short period of six months subsequent to the expiry of the implementation period in December 2003) the provision of *Garland* type benefits in *Grant* type situations.

This study considers discrimination between same-sex and different-sex unmarried partners, and is not concerned with those benefits that are granted to married different-sex partners, and are denied to unmarried same-sex partners. European case law confirms that the type of discrimination considered constitutes direct sexual orientation discrimination.¹¹ With respect to benefits dependent upon the civil status of the partners the requirement to be married may be a form of indirect sexual orientation discrimination, since in the vast majority of member states, same-sex partners are prevented from obtaining such a civil status.¹² In this respect, recital 22 of the Directive which states that the Directive 'is without prejudice to national laws on marital status and the benefits dependent thereon', is of no consequence for the partner benefits falling within the scope of this study, as these benefits only apply to unmarried employees.

While a number of member states do not provide any form of legal recognition of same-sex relationships, certain member states (BEL, FRA, NLD,¹³ most parts of ESP,¹⁴ and LUX¹⁵) allow both same-sex and different-sex partners to form registered partnerships.¹⁶ Discrimination between same-sex and opposite-sex registered partnerships would constitute direct sexual orientation discrimination, and thus fall within the scope of this study.

¹⁰ Ibid, para. 10.

¹¹ ECJ, 17 February 1998, C-249/96, *Grant v. South West Trains* [1998] ECR I-621; ECtHR 24 July 2003, *Karner v. Austria*, appl. 400116/98.

¹² Only in BEL and NLD is marriage open to same-sex partners. See Table 13 of para. 19.1.9 ('Other aspects of the legal background') of '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' (hereinafter the '2004 Report').

¹³ See Table 13 of para. 19.1.9 ('Other aspects of the legal background').

¹⁴ Those regions of ESP recognising de facto unions and/or registered partnerships are: Catalonia, Aragon, Navarra, Valencia, the Balearics, Madrid, Asturias, Andalucia, the Canaries, Extremadura, and the Pais Vasco. For further information see Table 13 of para. 19.1.9 ('Other aspects of the legal background') and subsection 'Related to Marriage' in para. 15.3.3 ('Discrimination between same-sex partners and different-sex partners') of the 2004 Report.

¹⁵ See Table 13 of para. 19.1.9 ('Other aspects of the legal background') and para. 12.3.3 ('Discriminations entre couples de même sexe et couples de sexe différent') of the 2004 Report.

¹⁶ In DNK, DEU, FIN and SWE registered partnerships are only available to same-sex partners. See sections #.3.3 of the relevant national chapters of the 2004 Report.

By removing discrimination on the basis of sexual orientation in employment benefits, the EC and its member states will counteract two negative aspects that such discrimination causes, as highlighted by Bell.¹⁷ Firstly the ‘symbolic disapproval’ of same-sex relationships by employers is challenged, as employers are prevented from applying their understanding of anti-homosexual societal norms. Secondly ‘the effect of non-recognition of partners can be quite substantial in monetary terms’, and thus the granting of partner benefits puts an end to employees in same-sex relationships in effect receiving less reward for their work, compared to their colleagues in opposite-sex unmarried relationships.

‘Discriminatory partner benefits’ (hereinafter referred to as DPBs) is the term used here to refer to those benefits which employers provide to unmarried different-sex partners, but which are denied to same-sex partners. Employers mostly provide such benefits either voluntarily according to their own internal rules, or due to legislation¹⁸ or a collective agreement. The overt nature of this type of discrimination allows for relatively easy detection thereof.

Abolishing such a direct form of sexual orientation discrimination is fundamental to contribute to the change of the prevailing culture in EU based employers. Combating this form of discrimination will to some extent pave the way to convince employees, employers and all levels of management that any discrimination or harassment based on sexual orientation is unacceptable. Consequently, discriminatory partner benefits have been selected to provide an example of an important type of actual sexual orientation discrimination by employers based in the EU.

1.2 Approach

The information used in this thematic study was obtained by the members of the Group of Experts in relation to their specific member state. In order to ensure the consistency of the information collected, a questionnaire was sent to each national expert, assessing in detail the points to be covered by their research (see section 1.3). Such research was composed of two strands, firstly their own desktop research, and secondly interviewing representatives of relevant organisations.¹⁹ For completing such interviews, an interview sheet was provided to all of the national experts. The findings of these two approaches were then combined into a template for each national contribution.

The national experts were asked to interview a number of representatives, from a range of organisations that would have some knowledge of the rules and practices in this field. Representatives were to come from the following types of organisation:

¹⁷ Bell, Mark, *Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union*, in Wintemute, Robert & Andenaes, Mads (eds.) *Legal Recognition of Same-Sex Couples. A Study of National, European and International Law* (Oxford-Portland Oregon: Hart Publishing, 2001), 653-676.

¹⁸ In the context of this study, legislation is taken as including administrative acts covering public sector employees.

¹⁹ Representatives from the following types of bodies/organisations were interviewed (and the total number for that type for all the member states is give in brackets): academics (10); government department (10); lesbian, gay and bisexual organisation (18); trade union/employees’ representative body (18); employers confederation (8); railway company (7); airline (6); company (5); other (2).

- the main national trade union(s),
- employers' confederations at the national level,
- civil servants of the department(s) involved in the implementation of the Directive in national law,
- relevant academics in the field of discrimination and/or employment,
- national LGB non-governmental organisations involved in issues about discriminatory partner benefits or on a more general basis with the implementation of the Directive (as far as sexual orientation is concerned),
- representatives from a medium-sized airline based in each Member State and the (main) train operating company, as well as the relevant industry unions. (This was in light of the fact that, as illustrated by *Grant*, travel benefits can easily and visibly constitute discriminatory partner benefits).

This study only looks at employment, not at self-employment and other forms of non-employed occupation.

1.3 Questions

The national experts were asked to answer five questions to establish the current state of play regarding the extent to which discriminatory partner benefits are currently used by employers within the EU. Five principal themes were considered by the national experts, and these can be summarised as follows (please refer to the Annex for the 'Questionnaire for national experts'):

- whether discriminatory partner benefits are considered unlawful according to the main legal authorities: legislation, *travaux préparatoires*, case law, and legal commentary,
- whether discriminatory partner benefits still exist in practice, in primary or secondary legislation, collective agreements, or the internal rules of employers,
- the types of benefits that in fact constitute discriminatory partner benefits,
- activities which have been undertaken to reform any remaining examples of discriminatory partner benefits, and the safeguards which have been put in place to prevent new examples emerging,
- any procedures (judicial or otherwise) which may be available to an individual to challenge the existence and application of a discriminatory partner benefit.

The results arising from these questions are analysed from section 2 onwards.

1.4 Partner benefits

Prior to discussing those partner benefits that could be provided on a discriminatory basis in the field of employment, it is worth while to consider those benefits which are generally extended to the partners of employees. On a general level, those benefits offered to partners include:

- Extra days off (i.e. in addition to the employee's holiday entitlement) for a variety of reasons such as relocation / childbirth / parental leave / nursing a sick partner / bereavement.
- Educational facilities for employees and their families.
- Events for employees and their families.
- Free provision of, or discounted prices for the employer's goods or services (most typically in the travel sectors).
- Survivor's benefits in occupational pension schemes or for the purposes of life insurance.
- Healthcare insurance for employees and their families.

1.5 Background information

In completing the thematic study, various difficulties were encountered which created barriers in obtaining an accurate representation of the prevalence of DPBs. In light of the factors described below, which reflect the experience obtained in the completion of this study, it would be a mistake to believe that DPBs are as rare as the quantity and nature of the examples documented in this study may suggest.

In the execution of this study, a considerable lack of awareness was encountered when interviewing the various representatives, particularly in certain member states. This was manifested in one of two ways. Either there was a refusal to discuss the topic in the first place, or the interviewee was simply not aware of the nature of the problem, and hence unable to discuss it in a constructive manner.

Moreover, two common and related problems were encountered. Firstly regarding rules that literally could be interpreted so as to include same-sex partners. Secondly the fact that employees may be reluctant to claim benefits covered by such rules.²⁰ If the terms of a collective agreement or the internal rules of an employer do not explicitly restrict benefits to different-sex partners, but neither explicitly extend them to same-sex partners, uncertainty may exist as to whether they are to encompass same-sex partners. Such uncertainty provides for a possibility of discrimination in their application. Whether terms or rules of this nature include same-sex partners would then be established on a case by case basis that inherently relies on an employee claiming such a benefit. At this stage, the second factor comes into effect. Claiming a benefit covered by such a provision would imply that the employee would have to come out (involuntarily), at least to the personnel department. By merely providing the name of his/her partner, the employee's sexual orientation would be revealed. In those member states where homosexuality is considered as less acceptable and stigmatisation associated with homosexuality is greater, employees are likely to be even more reluctant to engage in such a process.

²⁰ Due to a lack of cases, the policies of many employers have yet to be clarified. For instance, the European Investment Bank in one of only two cases concerning the provision of benefits to the same-sex partner of an employee, treated a NLD registered partnership as marriage. However, since the European Investment Bank has not received any claims from unmarried different-sex partners claiming benefits only formally available to married partners, it is impossible to say if direct sexual orientation discrimination, as defined for the purposes of this study, would have occurred.

Consequently, those rules that do not explicitly include or exclude same-sex partners may never be tested. Discrimination of this nature thus remains a hidden issue.

Furthermore, there is a lack of information as to the extent of both of these factors. The terms of collective agreements, but to a greater extent, the internal rules of employers, are not readily available in many cases. Henceforth it is virtually impossible to gain a reliable view of the extent of existing discrimination in such rules. Secondly, if employees are reluctant to come out and thus no claims are made, the extent to which this issue is a problem remains invisible. Therefore the prevalence of DPBs also remains invisible to an unknown extent. As already stated an important factor in deciding whether to claim a benefit is the required 'coming out'. The need to 'come out' may deter employees from claiming benefits. This would be exacerbated should employees feel that their coming out to staff at the human resources department would mean that they would also be 'outed' to their boss and/or colleagues. 'Outing' can be understood as an individual's sexual orientation being revealed by another person, without the individual's consent.

In addition, the very fact that there is generally limited awareness of these problems can be considered as an indication that discrimination possibly does exist in many cases. In fact, if the issue of DPBs would have been acknowledged and redressed, interviewees probably could have more readily interacted with the interviewer and could have provided clearer answers. It would be a valuable exercise to closely analyse the wording and application of collective agreements and internal rules of employers to gain an accurate picture of DPBs in practice. However, such an analysis was beyond the scope of this study.

Finally it must be considered that a general lack of challenges before the relevant national bodies (ombudsmen, labour inspectorates etc) cannot be considered as conclusive evidence that discrimination does not occur. Even in SWE, where the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation has not received any complaints on this topic since 1999, and in NLD, where the Equal Treatment Commission did not have to give any opinion on the topic since 1999, one cannot necessarily conclude DPBs no longer exist.

1.6 European employers

In light of the amendments to the EC Staff Regulations²¹ occurring concurrent to this study, any practices within the European institutions and other European bodies²² will be highlighted where they facilitate the discussion surrounding the practices within the member states.²³

²¹ Council Regulation No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities. Official Journal of the European Communities, L 124/1, 27 April 2004.

²² For the purposes of the European Staff Regulations the term European institutions can be understood as referring to: the European Parliament, the Council of the European Union, the European Commission, the Court of Justice of the European Communities, the Court of Auditors, the European Ombudsman, the European Economic and Social Committee, the Committee of the Regions, and the European Data Protection Supervisor. European bodies can be understood as including; the Office for Harmonisation in the Internal Market (Trade Marks and Designs), European Investment Bank, the European Agency for the

Furthermore, it was intended to collate details pertaining to the ‘best practices’ of commercial Europe-wide employers, with regards to employment benefits and sexual orientation discrimination. While it was possible to find diversity networks²⁴ existing within the operations of multi-national companies in a few member states, barely any information was found concerning a Europe-wide approach. Thus a number of potentially interesting questions remain unanswered, such as whether any employer provides benefits to same-sex partners in one member state but not in another member state.

Thus while some companies may not discriminate in providing partner benefits in any of their European operations, information about what happens in practice could not be established. Neither could it be established whether any company varied its approach to partner benefits (as far as sexual orientation is concerned) between member states.

2 The prohibition of discriminatory partner benefits

Already a few years before the Directive, the ECJ had considered discrimination between unmarried same-sex and different-sex partners to be a form of sexual orientation discrimination.²⁵ In 1998, that conclusion was of no help to Lisa Grant and her partner. Since 2 December 2003, however, the Directive requires that this and other forms of sexual orientation discrimination must be prohibited, both in private and in public employment.

Before detailing how particular member states have implemented the prohibition on DPBs, the jurisprudence of the ECtHR in the case of *Karner v. Austria*,²⁶ and the general principle of Community law concerning the direct applicability of directives to public bodies, must be recalled. From both it follows that DPBs in legislation (and in public employment) are already prohibited in all member states of the EU. Firstly, in *Karner* the ECtHR considered the legality of discrimination between unmarried same-sex and different-sex partners, where it proceeded to proclaim that ‘*differences based on sexual orientation require particularly serious reasons by way of justification*’.²⁷ The ECtHR accepted the Austrian Government’s contention that the protection of the family is ‘*in principle, a weighty and legitimate reason which might justify a difference in*

Evaluation of Medicinal Products, the European Maritime Safety Agency, the European Food Safety Agency, the European Monitoring Centre on Racism and Xenophobia, Europol and others. For example, the European Monitoring Centre on Racism and Xenophobia, on the basis of art. 11(1) of Council Regulation No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (OJ L 230, 21 August 1997) states: ‘The staff of the Centre shall be subject to the Regulations and Rules applicable to officials and other servants of the European Communities.’

²³ Correspondence with a number of these ‘European bodies’ has revealed a degree of deviation from the Staff Regulations, which may not be the case for the European institutions. For example, the European Investment Bank considers that it has a ‘margin of interpretation’, while the European Food Safety Agency may ‘adapt’ the Staff Regulations in particular circumstances, and the European Agency for the Evaluation of Medicinal Products will apply the regulations except if there are ‘exceptional local reasons’. However no evidence came to light to suggest that these bodies provide fewer or more DPBs than the European institutions.

²⁴ These networks include *Kaleidoscope* at British Telecom (BT), *GLEAM (Gay and Lesbian Employees at Morgan)* at JP Morgan and Chase, *Spectrum* at Barclays, the *Rainbow Group* at IBM and *Energay* representing gay and lesbian employees in the French electrical and gas industries.

²⁵ ECJ, 17 February 1998, Case C-249/96, *Grant v. South-West Trains*, [1998] ER I-621, para. 28

²⁶ ECtHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98.

²⁷ *Idem*, para. 37.

treatment.²⁸ However, in applying the test of proportionality, the ECtHR considered that the aim of protecting the traditional family unit is ‘rather abstract and a broad variety of measures may be used to implement it’. Thus not only should the measure be appropriate, but also it must be shown that in that particular instance sexual orientation discrimination was necessary to achieve the desired aim.²⁹ In applying such jurisprudence to the facts of the case, the ECtHR found that preventing a homosexual partner from falling within the concept of ‘life companion’ for the purposes of the succession of a deceased partner’s tenancy, was not acceptable. Thus, in all cases where direct sexual orientation discrimination occurs in legislation or public employment, within member states where the Directive has yet to be implemented, an aggrieved employee can rely upon this ruling. It would be a considerable, if not an impossible burden for a public employer or for a state to show that denying certain partner benefits to employees with a same-sex partner was really necessary to protect traditional family values.

Secondly, under the direct applicability principle, all public bodies are bound by the provisions of a directive once the implementation period has expired. This was established in the case of *Becker v. Finanzamt Münster-Innenstadt*,³⁰ in which DEU had failed to implement the necessary provisions of a tax directive within the implementation period. DEU was not allowed to rely upon its failure to implement the directive as against the complainant, and thus could not hide behind this fact to dissolve its obligations.

Following the expiry of the implementation period for the Directive, the legislation prevailing throughout the fifteen member states falls into two categories. On the one hand there are those member states where the prohibition of sexual orientation discrimination as required by the Directive has yet to be transposed into national law, as in DEU, GRC and LUX. On the other hand, implementation has ensured that this form of discrimination is prohibited in AUS, BEL, DNK, ESP, FIN, FRA, IRL, ITA, NLD, PRT, SWE and UK.³¹

Within the group of member states where the Directive has yet to be transposed a further division can be found, between those member states whose legal system does not enshrine any prohibition whatsoever against sexual orientation discrimination, and those which do, but not specifically with respect to employment. In GRC any discriminatory practice could theoretically be challenged under the constitutional principle of equal treatment in the workplace.³² Additionally reliance could be made upon the duty of good faith, from which the GRC courts have developed a broad anti-discrimination protection in the employment sphere.³³

The legislature of DEU has yet to implement the Directive, however the Industrial Relations Act³⁴ prohibits sexual orientation discrimination, and this may extend to partner benefits. Furthermore, sexual orientation discrimination

²⁸ *Idem*, para. 40.

²⁹ *Idem*, para. 41.

³⁰ ECJ, 19 January 1982, Case 8/81, *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53.

³¹ For a general overview see para. 19.1 (*‘General legal situation’*) and para. 19.2.1 (*‘Instrument(s) used to implement the Directive’*), and the corresponding sections in the national chapters of the 2004 Report.

³² Art. 22 and 25 of the Greek Constitution.

³³ Art. 281 and 288 of the General Principles Chapter of the Civil Code.

³⁴ Art. 75 of the Industrial Relations Act [*BetrVG - Betriebsverfassungsgesetz*].

has been prohibited in several state civil service employment laws.³⁵ Also, although LUX still has to implement the Directive, currently sexual orientation discrimination is prohibited by the Penal Code.³⁶ This does not specifically refer to employment conditions, but the proposed LUX legislation refers to '*conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération*'.³⁷

In the second group, where the Directive has been implemented, the prohibition of discriminatory partner benefits is less explicit in some member states than in others. This prohibition requires two elements to be fulfilled by the implementing legislation. Firstly discrimination between same-sex and different-sex cohabitants must be prohibited. Secondly the implementing legislation must make clear that partner benefits fall under the material scope of the prohibition on sexual orientation discrimination.

With regards to discrimination between same-sex and different-sex cohabitants the legislation of at least twelve member states considers such discrimination as sexual orientation discrimination (AUS, BEL, DNK, FIN, IRL, NLD, PRT, SWE and the UK). In FRA, ITA and ESP this is still uncertain, although required by the Directive. In the case of FRA, even though the Directive has been implemented, it would appear that the main protection against discriminatory partner benefits is to be found in the Civil Code's equation of same-sex and different-sex 'concubinage' as introduced by the legislation establishing the 'pacte civil de solidarité' (PACS).³⁸ Consequently homosexual unmarried partners cannot be treated discriminatorily in comparison with heterosexual unmarried partners, and this reaches through to all laws, collective agreements and internal rules of employers.

In all member states of the second group reference is made to pay and/or employment conditions. This aspect of the implementing provisions guarantees that partner benefits fall into the material scope of the legislation.

As for FRA, partner benefits fall within the scope of the legislation, coming under the term 'rémunération'. IRL fails to mention 'employment conditions', but prohibits pay discrimination on the basis of sexual orientation.³⁹ This situation is clarified by Section 2(1) of the Employment Equality Act which states that 'remuneration' (while not including pensions⁴⁰) 'includes any consideration, whether in cash or kind, which the employee receives, directly or indirectly, from the employer in respect of the employment'. Such a broad definition readily encompasses benefits. The transposing legislation of ESP makes reference to

³⁵ Namely in Sachsen-Anhalt (§ 8 1 2 *Beamtengesetz*), Niedersachsen (§ 8 *Beamtengesetz*), Bremen (§ 9 *Beamtengesetz*), and Brandenburg (*Beamtengesetz* and the *Laufbahnverordnung*).

³⁶ Art. 454 of the Penal Code (*Code pénal*).

³⁷ *Projet de loi portant transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, modification des articles 3 et 7 de la loi modifiée du 12 novembre 1991 sur les travailleurs handicapés et abrogation de l'article 6 de la loi modifiée du 12 mars 1973 portant réforme du salaire social minimum, Chambre des députés, Session ordinaire 2003-2004, 10 décembre 2003, n°5249.*

³⁸ *Loi du 15 novembre 1999 relative au pacte civil de solidarité et au concubinage*, providing for Article 515-8 of the Civil Code.

³⁹ Section 29 of the Employment Equality Act.

⁴⁰ Pensions are covered by the Pensions Act 1990 as amended by Sections 22 and 23 of the Social Welfare Act 2004.

working conditions,⁴¹ and inserted into the Workers' Statute a prohibition of sexual orientation discrimination, inter alia, as regards pay and other work conditions.⁴² In light of the ECJ's interpretation of pay it is apparent that discriminatory partner benefits are prohibited. In BEL the implementing legislation prohibits direct sexual orientation discrimination with regards to working conditions, which include conditions of remuneration,⁴³ of which benefits undoubtedly form an important part. Reference is made in the legislation of AUS to discrimination 'in connection with employment', which while not explicitly referring to partner benefits, nor pay, can be understood as encompassing this form of remuneration.

Employment conditions are explicitly referred to in DNK, FIN, ITA, NLD, PRT and SWE, while terms of employment and other benefits are mentioned in UK legislation.⁴⁴

While the DNK implementing legislation⁴⁵ reiterates the text of the Directive, the Equality Act of FIN prohibits discrimination in 'terms or conditions of employment'.⁴⁶ According to the *travaux préparations* this encompasses the concept of pay, which in turn covers partner benefits. In a similar manner ITA specifies employment and working conditions, and pay.⁴⁷ According to the Ministry of Equal Opportunities the prohibition on discriminatory (partner) benefits can be inferred from the implementing provision. In PRT a reference is made to working conditions in the current Labour Code,⁴⁸ however an explicit reference is made to pay and pecuniary payments in pending supplementary legislation.⁴⁹ Such a reference will undoubtedly encompass partner benefits.

Within NLD, discrimination is prohibited in the conditions of employment thus clearly covering partner benefits,⁵⁰ and again in SWE protection is provided when an employer '*decides on the application of salary conditions or other employment conditions*'.⁵¹

Case law in this field is scarce, principally due to the specific nature of the claim, and the inherent fact that engaging in such a legal challenge could 'out' the complainant. This is likely to act as a deterrent in some member states more than others. While the Directive may protect against victimisation, societal values inside and outside the work place still have a considerable influence.

⁴¹ Art. 34 of Statute 62/2003 on fiscal, administrative and social measures (Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social).

⁴² Art. 17 Workers' Statute [*Estatutos de los Trabajadores*].

⁴³ Art. 5(1) of the *Decreet houdende evenredige participatie op de arbeidsmarkt*.

⁴⁴ The Employment Equality (Sexual Orientation) Regulations (Statutory Instrument 1661/2003) refers to terms of employment (Reg. 6(2)(a)), and other benefits (Reg. 6(2)(b)). A further reference is made to benefits in Reg. 6(4) whereby an employer cannot discriminate in the provision of benefits to an employee, even if the object of the benefit is also provided to the general public, if the provision of that benefit is contained within the contract of employment. For further information see para. 19.2.7 ('*Material scope of applicability of the prohibition*' subsection '*employment and working conditions including dismissals and pay*') and corresponding sections in the national chapters of the 2004 Report.

⁴⁵ Act on Discrimination, Art no. 253 of 7 April 2004.

⁴⁶ Section 2(1) Equality Act 21/2004 [*Yhdenvertaisuuslaki*].

⁴⁷ Art. 3(1)(b) Legislative Decree 216/2004.

⁴⁸ Art. 21(1) and (2) of the Labour Code [*Código do Trabalho*] Law no. 99/2003, 27 August 2003, Diário da República, 1st series-A, no. 197 of 27 August 2003.

⁴⁹ Art. 33(1)(c) of Government Bill [*Proposta de Lei*] no. 109/IX, which was passed on 20 May 2004 and is currently awaiting the signature of the President so that it can enter into force.

⁵⁰ Art. 5(2)(d) of the General Equal Treatment Act of 1994.

⁵¹ Art. 5(5) of the 1999 Sexual Orientation Discrimination Act [*Lag (1999:133) om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*].

Furthermore many cases challenge *indirect* sexual orientation discrimination, such as the offering of free rail travel outside of the Netherlands to only married partners of railway employees in NLD.⁵² Alternatively cases relate to issues beyond the field of employment, such as discrimination in the provision of goods and services by the Irish Department of Social and Family Affairs: The Equality Authority in 2003 acted in a case where the Department issued free travel passes to unmarried opposite-sex partners, but not unmarried same-sex partners. The outcome of this case was that the travel pass was awarded, as otherwise this would have constituted unlawful sexual orientation discrimination.

One of the few cases directly related to DPBs in employment can be found in an opinion of the Dutch Equal Treatment Commission. It was held that excluding same-sex surviving partners from an occupational pension scheme that included unmarried different-sex partners amounted to direct discrimination on the grounds of homosexual orientation.⁵³ Another example can be found in SWE, where the Office of the Ombudsman against Discrimination on the grounds of Sexual Orientation initiated out of court proceedings to resolve discrimination contained in the definition of ‘partner’ for the purposes of the survivor’s pensions scheme. The collective agreements concerned did disadvantage unregistered same-sex cohabitants, but not unregistered different-sex cohabitants. These collective agreements were amended so as to include a sexual orientation neutral definition of spouse/partner/cohabitant.⁵⁴

Legal commentary on this particular issue is again scarce, however commentators in DEU consider that in light of the prohibition on sexual orientation discrimination in collective labour law,⁵⁵ same-sex partners should enjoy the same rights as opposite-sex partners as far as benefits are based on living together without being married.⁵⁶

3 Existing types of discriminatory partner benefits

Only a limited number of discriminatory partner benefits in primary/secondary legislation, collective agreements and the internal rules of employers have been documented in this study.

3.1 Legislation based discrimination

Only one example of directly discriminatory legislation in the field of employment came to light in the entire study, and this itself is open to a degree of interpretation. It concerns the application of the force majeure concept in the IRL Parental Leave Act 1998. Such paid leave can only be claimed by the employee in respect of his/her spouse ‘or a person with whom the employee is

⁵² Equal Treatment Commission, 20 June 1996, opinion 96-52. This took place before registered partnership, and marriage, became available to same-sex partners.

⁵³ Equal Treatment Commission, 23 April 1997, opinions 97-47 (against the employer) and 97-48 (against the pension insurer).

⁵⁴ Ombudsman’s decision 21 October 1999 and 8 December 1999; dossier no. 23/1999.

⁵⁵ §75 BetrVG (Industrial Relations Law).

⁵⁶ Däubler, Wolfgang/Kittner, Michael/Klebe, Thomas (Hrsg.), BetrVG-Kommentar, 8. Auflage, Frankfurt am Main 2002, § 75 Rn 23.

living as *husband or wife*.⁵⁷ It could be contested by some that while ‘living as husband or wife’ includes unmarried partners, it does not extend to living as ‘husband and husband’ or ‘wife and wife’. In light of the judgement in *Karner v. Austria*,⁵⁸ and moreover in light of the Directive itself, the application of this provision in a manner which discriminates against same-sex partners would constitute direct sexual orientation discrimination which is forbidden. Indeed, there may be many other provisions in other member states with a similar uncertain nature.

As regards legislation, frequently *indirect* sexual orientation discrimination was found, where a particular benefit is only provided to married partners a possibility which in all but two of the member states is not extended to same-sex partners. However, such indirect discrimination is not the subject of this study.⁵⁹ Current reforms in the area of partner benefits in many member states tend to focus on extending to unmarried partners legislative benefits which had thus far only been granted to married partners. Even in those member states where the legal recognition of same-sex relationships exists, e.g. DEU,⁶⁰ such reform can fail to consider partner benefits provided by employers. Furthermore indirect sexual orientation discrimination does not have to occur on the basis of marital status. As illustrated by ESP it may be argued that such discrimination can occur due to parental status. Certain benefits contained in the Workers’ Statute are linked to the role of child raising and are frequently based on the notion that, whether married or unmarried, the parents are of a different sex. For example, on the basis of one parent not being recognised as a legal parent, a same-sex couple raising a young child would be denied the right to reduce the number of hours they are obliged to work.⁶¹

Alternatively, directly discriminatory provisions could be found, but outside the field of employment law, for example regarding income tax and tax deductions based on living in a second home (*Zweitwohnsitz*), in DEU. Following the judgement in the *Karner v. Austria* case,⁶² such direct sexual orientation discrimination is most probably in violation of the ECHR. The same can be said about an interesting example of what could be considered as reverse homosexual discrimination. It can be found within a social security law provision of FIN. For the purposes of (un)employment benefits, the term ‘spouse’ is defined as requiring the unmarried but cohabiting partners to be of different sexes.⁶³ If one cohabitee claims unemployment benefit and his or her different-sex partner is employed, the income of that partner will be taken into consideration and a reduced benefit rate granted accordingly. In the case of same-sex cohabitants the income of the employed cohabitee would not be taken into consideration, and thus the claimant would receive a higher benefit rate than his/her counterpart in a different-sex relationship.

⁵⁷ Section 13(1) Parental Leave Act 1998. According to the UK House of Lords this phrase can be interpreted as covering a same-sex partner, see *Ghaidan v. Godin-Mendoza* (21 June 2004) [2004] UKHL 30, www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm

⁵⁸ ECtHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98.

⁵⁹ See para. 19.3.3 (*‘Discrimination between same-sex partners and different-sex partners’*) of the 2004 Report.

⁶⁰ See Table 13 of para. 19.1.9 (*‘Other aspects of the legal background’*) in the 2004 Report.

⁶¹ Art. 40.3 Workers’ Statute [*Estatutos de los Trabajadores*].

⁶² ECtHR, 24 July 2003, *Karner v. Austria*, appl. 40016/98.

⁶³ Section 7(1)(1) Unemployment Security Act (602/1984) [Työttöyysturvalaki].

3.2 Collective agreements and internal rules

Numerous benefits are regulated in collective agreements and the internal rules of employers. For most member states however, discriminatory provisions have not been revealed in this study. Many reports, for example those from ESP, ITA and PRT, point towards a lack of awareness in this field, and a lack of information regarding this particular point. It is interesting to note that in the UK a survey was conducted among trade union representatives on the extension or otherwise of benefits to same-sex partners.⁶⁴ Many representatives simply did not know whether such benefits were available. This re-iterates the situation in PRT where even once organisations which were willing to discuss this matter were found, many demonstrated a lack of awareness of the topic. Furthermore many benefit provisions in collective agreements and internal rules often do not explicitly restrict benefits to different-sex partners, but do not explicitly extend them to same-sex partners either.⁶⁵ In such instances, unless an employee unsuccessfully requests a benefit for a same-sex partner, discrimination would appear not to exist. Additionally, in small companies such rules may be unwritten, and thus open to a greater degree of uncertainty and possible discrimination than would be the case with a written benefits policy of a larger undertaking. However, there are also examples of explicit discriminatory provisions, such as the collective agreements in AUS that with respect to the provision of benefits to unmarried partners refer to the legislative definition of 'life companion' [*Lebensgefährte*] which explicitly requires the partner to be of the opposite sex.⁶⁶

3.3 Travel related benefits in collective agreements and internal rules

This study took a closer look at collective agreements and internal rules of the railway and airline industries. Discriminatory rules appear to prevail in the railway industries of a few member states, while the airline industry appears more progressive in this field.

From the information on the relevant provisions in collective agreements and internal rules in the railway sector it would appear that a situation as in *Grant v. South-West Trains* does or did exist in a number of member states. In AUS (where benefits are covered by internal rules in this sector), the Austrian Federal Railways, to whom the Directive already applies due to their public body status,⁶⁷ refused to extend to unmarried same-sex partners the benefits available to unmarried different-sex partners, for as long as there was no implementing legislation. Several cases in ESP (where benefits are determined

⁶⁴ Survey conducted by the Labour Research Department, www.lrd.org.uk

⁶⁵ A number of collective agreements from ESP are drafted in such a manner. These include Red de Ferrocarriles Nacional (RENFE), BOE 18 July 2000; Petroquímica Española, BOE 11 February 2000; Iberia, BOE 20 August 1999; Warner Lambert, BOE 5 May 2000; Industria de pastas alimenticia, BOE 16 December 1999; Aseguradora la Estrella, BOE 4 April 2001; Empresas Minoristas de Droguerías, Herboristerías, Ortopedias y perfumerías, BOE 28 November 2000. Other examples exist in FIN (see para. 3.4), and possibly other member states.

⁶⁶ Art. 123 of the General Act on Social Insurance [*Allgemeines Sozialversicherungs-Gesetz, ASVG*].

⁶⁷ See ECJ, 12 July 1990, Case C-188/89, *A. Foster and Others v. British Gas plc* [1990] ECR I-3313, para. 20 '... a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.'

by collective agreements in this sector) have challenged the National Railway Company's (RENFE) policy of distinguishing between different-sex and same-sex de facto unions. For the purposes of granting benefits, de facto different-sex unions were accepted, while de facto same-sex unions were excluded. The outcome of these legal proceedings has not been consistent. While RENFE failed to defend its discriminatory approach in the lower courts, it has on one occasion at least managed to successfully appeal against such a lower court decision.⁶⁸ Eventually this has led to a reform of the relevant collective agreement, so that benefits are explicitly extended to married and non-married unions, with sexual orientation becoming an irrelevant factor. In ITA benefits are not provided to any unmarried partner, whether of the same or different sex, and thus only indirect sexual orientation discrimination occurs. Nevertheless it is interesting to note that Trenitalia adheres to international regulations and issues tickets to same-sex partners of employees of foreign train companies, if the same-sex union is recognised in the member state of residence. BEL offers a positive example of granting free or reduced price travel, whereby both the employer (the Belgian National Railway Society, SNCB) and employees contribute to a social solidarity fund which is used for providing free or reduced price travel within Europe. So long as the employee can demonstrate⁶⁹ that he/she has been cohabiting with their partner (regardless of sex) for a period of at least two years, then the employee can claim free or reduced price travel for his/her partner.

Contrary to the position of many of the railway companies, airlines on the whole provided a more positive view. For example at least two airlines in ITA do not make a distinction on the basis of an employee's civil status, and neither between same-sex and different-sex unmarried partners. Consequently in the provision of free air tickets, a situation as in *Grant v. South-West Trains* is avoided. This also occurs in BEL, where benefits are provided to same-sex and different-sex partners, whether or not married or registered as legal cohabitants. It is highly probable that similar practices exist in some other member states.

3.4 Leave and pensions

Another example of granting partner benefits to same-sex partners can be found in FRA. With regards to leave in the event of the death of, or serious injury to an employee's same-sex partner, the collective agreement covering the air transport sector will provide the employee with such leave.⁷⁰ An example of a non-discriminatory collective agreement provision came to light in FIN, which serves to illustrate a provision that would be common in several member states. The collective agreement on bingo workers states that an employee is entitled

⁶⁸ The successful appeal by RENFE, which pre-dates the cases dismissing RENFE's policy, can be found in a decision of the Regional Court of Catalonia, *Sentencia del Tribunal Superior de Justicia de Cataluña*, 3 September 1998, n. 5637/1998. The lower court decisions can be found in the *Decisions of the Provincial Social Courts [Sentencias de los Juzgado Social]* of 15 January 2002 (from Barcelona, Madrid, Seville and Valladolid).

⁶⁹ To demonstrate that the requirement of having lived together for a minimum of two years, a wide variety of means is acceptable to do this. For example a lease contract in both the partners' names.

⁷⁰ For an indepth discussion into indirect sexual orientation discrimination and the possible impact of recital 22 of the Directive, see para. 2.2.4, 2.3.3, 19.2.4 and 19.3.3 of the 2004 Report.

to leave for attending funerals of 'close family members', which is defined as including "...a spouse with whom one lives in a marriage like relationship".⁷¹

Returning to the airline industry, one ITA airline provides that the third party beneficiary for death insurance purposes is to be nominated by the employee without any restriction as to the nominee, and thus this includes same-sex partners. Even before the implementation of the Directive a particular airline in AUS made no distinction on the basis of civil status nor between same-sex and different-sex unmarried partners. Indeed the interviewed representative stated that they would positively consider a request for time off for a same-sex marriage abroad and questioned the relevance of the sex of an employee's spouse for the employer.

An example of direct discrimination between different-sex and same-sex partners exists in NLD, however, between different-sex married and same-sex married partners, and thus not between unmarried partners. In this particular instance the Roman Catholic Church in NLD denies survivors' pensions to same-sex widows/widowers in the pension scheme for (amongst others) pastoral workers.⁷² In light of the fact that currently only two of the member states recognise same-sex marriage such discrimination is as yet not a Europe-wide issue, but this could be the beginning of a trend if in the future same-sex marriage is also provided for in other member states, with parts of society attempting to put obstacles in the way of such developments. It is worth recalling two aforementioned cases. Firstly, with regards to NLD the Equal Treatment Commission found that excluding same-sex surviving partners from an occupational pension scheme that included unmarried different-sex partners amounted to direct discrimination on the grounds of homosexual orientation (as discussed in 2.1).⁷³ Secondly there is the uncertainty surrounding the application of the force majeure concept in the IRL Parental Leave Act 1998, which provides that an employee may claim leave in respect of his/her spouse 'or a person with whom the employee is living as husband or wife'.⁷⁴

3.5 The need to 'come out' in order to claim benefits

The manner in which an employee has to notify his/her employer of his/her same-sex partner in many cases will require the 'coming out' of the employee. In cases where it is not certain whether the benefit would be granted, this constitutes a major deterrent. For example one ITA airline requires the employee to make a formal statement indicating the name of the unmarried partner. In almost all cases, this will entail the employee's sexual orientation being revealed.

A further example of this involuntary 'coming out' is to be found in the UK regarding the superannuation scheme for university employees.⁷⁵ Like nearly all benefits, the very nature of this pension scheme requires 'coming out' and yet the employee cannot be guaranteed that the benefit will be granted. A

⁷¹ Collective Agreement on Bingo Workers 1 February 2001 – 31 March 2003.

⁷² Whether this is permitted under the exceptions for religious employers in the Dutch General Equal Treatment Act is uncertain. See para. 13.4.2 and 13.4.5 of the 2004 Report.

⁷³ Equal Treatment Commission, 23 April 1997, opinions 97-47 (against the employer) and 97-48 (against the pension insurer).

⁷⁴ For further discussion, see section 3.1.

⁷⁵ Universities Superannuation Scheme – applicable to all UK universities.

partner dependent on the employee can be registered, and then pension administrators will decide whether the nominated partner can receive the benefit. While the test of dependency may not involve in depth questioning (for example joint ownership of a house which neither could afford alone), the sexual orientation of the employee is nonetheless revealed.⁷⁶

Thus while the terms of collective agreements and internal rules may be either neutrally worded or expressly applicable to same-sex partners, they nonetheless require the sexual orientation of the employee to be revealed, and this can dissuade employees from claiming benefits to which they are entitled.

There are ways in which such deterring 'coming out' can be avoided somewhat by an employer. For instance, an airline based in LUX provides reduced priced tickets to all those who are registered at the same address as the employee. This would allow the same-sex partner to claim the benefit, while the sexual orientation of the employee would not necessarily be revealed.

3.6 Concluding remarks

Examples of directly discriminatory partner benefits are scarce. Firstly, a general lack of awareness and information has been encountered in the completion of this study. The invisibility of this issue is increased by the fact that many employees are reluctant to 'come out' and to claim benefits which they are entitled to. Thirdly, many rules on benefits do not specify whether same-sex partners are included or not. Furthermore in the field of employment law benefits are often restricted to married partners, and consequently the question arises whether this amounts to indirect sexual orientation discrimination. That question falls outside the scope of this study. Finally, there are examples of direct sexual orientation discrimination outside employment, and therefore also falling outside the boundaries of this study.

4 Reform activities and safeguards

4.1 Good practices in companies

This study has found several examples of private undertakings that have started to provide benefits to their employees without distinction as to the sex of the employee's partner, nor to their marital status. Such developments appear to have taken place independently of the implementation of the Directive.

A few of these examples have been discussed above in relation to the airline and railway sectors. A number of manufacturing and financial services undertakings provide benefits on a non-discriminatory basis. Such undertakings, in the examples revealed by the study, are large multi-national corporations, in which homosexual employees have constructively negotiated for recognition and various changes to employment conditions, mostly as part of more general policies.

Influence from outside a member state can also provide a catalyst for change. Thus, while in IRL many benefits are only provided to married partners, and

⁷⁶ Also, different-sex couples are not required to show dependency, which is itself an example of indirect discrimination against employees in same-sex relationships.

rarely extended beyond, even where different-sex partners are concerned, companies from the USA operating in IRL do extend partner benefits to all unmarried partners. Furthermore these companies have been pressing for a change in the immigration laws so that same-sex partners are eligible to benefit from family reunification rules.

Examples from DEU reveal that a non-German car manufacturer provides reduced priced cars for the registered partner of an employee, and a German bank offers reduced price services in the same manner. Furthermore, the collective agreement covering another German bank provides relocation expenses to homosexual partners.⁷⁷ In all cases the partnership must be registered.

A further example of such best practices, can be found regarding the UK operation of an international computer/software manufacturer. The employee is entitled to ten reduced price personal computers per year for friends and family, which includes their same-sex partner. International relocation expenses are provided fully to same-sex partners, as is parental leave and life insurance. Furthermore, the trustees of the company's pension scheme will look favourably upon an employee lodging their same-sex partner as the beneficiary of their pension so long as a degree of financial dependency can be shown. However, this is not an absolute guarantee that the employee's request will be granted without discrimination on the basis of sexual orientation. Such discretionary practices are not fully satisfactory as they may leave the employee with having to take legal action to claim their benefit. (See also para. 2.2(e) concerning the example from the UK Universities Superannuation Scheme).

Finally, from a mainstreaming perspective, the Equality Challenge Unit in the UK seeks to support higher education institutions in achieving institutional practices free from sexual orientation discrimination. In a model policy on sexual orientation, it reads that:

*'Assumptions will not be made that partners of staff and students are of the opposite sex. Whenever possible, workplace benefits will apply equally to same-sex partners.'*⁷⁸

4.2 Review and repeal of earlier discriminatory provisions in legislation

In some member states, there are no provisions to amend or repeal earlier discriminatory provisions in legislation. Some member states rely upon the primacy of EC law, in combination with scrutiny by the (constitutional) courts. For example, in SWE, Acts of Parliament, Government Decrees and administrative provisions can be set aside by any court of law (there being no SWE constitutional court), although such provisions cannot be set aside in the

⁷⁷ 'Regarding the necessary repositioning of employees, due to structural and/or organisational changes, age, health, family (including non-married and same-sex life partnerships and children) and social relations as well as distances between former and future workplace and place of living regarding place and time will be taken into account next to the qualifications and the suitability of the employee.' [*'Bei den im Rahmen der strukturellen und/oder organisatorischen Veränderungen notwendigen Versetzungen werden sowohl Alter, Gesundheitszustand, familiäre (hierzu zählen auch nichteheliche und gleichgeschlechtliche Lebenspartnerschaften und Kinder) und soziale Verhältnisse als auch räumliche und zeitliche Entfernungen des neuen Arbeitsplatzes zum bisherigen Arbeitsplatz bzw. Wohnort des Mitarbeiters neben Qualifikation und Eignung berücksichtigt.'*]

⁷⁸ Equality Challenge Unit, *Implementing the new Regulations Against Discrimination: Practical Guidance*. Available at www.ecu.ac.uk.

abstract. Moreover, it would have to be shown that the inconsistency of the provision being challenged (of an Act of Parliament or a Government Decree) in light of a provision of a higher constitutional ranking, would have to be 'obvious'.⁷⁹ Due to the primacy of EC law, such provisions could be challenged in light of provisions of the Directive.

In NLD following the general legislative trend since the 1970s not to make any distinction between same-sex and different-sex unmarried partners, the repeal or amendment of DPBs in legislation was not necessary on the coming into force of the General Equal Treatment Act in 1994 nor for the implementation of the Directive.

In SWE the general equality provisions of the Registered Partnership Act⁸⁰ and the Cohabitation Act⁸¹ removed remaining discrimination with respect to partner benefits from legislative and administrative provisions. Discriminatory legislative provisions in IRL are extinct in all but the area of pensions. However, sexual orientation discrimination which currently exists in the Pensions Act 1990 will be removed by the Social Welfare Bill 2004, which will prohibit discrimination between same-sex and different-sex unmarried partners.

4.3 Nullity of discriminatory provisions in collective agreements and internal rules

A number of member states have enacted provisions under which discriminatory provisions in collective agreements and the internal rules of employers are to be considered null and void.

Legislation in FIN provides that courts may either change or ignore any contractual term which is contrary to the prohibition of discrimination⁸² as defined in the Equality Act. In neighbouring SWE any agreement or contract is null and void⁸³ to the extent that it provides for, or allows for, discrimination as prohibited by the Sexual Orientation Discrimination Act. However there remains doubt as to whether this clause expressly covers discriminatory rules contained in internal rules of employers, as opposed to contract based discrimination. The same approach is taken in the UK legislation, which considers that discriminatory contractual terms are void.⁸⁴ Furthermore, a non-discrimination clause is implicitly read into every occupational pension scheme.⁸⁵ In a similar manner, the Employment Equality Act 1998⁸⁶ of IRL provides that discriminatory elements of collective agreements and internal rules are null and void, although this can only be established through the course of litigation. Again, any contractual provision violating the non-discrimination provision of the General Equal Treatment Act in NLD is null and void.⁸⁷ Additionally the Minister of Social Affairs and Employment has the power, to declare provisions of a

⁷⁹ Art. 14 of ch. 11 of the Instrument of Government.

⁸⁰ Art. 1 of ch. 3 of the Registered Partnership Act (1994:1117).

⁸¹ Art. 1(1-2) of the Cohabitation Act (2003:376).

⁸² S. 10 of the Equality Act 21/2004.

⁸³ Art. 9 of the 1999 Sexual Orientation Discrimination Act.

⁸⁴ Reg. 35 and Schedule 4 of the Employment Equality (Sexual Orientation) Regulations 2003.

⁸⁵ Employment Equality (Sexual Orientation) (Amendment) Regulations 2003.

⁸⁶ Section 9, Employment Equality Act 1998.

⁸⁷ Art. 9 of the General Equal Treatment Act.

collective agreement void (*onverbindend*) if this is in the general interest.⁸⁸ In ESP, under the Workers' Statute administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which amount to discrimination on the ground of sexual orientation (amongst others) will be nullified.⁸⁹ Discriminatory contracts or clauses in contracts are also void or voidable in other countries, including BEL, FRA and PRT, and will be in LUX.⁹⁰

In AUS the general provisions and principles of private employment law prohibit sexual orientation discrimination and thus discriminatory provisions in collective agreements and employment contracts are null and void.⁹¹ As civil servants are regulated by public law conditions of employment, any discriminatory provisions therein are automatically unlawful as the Austrian state is bound by the Directive. Obviously this approach applies to all public sector employment throughout the European Union. It should be feared, however, that such unlawful (and null and void) discriminatory provisions will continue to be applied by some employers.

With respect to collective agreements some already explicitly prohibit sexual orientation discrimination. While a number of examples came to light in ESP,⁹² it is entirely possible that they exist in other member states too.

4.4 Monitoring and preventing discriminatory partner benefits

The role of the Ombudsman against Discrimination on grounds of Sexual Orientation in SWE,⁹³ includes the monitoring and prevention of discrimination. Such monitoring is also carried out by labour unions and employers' associations. This more unregulated approach to monitoring is commonplace in the UK, where at least one trade union monitors and surveys on a regular basis the employment conditions of its members. Similar activities may of course occur in other member states. The influence of trade unions in eliminating discrimination is evident in IRL, where a national agreement has been reached between employers and trade unions concerning the *force majeure* concept (as used in the Parental Leave Act 1998), so as to include same-sex partners.⁹⁴

In addition to the existing equality bodies dealing with sexual orientation discrimination in AUS,⁹⁵ BEL,⁹⁶ IRL,⁹⁷ NLD,⁹⁸ SWE,⁹⁹ and the UK (Northern

⁸⁸ Art. 8 of the *Act on Declaring Provisions of Collective Agreements Generally Binding or Void* of 1937; this power has so far not been used against discriminatory provisions.

⁸⁹ Art. 17 of the Workers' Statute (*Estatutos de los Trabajadores*).

⁹⁰ See para. 19.6.3 ('*Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations* (art. 16(b) *Directive*')) and corresponding sections of the national chapters in the 2004 Report.

⁹¹ Art. 879 General Civil Code [*Allgemeines Bürgerliches Gesetzbuch, ABGB*].

⁹² These include those of the Union General de Trabajadores (UGT), Telemadrid, Cadena Ser, Antena 3 Radio, Radio Murcia and the Andalucian Regional Government.

⁹³ Art. 16 of the 1999 Sexual Orientation Discrimination Act.

⁹⁴ This agreement between the social partners and the employers will only take place in the context of future legislative reform. Currently the potentially discriminatory legislation remains in place.

⁹⁵ See para. 3.5.2 ('*Specific and/or general enforcement bodies*') in the 2004 Report.

⁹⁶ The Centre for Equal Opportunities and the Fight Against Racism [*le Centre pour l'égalité des chances et la lutte contre le racisme*], as established by the Federal Law of 25 February 2003 *tendant à lutter contre la discrimination et modifiant la loi due 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme*.

Ireland¹⁰⁰) two member states have proposed equality bodies: The UK Government intends to create a Commission for Equality and Human Rights, which will monitor compliance with anti-discrimination legislation through partnerships with inspectorates and 'other standard setting organisations'. FRA will probably see the establishment of an anti-discrimination body to combat all forms of discrimination, which will also draft codes of good practice which may serve as a means to promote non-discrimination in the granting of partner benefits.¹⁰¹

Although examples of monitoring activities are rare, legislation in BEL¹⁰² establishes that a body of civil servants will be established to monitor compliance with the implementation of the Directive, although it is unclear how this body will function. Furthermore the Legal Council in SWE is responsible for scrutinising legislative proposals as to their compatibility with the Constitution and the legal system as a whole, including EC law.¹⁰³

4.5 Procedures available to individuals

The procedures available to those who are aggrieved by DPBs correlate to those established in the member states as means of upholding the prohibition of employment discrimination in general.

In all member states employees can start court proceedings to challenge discriminatory rules, however civil servants in some member states first have to rely upon administrative mechanisms (in AUS, FRA, NLD and PRT for example¹⁰⁴). Where DPBs are contained in collective agreements or individual contracts they constitute discriminatory clauses, which can be declared void in AUS, BEL,¹⁰⁵ FIN, FRA, NLD, PRT, SWE, and UK (and proposed in LUX).¹⁰⁶ The situation with regards to DPBs that are regulated in a non-contractual manner, i.e. in the employer's internal rules, is less certain; possibly an

⁹⁷ IRL has two such bodies: (i) The Equality Authority, which is responsible for working towards the elimination of discrimination, promoting equality of opportunity and providing information to the public on the legislation (Section 39, Employment Equality Act). (ii) The Office of the Director of Equality Investigations – the Equality Tribunal, providing a quasi-judicial forum for the investigation of complaints.

⁹⁸ NLD has two such bodies: (i) The Equal Treatment Commission, established under art. 16 of the General Equal Treatment Act. (ii) The Labour Inspectorate [*Arbeidsinspectie*] responsible for the enforcement of the Working Conditions Act 1998.

⁹⁹ The Office of the Ombudsman against Discrimination on the grounds of Sexual Orientation [*Ombudsmannen mot diskriminering på grund av sexuell läggning (HomO)*], established by art. 16 of the 1999 Sexual Orientation Discrimination Act, which states that '[f]or the purposes of enforcing this Act there shall be an Ombudsman against Discrimination on grounds of Sexual Orientation. The Ombudsman against Discrimination on grounds of Sexual Orientation is appointed by the Government.'

¹⁰⁰ The Equality Commission, established by s. 73 of the Northern Ireland Act 1998, includes sexual orientation discrimination in its mandate following the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003.

¹⁰¹ A specialised body dealing with sexual orientation discrimination has also been established in the Basque Country (ESP), see para. 15.5.2 of the 2004 Report.

¹⁰² Art. 17 of the Law of 25 February 2003. *Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, Moniteur belge*, 17 March 2003.

¹⁰³ Art. 18 of ch. 8 of the Instrument of Government.

¹⁰⁴ See para. 3.5.1, 7.5.3, 13.5.1 and 14.5.1 ('Basic structure of enforcement law of employment law') of the 2004 Report.

¹⁰⁵ Under the Law of 25 February 2003, an injunction may be sought to prohibit the continuation of the discriminatory act (art. 19 - *action en cessation*), or an order may be sought to cease the practice in question under the threat of a fine (art. 20 - *astreinte*).

¹⁰⁶ See para. 19.5.4 ('Civil, penal and/or administrative sanctions') and corresponding sections of the national chapters of the 2004 Report.

aggrieved employee would have to rely on more general principles.¹⁰⁷ Finally, in a number of member states, should an employer discriminate on the basis of sexual orientation, then this constitutes a criminal offence, and the matter will then fall into the competence of the police/public prosecution service. This avenue of challenge exists in BEL, FIN, FRA, ITA, LUX, NLD and ESP.¹⁰⁸

Non-judicial administrative procedures are available in a variety of guises. For example the labour inspectorates in ESP¹⁰⁹ and PRT¹¹⁰ are able to impose administrative fines should anti-discrimination legislation be breached in the provision of partner benefits.¹¹¹ In some other member states the labour inspectorate also has some role in enforcing anti-discrimination legislation. A handful of member states have entrusted the enforcement of the prohibition of sexual orientation discrimination to specialised enforcement bodies, which apart from SWE, also cover other grounds of discrimination in employment. These bodies are: the Centre for Equal Opportunities and the Fight Against Racism in BEL; the Equality Authority and the Equality Tribunal in IRL; the Equal Treatment Commission in NLD; the Office of the Ombudsman against Discrimination on grounds of Sexual Orientation (SWE); and the Equality Commission for Northern Ireland (UK).¹¹² The procedures of most specialised enforcement bodies (in AUS, IRL, NLD and SWE) allow them to take non-binding decisions.¹¹³ The role of these bodies is enhanced where they are empowered to litigate on behalf of an identifiable (and consenting) victim, which is the case in BEL and NLD.¹¹⁴ Only in IRL do the decisions have binding effect, where the Equality Authority is empowered to issue binding 'non-discrimination notices', and the Equality Tribunal may issue binding decisions following an employee's valid complaint.

As a more informal approach conciliatory procedures are specifically provided for in BEL, IRL, ITA,¹¹⁵ and PRT¹¹⁶ while certain enforcement bodies may also engage in non-litigation based activities. Thus, the specialised bodies of NLD, SWE, and the proposed AUS bodies have the capacity to promote friendly settlements between aggrieved employees and their employer. As another non-judicial possibility, employment law in DEU provides for an internal

¹⁰⁷ For example in SWE art. 10 of the 1999 Sexual Orientation Discrimination Act allows an employee to petition for the amendment of, or a declaration of invalidity of a discriminatory provision in a collective or individual agreement. It is not clear though whether this applies to such a clause if it were included in the internal rules of an employer (i.e. in a non-contractual manner). If excluded, reliance would have to be made upon the general principle of good customs and practices in working life, by which all employers are bound.

¹⁰⁸ See para. 19.5.4 ('Civil, penal and/or other administrative sanctions') and corresponding sections in the national chapters of the 2004 Report.

¹⁰⁹ See para. 15.5.4 ('Civil, penal and/or other administrative sanctions') of the 2004 Report.

¹¹⁰ See para. 14.5.4 a) ('Civil, penal and/or other administrative sanctions' – 'Administrative sanctions') of the 2004 Report.

¹¹¹ Also proposed for AUS, see para. 3.5.4 ('Civil, penal and/or other administrative sanctions').

¹¹² For further information, see the Report *Specialised bodies to promote equality and/or discrimination. Final report*, May 2002 (available at

http://europa.eu.int/comm/employment_social/fundamental_rights/publi/pubs_en.htm).

¹¹³ The following bodies are empowered to do so; in IRL the Rights Commissioner, in SWE the Ombudsman against Discrimination on grounds of Sexual Orientation, in NLD the Equal Treatment Commission, and finally in AUS the Equal Treatment Commissions.

¹¹⁴ See para. 4.5.7 and 13.5.7 ('Standing for interest groups') of the 2004 Report.

¹¹⁵ With respect to ITA, Art. 4(3) of Legislative Decree 216/2003 provides that such procedures are available with respect to provisions in collective agreements in private employment, and provisions in legislation where the public sector is concerned.

¹¹⁶ See para. 4.5.3, 10.5.3 and 14.5.3 ('Civil, penal, administrative, advisory and/or conciliatory procedures') of the 2004 Report.

arbitration procedure to resolve disputes between an employer and works councils.¹¹⁷

Thus, the procedures available for challenging DPBs will be as effective (or as ineffective) as those for challenging other types of direct sexual orientation discrimination in employment, wherever that discrimination may be found.

5 Conclusions and recommendations

In short, very few examples of discriminatory partner benefits¹¹⁸ as defined for the purposes of this study have come to light. A number of examples of direct sexual orientation were found, but these often fell outside the sphere of employment law. Many examples concerned with employment were found, but these were often cases of indirect sexual orientation discrimination (being based on marital status, or on another civil status).

Various factors have hindered the uncovering of DPBs in a number of ways. Firstly, the internal rules of employers are not readily accessible, and indeed may not even be in a written format. Secondly, in some member states issues related to sexual orientation discrimination receive very little attention, and so awareness of this matter remains minimal. As a consequence finding representatives willing to be interviewed was difficult, and even those who were willing were not always sufficiently knowledgeable. Thirdly, sexual orientation discrimination, in particular, with regards to partner benefits, remains a hidden issue in many member states. Due to the social stigma surrounding sexual orientation many employees are reluctant to reveal their sexual orientation to claim a benefit or to seek an interpretation of a provision which is unclear as to whether it extends to same-sex partners.

In many member states there has been no systematic repeal, amendment, monitoring or prevention of DPBs by government departments or parliaments. Monitoring, if it exists at all, falls to specialised bodies (if any) and to trade unions and other interest groups that carry out such monitoring on an ad hoc basis. Due to the lack of any considerable systematic monitoring and any systematic repeal or amendment in most member states, it is difficult to assess the extent of DPBs.

Apart from partner benefits that are clearly and explicitly discriminatory, or clearly and explicitly non-discriminatory, there are those which are worded in such a way that it remains unclear as to whether they apply to same-sex partners. The uncertainty and resulting scope for discrimination should be removed. This could be achieved by clearly spelling out in writing the rules applicable to partner benefits, by ensuring that these rules are accessible to all employees, and by phrasing them so that no doubt is left as to their applicability to same-sex partners. Such increased certainty would help reduce the discriminatory application of otherwise uncertain rules, thus encouraging more employees to claim the benefits that the Directive has made available to them.

¹¹⁷ §76 BetrVG (Industrial Relations Act).

¹¹⁸ Hereinafter referred to as DPBs. For the purposes of this study DPBs were defined as those benefits which employers provide to unmarried different-sex partners, but which are denied to unmarried same-sex partners. See section 1.1 above.

In light of the dissuasive effect that involuntarily 'coming out' may have upon employees wishing to claim partner benefits, certain measures should be in place to ensure that discrimination does not occur. If employees feel that as a consequence of revealing their (homo)sexual orientation to the human resources department of their employer, they are going to be subject to harassment or other forms of discrimination, whether it be by the employer or by colleagues or their supervisors, then they will be deterred from claiming what they are entitled to. Therefore, it is of importance that their sexual orientation (and information about their partner) is kept in the strictest confidence, and in this respect guarantees should be made clear to employees that confidential details relating to their private lives, if revealed to the human resources department, will not be revealed any further.

To ensure that DPBs are eradicated from collective agreements and internal rules, it is of utmost importance that national legislation leaves no doubt as to the unlawful nature of such discriminatory provisions. However, making DPBs unlawful is not enough, because art. 16(b) requires all discriminatory clauses contained in collective agreements and internal rules to be declared null and void, or to be amended. While nullity is provided for in most member states, this is not always specifically so. However, a provision being null and void fails to ensure sufficient protection, if the provision is not also repealed, and thus remains in place, leaving open the possibility that it would still be applied in a discriminatory manner. The invalidity of such a provision would have to be established on a case by case basis, which is a less effective process than repealing once and for all any offending provision.

In many member states aggrieved individuals have to rely upon their own initiative (or that of an interest group) to take matters to court. Only in a few member states can such individuals enlist the support of the labour inspectorate or of a specialised anti-discrimination body, which, given their greater resources and experience, should prove a more effective mechanism to combat DPBs.

Even without a legislative impetus some employers have recognised the benefits of, and the need to avoid discrimination in the remuneration of their employees. In particular, there are some encouraging examples of employers providing partner benefits in a non-discriminatory manner, as seen for instance in the examples provided by the airline sector. These examples are particularly encouraging when they are found in those member states where there has been less legislative advancement towards removing sexual orientation discrimination.

In some companies, issues surrounding the sexual orientation of the employees are openly discussed, and problems such as DPBs are resolved. This scenario can be illustrated by the role of 'diversity groups' which can be found in many multinational enterprises.¹¹⁹ In cases where such groups exist and employees in same-sex relationships are prepared to 'come out' and claim a benefit, constructive negotiations often result between the employees and the company concerned. The issue then no longer remains invisible, and the discrimination that could well have existed may be stopped, or at least reduced. Until that process has begun, discrimination is likely to remain.

¹¹⁹ See examples in section 1.6.

In all but three member states (DEU, GRC and LUX), the Directive has been implemented and DPBs are prohibited, either with a reference to pay or remuneration, or to employment conditions. In the absence of implementing legislation, some protection is granted by general provisions of employment law and constitutional principles of equality. Nevertheless, there are benefits which have not yet been extended to same-sex partners, both in member states with and member states without implementing legislation. Often (but not always) this is so because benefits are only made available to married partners. The Directive and its implementation should help to ensure that once lawmakers, employers, and/or trade unions choose to extend partner benefits to unmarried partners, such benefits are provided irrespective of sexual orientation.

Annex: Questionnaire for national experts

This EGESO thematic study will consider a specific category of discrimination, namely direct sexual orientation discrimination in written employment conditions that provide for benefits for unmarried partners of employees. Accordingly the study is about benefits that employers (voluntarily, or as required by law or collective agreement) provide to unmarried different-sex partners, but that they deny to unmarried same-sex partners (hereinafter referred to as 'discriminatory partner benefits'). This category of discrimination can be found in legislation, collective agreements and internal rules of employers. The study will not look at benefits that are only available to married and/or registered partners.

1. **Are discriminatory partner benefits now considered unlawful, according to:**
 - a. Legislation?
 - b. Travaux préparatoires?
 - c. Case Law?
 - d. Legal commentary?
2. **Do discriminatory partner benefits still exist in:**
 - a. National primary and/or secondary legislation (please specify)?
 - b. Collective agreements (please give examples)?
 - c. Internal rules of employers (please give examples)?
3. **What types of benefits are involved in the provisions mentioned in the answer to the previous questions? Please specify the provisions.**

For example:

- a. Free or discounted goods or services of the employer.
 - b. Financial benefits (e.g. relocation costs).
 - c. Survivor's pensions (and similar payments).
 - d. Insurance cover (as provided by the employer).
 - e. Extra days off (e.g. for family occasions).
 - f. Others, please specify.
4. **What activities have been undertaken to reform remaining examples of discriminatory partner benefits? What safeguards are in place to prevent new examples of discriminatory partner benefits to find their way into legislation, collective agreements or internal rules? Please specify and give examples.**
 - a. Repeal or amendment of legislation.
 - b. Nullification (by law or by judicial or administrative decision) of a provision in a collective agreement or internal rules.
 - c. Repeal or amendment of a collective agreement or of internal rules.
 - d. Monitoring (of the compliance with the discrimination prohibition) by government agencies, by organisations of employers or employees, or by others.
 5. **What procedures are available to an individual to challenge discriminatory partner benefits? Please specify.**
 - a. *Judicial procedure* to challenge the *existence* of discriminatory partner benefits.
 - b. *Judicial procedure* to challenge the *application* of discriminatory partner benefits.
 - c. *Other procedures* to challenge the *existence* of discriminatory partner benefits.
 - d. *Other procedures* to challenge the *application* of discriminatory partner benefits.

