

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*

Summary of chapter 2 on European law

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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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Introduction

Since 1999, art. 13 of the Treaty establishing the European Communities allows the adoption of appropriate measures to combat discrimination on a number of grounds, including sexual orientation. On the basis of art. 13 the Council of the European Communities, in November 2000, adopted Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (hereinafter: the Directive). The Directive requires member states to take measures to prohibit discrimination in employment on grounds of religion or belief, disability, age or sexual orientation in order to meet the standards it sets forth to this end.

The prohibition of discrimination

The Directive has both a personal and a material scope. This means that it defines in which areas its provisions apply, and to whom.

As far as its material scope is concerned, the Directive applies to a number of realms related to employment and occupation. They are:

- (a) 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;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) 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.

This list seems broad enough to encompass such grey areas as compulsory military service and voluntary work.

According to the Directive, the respect for the principle of equal treatment and the right to non-discrimination 'does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes'. Any consequence of this provision on the legislation of member states will remain to be seen.

As far as personal scope is concerned, the Directive applies to '*all persons*, as regards both the public and private sectors, including public bodies'. The chosen formula suggests that a broad interpretation of the prohibition is to be preferred. Harassment, for instance, often comes from other people than the contractual employer (for example from co-workers or clients); certain other acts of discrimination (e.g. denying promotion) may also come from a boss/manager.

The Directive also forbids instructing another to discriminate against persons on the ground of sexual orientation. A case immediately relevant would be that of an employer who instructs a job agency to select personnel among heterosexuals only.

In addition, the Directive protects workers from differential treatment which is a consequence of someone having brought forward a claim of discrimination (victimisation). For example, if a worker who complains to a court of having being denied promotion because of his or her sexual orientation is dismissed, he or she may have been victimised. Moreover, there is nothing in the Directive that suggests that only victims of discrimination should be protected from retaliatory measures whilst witnesses should be excluded. Nothing suggests that only retaliatory dismissal should fall within the protection from victimisation.

Harassment related to sexual orientation is deemed to be a form of discrimination. According to the Directive, the conduct must be unwanted and must have the purpose *or* the effect of violating the dignity of a person *and* of creating an intimidating, hostile, degrading, humiliating or offensive environment. The definition of harassment as a form of discrimination is quite a novel concept for a number of member states.

Following the Directive, discrimination on grounds of sexual orientation may be direct or indirect. Direct discrimination happens when an employer or its agents use sexual orientation as a criterion for making their choices.

As far as sexual orientation is concerned, the relevant distinction is the one between heterosexual and homosexual or bisexual persons. Therefore, direct sexual orientation discrimination finds its source in a treatment that places on gay, lesbian and bisexual persons burdens that are not placed on heterosexual persons. These burdens (such as employment discrimination) are often a result of bias, stereotype and prejudice associated with homosexuality. Given the specific features of sexual orientation, such as invisibility, the additional burden placed on lesbians and gay persons could be, and often is, that of imposition of silence for fear of facing such prejudice and its cumbersome consequences. Silence and hiding, in turn, might have a negative impact on a person's self-perception as equally worthy of consideration and respect, and on the possibility of developing a fulfilling life in all of its social and relational dimensions. This frustrates one of the conceptual aims of equality, that of protecting human dignity.

On the other hand, indirect discrimination occurs when the criterion used to make choices is apparently neutral (e.g. being married), but it puts at a particular disadvantage persons who have a particular sexual orientation (e.g. gay and lesbians) because for them it is more difficult to meet the condition requested (normally one cannot marry a person of the same sex). Unlike direct discrimination, indirect discrimination may be justified by a legitimate aim.

But what exactly is meant by the words 'sexual orientation'? The Framework Directive does not define what is to be intended by this expression. Sexual orientation may be seen both as an attraction or preference, and as a conduct or behaviour, which refers to the choice of the sex of the partner in the emotional-erotic sphere.

A person would be discriminated against on grounds of sexual orientation if he or she was subjected to differential treatment on grounds of being gay, lesbian or bisexual (even if it has not acted), on grounds of having engaged in same-sex erotic conduct or being in a same-sex relationship, or on grounds of coming out as gay, lesbian or bisexual.

There would be discrimination on grounds of sexual orientation even if the aggrieved person does not actually identify as gay, lesbian or bisexual, but was perceived as such by the person who discriminated or was treated differently because he or she associates with gay, lesbian or bisexual persons (e.g. takes part in demonstrations or movements, has gay, lesbian or bisexual relatives or acquaintances, etc.). In addition, the case could be made for a group of lesbian or gay employees that is refused time or facilities to meet, or is refused the possibility to distribute flyers or hang posters. In these instances there would be discrimination on grounds of sexual orientation.

Sexual orientation may never be regarded as a ground for unfitness to work, except when it falls under the limits of the art. 4(1) exception, and this means that questions by the employer related to sexual orientation are likely to be impermissible. In turn, this means that people who are questioned do not have a duty to respond or to give an accurate answer.

The prohibition of sexual orientation discrimination also means that the same-sex partner of an employee must be treated in the same way as the different-sex partner is or would be. This statement holds true as long as the same-sex partner is compared with the different-sex partner who is not married to the employee. It is still possible that the Directive also requires employers to treat the (unmarried) same-sex partner of the employee in the same way as the married partner of a heterosexual employee is treated, but the courts will have to decide this issue on a case-by-case basis, to see whether differential treatment amounts to indirect discrimination.

Exceptions

The Directive lists a number of member state objectives that take precedence over equal treatment, subject to a test of necessity. Measures that would at a first sight infringe the prohibition of discrimination will be saved when they 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.

In addition, Member States may provide that a difference of treatment, which would otherwise be prohibited, 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', a characteristic related to one of the forbidden grounds constitutes 'a genuine and determining occupational requirement'. The objective must be legitimate and the requirement must be proportionate.

The meaning of this concept is to justify a violation of the principle of equal treatment when differential treatment is needed because of the nature of a particular job: for instance, a theatre company advertising a post for an actor who will have to play Shakespeare's Othello (a moor general) might be able to exclude members of the Caucasian race and require that the prospective actor be of a certain skin colour.

It is, however, very difficult to imagine certain jobs where a particular sexual orientation is needed. The Directive also allows organisations with an ethos

based on religion or belief to 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

Positive action is allowed by the Directive. This means that member states may provide that equal treatment shall not apply because they want to favour certain classes of disadvantaged people. It may certainly be that employers take action for tackling specific issues concerning sexual orientation at the workplace, such as confidentiality, visibility, coming out and personal safety. This could hardly be seen as discrimination on grounds of heterosexual orientation.

Enforcement

The choice of sanctions is left to national legislatures, but they must be *effective, proportionate and dissuasive*.

At least, member states are required to allow interest groups to engage, on behalf or in support of complainants, in any judicial or administrative procedure.

Once the victim has proven 'facts from which it may be presumed that there has been direct or indirect discrimination' (art. 10(1)), the Directive places on the respondent the burden of proving that no breach of the principle of equal treatment occurred.

For discrimination on grounds of sexual orientation, the Directive did not require that member states set up a specific body entrusted with the task of providing guidance to victims and of receiving their complaints. However, it might well be that certain member states have gone beyond what was required, and have set up a specific body for dealing with sexual orientation discrimination issues.

Concluding remarks

The general legal situation of the European Communities concerning the protection of fundamental rights has been evolving for over thirty years. Rights of gay, lesbian and bisexual people have only recently been embraced as part of binding measures – such as art. 13 EC and the Directive – to fight discrimination.

The prohibition of discrimination required by the Directive encompasses a number of different areas; some of them are general, some others have specific repercussions and ramifications on sexual orientation. Among the second ones there are aspects concerning the concept of sexual orientation and the many subtle intricacies and nuances concerning actual or assumed preference or behaviour. Other issues meaningful for gay, lesbian and bisexual life, susceptible of causing discriminatory reactions in the field of employment include; coming out, partnerships, events and activity of organisations, answers to questions concerning sexual orientation, previous criminal record for offences without heterosexual equivalent, burden of proof of sexual orientation, etc.

Whilst the prohibition of sexual orientation discrimination is today a reality, there are aspects of the Framework Directive that – by attempting to strike the right balance among different interests – call for closer observation as far as their

concrete application is concerned, especially in the areas of partner benefits and loyalty to the religious ethos of some employers.