

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

Report of the *European Group of Experts  
on Combating Sexual Orientation Discrimination*<sup>1</sup>

about the implementation up to April 2004 of  
*Directive 2000/78/EC establishing a general framework  
for equal treatment in employment and occupation*

## 1 Introduction

by Kees Waaldijk and Matteo Bonini-Baraldi<sup>2</sup>

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<sup>1</sup> The European Group of Experts on Combating Sexual Orientation Discrimination ([www.emmeijers.nl/experts](http://www.emmeijers.nl/experts)) was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 ([http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/index\\_en.htm](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](http://www.emmeijers.nl/experts).

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## 1.1 Presentation

Since 1999, article 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 article 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 and occupation on grounds of religion or belief, disability, age or sexual orientation in order to meet the standards it sets forth to this end. The Council also decided to set up a Community action programme to combat discrimination (2001-2006). The action programme aims to promote measures to combat direct or indirect discrimination on a number of grounds, to improve the understanding of discrimination issues, to develop the capacity to prevent and address discrimination, and to promote and disseminate the values and practices underlying the fight against discrimination.

The present report, *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, presents the results of the activity of the European Group of Experts on Combating Sexual Orientation Discrimination. The Group has been formally established in October 2002 in the context of the Community action programme to combat discrimination, in order to provide an independent analysis of the transposition of the Directive by member states as regards sexual orientation discrimination in employment.

While leaving aside measures which tackle discrimination on other grounds, this report thus describes pre-existing, as well as new or proposed legislation aimed at combating discrimination on grounds of sexual orientation in employment, and critically reviews it in light of its conformity with the provisions of the Directive. Prior to its enactment, eight of the then fifteen member states had in place legislation prohibiting sexual orientation discrimination in employment (IRL, ESP, FRA, LUX, NLD, DNK, SWE and FIN). However, these laws followed a variety of approaches, not always consistent with the Directive's requirements. All member states were required to bring some changes to their legislative framework in order to implement the provisions of the Directive with respect to sexual orientation discrimination in employment.

The Group consists of fifteen independent legal experts selected for their knowledge of both the national legal system and domestic language, as well as for their expertise in issues of sexual orientation discrimination. The Group has been coordinated from the Leiden Faculty of Law, by the Dutch expert, Dr. Kees Waaldijk, assisted by the researcher Dr. Matteo Bonini-Baraldi. In January 2004 the researcher Mr. Alan Littler LL.M. joined the coordinators. The Group further consists of legal academics from a number of European universities, several practising lawyers, and the Swedish Ombudsman for Sexual Orientation Discrimination.<sup>3</sup>

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<sup>3</sup> The Group has established its own internet page at [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts), with basic information about the Group, its activities and its members.

The deadline for transposition was 2 December 2003; however, because in some member states the implementation process has not yet come to an end, this report does not purport to say the final word on the state of transposition. This report was completed in the Summer of 2004. It aims to represent the situation of enacted and proposed legislation as it was on the eve of the accession of the new member states to the EU on 1 May 2004. Only occasionally developments that took place after that date have been taken into account.

## 1.2 How to read this report

This report consists of twenty chapters (with chapter 1 being its introduction and chapter 20 its conclusions). The chapters have been written following a common template, that can be consulted above (after the table of contents, both in English and in French); the uniform paragraph numbering should facilitate the comparison of different member states on a particular topic.

Chapter 2 is a discussion of European law concerning issues of sexual orientation discrimination in employment. Chapters 3 to 17 (in alphabetical order per country name) provide a description and critical analysis of the national law of each of 'old' fifteen member states. Information provided in the national chapters is mostly based on sources typically used by legal scholars, such as legislative texts, *travaux préparatoires*, judicial decisions, books and journal articles. Each chapter contains a list of literature used in footnotes, located at the very end. References to, and summaries (or even full texts) of, most provisions, decisions, journal articles, and books cited in chapters 2 to 19 have been stored in the on-line databank of the Centre for Research and Comparative Legal Studies on Sexual Orientation and Gender Identity (Cersgosig).<sup>4</sup>

At the end of each chapter (at least for the countries where legislation or draft legislation is present), the expert has included a list of the main shortcomings he or she believes affect national legislation.

In chapters 18 and 19 follows the comparative part of this report. Chapter 18 is an overview of domestic law, and is based on information set out in the national reports (chapters 3 to 17). It consists mainly of tables that compare the law of the fifteen member states. Its introductory part explains how the tables have been prepared and how they can best be consulted. Chapter 18 makes, however, no reference to the Directive, nor to the compatibility of national law with it. This sort of analysis is instead provided in chapter 19, where the state of the law of all fifteen member states is compared and brought together in a critical assessment of its conformity with the Directive. Each paragraph contains a conclusion that highlights the shortcomings that may affect national law, as well as some examples of what can be seen as good practices. Chapter 20 summarises the conclusions of chapter 19. At the very end of chapter 20 may be found a table summarising the main conclusions of the report.

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<sup>4</sup> Available at [www.cersgosig.informagay.it](http://www.cersgosig.informagay.it).

It is important to note that this report only provides a tentative analysis of the implementation of the Directive. Among other reasons, this is so because two member states (DEU and GRC) have not yet presented a final proposal for the implementation of the Directive, and because in LUX the proposals are still being discussed and possibly amended in Parliament. Regional legislation necessary to implement the Directive has not yet been adopted in DEU, and not everywhere in AUS.

### 1.3 The content at a glance

The uniform structure for chapters 2 to 19, presented above,<sup>5</sup> provides at a glance the many topics that have been analysed in this report. The Group has chosen to focus on the crucial provisions of the Directive, leaving aside other provisions that might deserve more attention at a later stage: dissemination of information (art. 12 of the Directive), social dialogue (art. 13), and dialogue with non-governmental organisations (art. 14).

As the title indicates, the focus of the Group has been on the analysis of enacted or proposed measures to implement the Directive. Such analysis concerns the following provisions of the Directive: art. 1 to 4 (purpose, concept of discrimination, scope, and occupational requirements), 7 (positive action), 9 to 11 (defence of rights, burden of proof, and victimisation) and 16 and 17 (compliance and sanctions).

At the outset of each chapter, paragraph 1 includes general background information concerning constitutional protection against discrimination, general principles and concepts of equality, division of legislative powers relating to discrimination in employment, and basic structure of employment law. Also in paragraph 1 the reader will be able to get a general sense of how issues of sexual orientation discrimination in employment are treated in the relevant country. In fact, it is possible to find a brief description of provisions on sexual orientation discrimination in employment, of important case law precedents on sexual orientation discrimination, of provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation, and of provisions on sexual orientation discrimination in other fields than employment and occupation.

Paragraph 2 of each chapter is devoted to the prohibition of discrimination required by the Directive. To that aim, it provides an overview of the instrument(s) used to implement the Directive, and of their content with respect to: the concept of sexual orientation (art. 1 Directive), the definitions of direct and indirect discrimination (art. 2(2)), harassment (art. 2(3)), and instruction to discriminate (art. 2(4)). Still with a view of delineating the actual nature and impact of relevant law, paragraph 2 includes a discussion of both the material and the personal scope of applicability of the prohibition (art. 3).

The following paragraph 3 presents several forms of conduct in the field of employment and aims to assess whether they are prohibited as sexual orientation discrimination. These fact-situations are those that are considered likely to strike gay, lesbian, and bisexual workers and employees, as well as

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<sup>5</sup> The structure can be found, in English and French, after the table of contents of this report.

their groups or events, and people who associate with them. For example, each chapter attempts to give an answer to such questions, as whether discrimination on grounds of assumed homosexual preference or behaviour is covered, or whether discrimination on grounds of a person's coming out is. Furthermore, it also tackles possible instances of discrimination *vis à vis* occupational benefits granted to partners of the employees, as well as the consequences of a person's refusal to answer a question about sexual orientation.

Paragraphs 4 and 5 deal respectively with the exceptions to the prohibition of discrimination and with remedies and enforcement. The analysis of each chapter concerning the system of exceptions aims to assess the stances taken by member states with respect to such issues as the rights of others, occupational requirements, religion based employers, and positive action. In the paragraph on enforcement, although the Directive does not require member states to set up specific enforcement bodies, their role is analysed alongside that of more traditional law enforcement bodies.

Paragraph 6 deals with efforts made by member states to eliminate from the legal system provisions or rules that still had a discriminatory content, as well as to ensure that discriminatory provisions contained in contracts, collective agreements or internal rules are amended or deleted.

Finally, paragraph 7 concludes the analysis by listing the shortcomings that, in the opinion of the author, affect national legislation with respect to the provisions of the Directive. As indicated before, a comparative analysis of the various shortcomings can be found in chapter 19, and in the conclusions of this report (chapter 20).

In 2004 the Group of experts at the request of the European Commission also carried out a thematic study, on discriminatory partner benefits in employment. The report of this separate but related study, written by Alan Littler on the basis of materials provided by the experts, has been added as an appendix to the main report.

The authors and coordinators will be pleased to receive any comment or suggestion the reader might have.<sup>6</sup>

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<sup>6</sup> See [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts) for contacting details.

