European Union Agency for Fundamental Rights
Agentur der Europäischen Union für Grundrechte
Agence des droits fondamentaux de l'Union européenne

Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States:

Part I - Legal Analysis

European Union
Agency for Fundamental Rights

European Union
Agency for Fundamental Rights

Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States

Part I – Legal Analysis

Olivier De Schutter
2008

Contents

Foreword

The European Union Agency for Fundamental Rights was established by Council Regulation (EC) No 168/2007 on 15 February 2007. The objective of the Agency is to provide assistance and expertise to relevant institutions, bodies, offices and agencies of the Community and its Member States, when implementing Community law relating to fundamental rights.

In this context the European Parliament asked in June 2007 the Fundamental Rights Agency to launch a comprehensive report on homophobia and discrimination based on sexual orientation in the Member States of the European Union. The aim of this report is to assist the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, when discussing the need for a Directive covering all grounds of discrimination listed in Article 13 of the EC Treaty for all sectors referred to in the Racial Equality Directive 2000/43/EC. These sectors are education, social security, healthcare, and access to goods and services. In addition, the European Parliament considered that the report will also bring a valuable contribution to the impact assessment carried out by the European Commission, with the aim of exploring the possibility of tabling a draft directive, which would include these further areas.

In response the Agency launched a major project in December 2007 aimed at producing a comprehensive report on homophobia and discrimination on grounds of sexual orientation. The report is composed of two parts: The first part is the present publication, which contains a comprehensive comparative legal analysis of the situation in the European Union Member States drafted by Professor Olivier De Schutter, as well as conclusions and opinions for which the Agency is responsible. The comparative analysis is based on 27 national contributions by country based legal experts drafted on the basis of detailed guidelines provided by the Agency. The second part, a comprehensive sociological analysis, based on both available secondary sources and interviews with key actors, is expected to be published by the end of 2008.

The principle of equal treatment constitutes a fundamental value of the European Union: Article 21 of the Charter of Fundamental Rights prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Until the Treaty of Amsterdam the focus of EU legal action in this respect was on preventing discrimination on the grounds of nationality and sex. Article 13 of the Amsterdam Treaty granted the Community new powers to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Consequently two new EC Directives were enacted in the area of anti-discrimination: the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC).

The Racial Equality Directive 2000/43/EC provides comprehensive protection against discrimination on the grounds of race or ethnicity in several spheres of social life employment and training, education, social protection (including social security and

healthcare), social advantages, membership and involvement in organisations of workers and employers and access to goods and services, including housing. However, the Employment Equality Directive provides protection against discrimination on grounds of religion or belief, disability, age, and sexual orientation only in the areas of employment and training.

In light of this the principle of equal treatment in EU law appears paradoxically to be applied through the existing directives “unequally” creating an artificial "hierarchy" of grounds of discrimination, protecting one more comprehensively than others.

Although various anti-discrimination provisions may offer a certain level of protection against sexual orientation discrimination in the Member States, treating grounds of discrimination differently is not commensurate with the EU's fundamental principle of equal treatment. Furthermore, the task of EU law is to approximate national legislation to a common denominator so that a fundamental principle of the European Union, enshrined in its Charter of Fundamental Rights, can be implemented respected and protected equally in all Member States.

Furthermore, the analysis of the unequal treatment of same sex couples across the EU points to the urgent need to clarify the situation in conformity with international human rights law for rights and benefits provided for spouses and partners under the EU’s Free Movement Directive, the Family Reunification Directive and the Qualification Directive.

Therefore, the opinion of the Fundamental Rights Agency is that a comprehensive horizontal directive extending the protection of the Race Equality Directive in employment and training, education, social protection (including social security and healthcare), social advantages, membership and involvement in organisations of workers and employers and access to goods and services, including housing, to all grounds of discrimination will offer comprehensive protection in the spirit of the Charter of Fundamental Rights.The legal analysis presented here examines specific areas based on the idea that the main task of the EU Fundamental Rights Agency is to help EU Member States implement EU law in accordance with the requirements of fundamental rights, as required under Article 6(2) of the EU Treaty. In this context, a number of the legislative instruments examined in this report may have a deep impact on the situation of Lesbians, Gays, Bisexuals and Transsexuals (LGBT) persons, and it would be most useful to provide such guidance to national authorities, where these instruments themselves are silent about the requirements of fundamental rights. However, the enforcement of the rights of LGBT persons requires much more than legislation and litigation. It calls for decisive action by policy makers at both European and national level to protect through concrete measures LGBT rights ensuring that their right to complaint and seek redress from discrimination can be exercised effectively. This requires not only the implementation of the appropriate legislative instruments, but also the operation of equality bodies that are well resourced and efficient, as well as information campaign to inform the public of LGBT rights.

A first positive and welcome finding of this report is that already 18 EU Member States have gone beyond minimal prescriptions regarding sexual orientation in implementing

the Employment Equality Directive by providing protection against discrimination for LGBTs not only in employment, but also in other or even all of the areas covered by the Racial Equality Directive.

On the other hand it is striking to see how few official or even unofficial complaints data are currently available across the EU on discrimination on grounds of sexual orientation, which might point to the persistence of a social stigma that makes LGBT individuals reluctant to identify themselves as such. This issue, however, will be scrutinised in the upcoming sociological analysis that forms the second part of this report.

Furthermore, the report finds that the issue of transgendered persons, who are also victims of discrimination and homophobia, is adequately addressed in only 12 EU Member States that treat discrimination on grounds of transgender as a form of sex discrimination. This is generally a matter of practice of the anti-discrimination bodies or the courts rather than an explicit stipulation of legislation. In two Member States this type of discrimination is treated as sexual orientation discrimination. While in 13 Member States discrimination of transgender people is neither treated as sex discrimination nor as sexual orientation discrimination, resulting in a situation of legal uncertainty.

Finally, the legal analysis shows that a number of EU legislative instruments examined (Free Movement Directive 2004/38/EC, Family Reunification Directive 2003/86/EC, Qualification Directive 2004/83/EC) do not take explicitly into account the situation of LGBT persons. These instruments need to be interpreted in the light of fundamental rights principles in the context of LGBT issues. It would be most useful to provide further guidance to national authorities in this respect to ensure legal certainty and equal treatment.

As the European Union's Agency for Fundamental Rights we must acknowledge that this legal analysis presents a situation that calls for serious considerations. Let us not forget that the EU Charter of Fundamental Rights is the first international human rights charter to explicitly include the term “sexual orientation” in its Article 21 (1):

“Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

The Union's political leaders have therefore an obligation to take measures that will ensure that any discrimination on grounds of sexual orientation and against transsexual people is eradicated and all these people can truly enjoy their right to be "different, but equal".

In closing I would like to thank Professor Olivier De Schutter and the other legal experts of FRALEX for their contribution, as well as the staff of the Agency for their hard work and commitment.

Morten Kjærum, Director

Background

This legal analysis constitutes the first part of a comprehensive comparative report on homophobia and discrimination on grounds of sexual orientation. The second part, a sociological analysis, is expected to be published by the end of 2008.

Following an interdisciplinary methodology the Agency approached this challenging task by developing a legal analysis based on background material collected and analysed by its team of senior legal experts (FRALEX[1]) and a sociological analysis based on a variety of secondary data, as well as interviews with key actors, carried out by the Danish Institute for Human Rights (DIHR) and the international consultancy firm COWI.

The present report is a comparative legal analysis of the situation in the Member States of the European Union based on 27 national contributions by FRALEX drafted on the basis of detailed guidelines provided by the Agency. The report examines and analyses comparatively key legal provisions, relevant judicial data, e.g. court decisions, and case law in the EU Member States. In addition, the report identifies and highlights 'good practice' in the form of positive measures and initiatives aimed for example at overcoming underreporting of discrimination on grounds of sexual orientation, promoting the visibility of homosexuality and other gender identities, and the need to protect transgendered persons from investigations into their past.

In developing this report the Agency has consulted with key stakeholders, such as the European Commission, the Commissioner for Human Rights of the Council of Europe, and the European level NGO ILGA-Europe.

The work of the European Union institutions

The European Parliament has been consistently supportive of gay and lesbian rights, having passed several non-binding resolutions on this subject - the first of which, back in 1984, called for an end to work-related discrimination on the basis of sexual orientation. Discrimination experienced by lesbians and gays in the EU was detailed in the 1994 “Roth Report”, which triggered a European Parliament recommendation on the abolition of all forms of sexual orientation discrimination, leading to its Resolution on equal rights for homosexuals and lesbians (A3-0028/94). The European Parliament also requested that the Council and Commission consider the question of discrimination against homosexuals during EU membership negotiations. During the past years the European Parliament has adopted a number of resolutions on homophobia in Europe reflecting the

1 FRALEX is a group of senior experts contracted by the Agency to provide background material, information and analysis on legal issues. You may find more information at our website www.fra.europa.eu

increasing importance attached to this issue: P6_TA(2006)0018 Resolution on Homophobia in Europe, 18 January 2006; P6_TA(2006)0273 Resolution on the increase in racist and homophobic violence in Europe, 15 June 2006; P6_TA-PROV(2007)0167 Resolution on Homophobia in Europe, 26 April 2007.

In 1999, the Treaty of Amsterdam enabled the European Commission to develop action against discrimination on grounds of sexual orientation (Article 13). This led in 2000 to the adoption of the Employment Directive, which obliges all Member States to introduce legislation banning discrimination in employment on a number of grounds, including sexual orientation by December 2003. Countries applying to join the European Union are also obliged to introduce similar legislation. The European Commission also launched its 5-year Community Action Programme to Combat Discrimination involving the investment of EUR100 million over the period 2001 to 2006 in the fight against discrimination in a number of areas, including sexual orientation. For the period 2007-2013 the European Commission pursues further its efforts through its new integrated programme PROGRESS (Programme for Employment and Social Solidarity) PROGRESS that includes the non-discrimination theme in one of its sections entitled 'Anti-discrimination and diversity' that aims to support the effective implementation of the principle of non-discrimination and to promote its mainstreaming in all EU policies.

Finally, it should be highlighted that the Charter of Fundamental Rights of the European Union is the first international human rights charter to include the term “sexual orientation” in its Article 21 (1):

“Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

The work of the Council of Europe

The European Convention on Human Rights and Fundamental Freedoms prohibits any form of discrimination in the exercise of the rights and freedoms guaranteed by the Convention. The case-law of the European Court of Human Rights has been an important instrument in the fight against forms of discrimination on grounds of sexual orientation particularly regarding the decriminalisation of consensual homosexual conduct between adults in private, but also regarding forms of discrimination, such as unequal ages of consent for homosexuals and heterosexuals, exclusion from the military and discrimination in the exercise of the freedom of peaceful assembly.

The Parliamentary Assembly has adopted several relevant recommendations, such as Recommendation 924 (1981) Discrimination against homosexuals, Recommendation 1470 (2000) Situation of gays and lesbians and their partners in respect of asylum and

immigration in the member states of the Council of Europe, Recommendation 1474 (2000) Situation of lesbians and gays in Council of Europe member states, and Recommendation 1635 (2003) Lesbians and gays in sport.

The Congress of Local and Regional Authorities recently adopted Recommendation 211(2007) on Freedom of assembly and expression by lesbians, gays, bisexuals and transgendered persons and called upon the Committee of Ministers to invite the member states to ensure that a number of measures are taken - notably to protect LGBT persons from discrimination and violations of their rights to freedom of expression and assembly.

Issues concerning discrimination on the ground of sexual orientation are also covered as part of other CoE activities. For example, NGOs have conducted in the framework of the campaign “All Different All Equal”, the Week Against Homophobia throughout Europe in March 2007, involving members of the Council of Europe Secretariat. The Compass publication, a manual on human rights education for young people contains a specific section on discrimination on the ground of sexual orientation.

The Council of Europe Secretary General and the Commissioner for Human Rights have made several public statements condemning homophobia and since November 2007 the Office of the Commissioner for Human Rights has been implementing the LGBT Human Rights Monitoring Programme. This ambitious programme aims at fostering the effective observance of human rights of LGBT people; assisting member States in the implementation and promotion of relevant CoE human rights standards; identifying shortcomings in the law and practice concerning human rights; involve national ombuds institutions and other human rights structures in LGBT equality issues. Moreover, the programme will work closely together with civil society and with relevant UN bodies, OSCE and the EU, in particular the FRA.

Executive summary

Implementation of Employment Directive 2000/78/EC

The implementation of the Employment Equality Directive (Council Directive 2000/78/EC (27.11.2000)) has been variable across the Member States. In eight Member States the Employment Equality Directive has been implemented as regards sexual orientation discrimination, in the fields designated by Article 3(1) of the Directive, i.e., in matters related to work and employment. In ten other Member States, the protection of discrimination on grounds of sexual orientation has been partially extended beyond employment and occupation, in order to cover certain but not all fields to which the Racial Equality Directive (Council Directive 2000/43/EC (29.6.2000)) applies – i.e., beyond work and employment, social protection (social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public, including housing. In the nine remaining Member States, the scope of the protection from discrimination on grounds of sexual orientation has been extended to all fields covered by the Racial Equality Directive. There is a tendency within the States belonging to the first two groups to join the third group to have the prohibition of discrimination on grounds of sexual orientation in their domestic legislation extended to all areas to which the prohibition of discrimination on grounds of race and ethnic origin applies.

The first chapter focuses on three issues that have remained contentious throughout the implementation of the Employment Equality Directive. First, it examines the hierarchy of grounds seemingly established under the two Equality Directives adopted in 2000. This report concludes that this might not be compatible with the status acquired by the prohibition of discrimination on grounds of sexual orientation in international human rights law (1.1.). Second, it presents an overview of equality bodies set up by the EU Member States in the implementation of the equality directives of 2000, showing that 18 Member States have by now one such equality body whose powers extend to discrimination on grounds of sexual orientation. The choices facing the Member States in setting up such bodies and the existing best practices are highlighted (1.2.). Third, it discusses whether the prohibition of discrimination on grounds of sexual orientation might entail a prohibition of differences in treatment between married couples and non-married couples, whether the latter are *de facto* durable relationships or officially registered. It answers this question in the affirmative (1.3.).

1.1. The hierarchy of grounds of discrimination. Under current EU law, the prohibition of discrimination on grounds of race and ethnic origin is stronger and more extended than

the prohibition of discrimination on any of the other grounds mentioned in Article 13 EC, including sexual orientation, and with the exception of sex. However, while the establishment of such a 'hierarchy of grounds' is not *per se* incompatible with international human rights law, it is in contrast with the recognition of sexual orientation as a particularly suspect ground and appears increasingly difficult to justify. It should therefore come as no surprise that in a significant number of EU Member States, the idea that all discrimination grounds should benefit from an equivalent degree of protection has been influential in guiding the implementation of the equality directives. Not only have a number of States aligned the prohibition of discrimination on grounds of sexual orientation with the prohibition of discrimination on grounds of race or ethnic origin. There is also a general convergence towards the model of one single equality body, competent to deal with all discrimination grounds, notwithstanding the fact that only the Racial Equality Directive mandates (in Art. 13) the establishment of such an equality body, competent for racial and ethnic discrimination: the single equality body is the model already in place in seventeen Member States, a figure which could rise to twenty-two in the next two years; and in one other State, an Ombudsperson has been established to deal with sexual orientation discrimination, bringing the total number of States having set up an institution competent to deal with this kind of discrimination to eighteen.

1.2. The establishment of equality bodies. The examination of the equality bodies whose powers extend to discrimination on grounds of sexual orientation leads to four conclusions. First, because the powers of ombudsinstitutions established in the 1980s and 1990s have often been extended to cover human rights issues in the exercise of public powers, there may be a need, where such ombudsinstitutions coexist with an equality body, to identify how synergies between both institutions could be maximised. A similar question arises as regards the coexistence of equality bodies with labour inspectorates.

Second, as mentioned above, most States have opted for the model of a single equality body covering all grounds rather than for a body specialised on sexual orientation discrimination. This choice is justified primarily by considerations related to economies of scale, to the need for consistency in the interpretation of anti-discrimination, and to the frequency of incidents of multiple discrimination. But it may have to be combined with the need to give sufficient visibility to the work of the Body on sexual orientation discrimination, and with the need to develop a specific expertise on this issue: as shown by the record of HomO in Sweden, a specialised institution is far more capable of attracting complaints and building a relationship of trust with victims of discrimination.

Third, while many equality bodies combine their promotional duties (1) with assistance to victims (2), a mediation role between victim and offender (3), and/or a quasi-adjudicatory function through the delivery of non-binding opinions (4), the combination of these different tasks within one single institution may be the source of certain dilemmas. For

reasons explained in the report, the Austrian system of Equal Treatment Commissions (ETCs) and ombudsinstitutions for Equal Treatment (OETs) may constitute an interesting means both to avoid fragmentation of anti-discrimination law by having each ground treated within an institution entirely separate from the other, while at the same time allowing for a certain degree of specialisation, and to fulfil both quasi-adjudicatory functions (through the ETCs) and counselling and assistance to victims (through the OETs).

Fourth, finally, the few available statistics on the use by the victims of the complaint mechanisms they have at their disposal show that, with the exception of the HomO in Sweden, these mechanisms are very rarely relied upon. Rather than an indicator that little discrimination on grounds of sexual orientation is occurring, this should be seen as an indicator that it is still costly, in terms of reputation and risks to privacy, to report about one's sexual orientation. One partial solution to this problem of underreporting would be to allow equality bodies either to act on their initiative, or on the basis of anonymous complaints, without revealing the identity of the victim to the offender. Another solution would be to ensure that individuals alleging that they are victims of discrimination on grounds of sexual orientation are heard, within the equality body, by trained LGBT staff, in order to establish trust between the parties.

1.3. Differences in treatment between marriage and other unions (registered partnerships or durable de facto *relationships).* The Employment Equality Directive does not clearly specify whether, in States where same-sex marriage is not allowed, differences in treatment based on whether or not a person is married may be tolerated, or whether such differences in treatment should be considered as a form of indirect discrimination based on sexual orientation. The recent case-law of the European Court of Justice clearly rejects the idea that Recital 22 of the Employment Equality Directive would justify any difference of treatment between marriage and other forms of union. On the contrary, the Court notes that the exercise by the Member States of their competence to regulate matters relating to civil status and the benefits flowing therefrom 'must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination'. This does not amount to stating that the Member States must create for the benefit of same-sex couples an institution equivalent to marriage, allowing them to benefit the same advantages as those recognised to married couples when they form a stable and permanent relationship.

However, international human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official recognition, the *de facto* durable relationships they enter into leads to extending to them such advantages. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a

deliberate *choice* not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows *a contrario* that advantages recognised to married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

Freedom of movement

Three questions are relevant when examining which implications follow from the requirements of fundamental rights for the implementation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive). A first question is whether the same-sex married person (whose marriage with another person of the same-sex is valid under the laws of Belgium, the Netherlands, or Spain) should be considered a 'spouse' of the citizen of the Union having moved to another EU Member State for the purposes of this Directive, by the host Member State, thus imposing on this State to grant the spouse an automatic and unconditional right of entry and residence. This report concludes that any refusal to do would constitute a direct discrimination on grounds of sexual orientation, in violation of Article 26 of the International Covenant on Civil and Political Rights and of the general principle of equality, as reiterated in Article 21 of the Charter of Fundamental Rights. Altogether though, and despite this requirement of non-discrimination on grounds of sexual orientation, at least eleven Member States appear hostile to the recognition of same-sex marriage concluded abroad, and might refuse to consider as 'spouses', for the purposes of family reunification, the same-sex married partner of a citizen of the Union having exercised his/her free movement rights in the forum State. A clarification of the obligations of the EU Member States under the Free Movement Directive, as regards the recognition of same-sex married couples, would therefore be highly desirable.

A second question is raised in the situation where a couple, formed of two persons of the same-sex, although they cannot marry in their State of origin, has access to registered partnership, or to some equivalent form of civil union, and where such an institution has been entered into. In this case, the Free Movement Directive states that only when the host State 'treats registered partnerships as equivalent to marriage' in its domestic legislation, should it treat registered partnerships concluded in another Member State as equivalent to marriage for the purposes of family reunification. The same rule would seem to be imposed on host Member States where same-sex couples may marry. In total, ten EU Member States are in this situation. In thirteen Member States no

registered partnership equivalent to marriage exists, and in four Member States whichever institution does exist does not produce effects equivalent to marriage.

A third question arises in the hypothesis where no form of registered partnership is available to the same-sex couple in the State of origin, and where the relationship between two partners of the same-sex therefore is purely *de facto*. In this case, the obligation of the host Member State is to 'facilitate entry and residence' of the partner, provided either the partners share the same household (Art. 3(2), a)), or there exists between them a 'durable relationship, duly attested' (Art. 3(2), b)). Such 'durable relationship' is considered to be established ipso facto where a registered partnership has been concluded, according to the Petitions Committee of the European Parliament. This obligation, which requires from the host State that it carefully examines the personal circumstances of each individual seeking to exercise his or her right to family reunification, is not conditional upon the existence, in the host Member State, of a form of registered partnership considered equivalent to marriage. It follows that, where a registered partnership has been concluded between two persons of the same-sex in one Member State, the host Member State either has to treat this union as equivalent to marriage (if the host Member State treats registered partnerships as equivalent to marriage in its own domestic civil law), or must at least 'facilitate entry and residence' of the partner, either because the partners share the same household (Art. 3(2), a)), or because such a registered partnership as a matter of course establishes the existence of a 'durable relationship, duly attested' (Art. 3(2), b)). In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a 'durable relationship' may be proven. While this may be explained by the need not to artificially restrict such means, the risk is that the criteria relied upon by administrations might be arbitrarily applied, and possibly lead to discrimination against same-sex partners, which have been cohabiting together or are engaged in a durable relationship. Further guidance on how these provisions should be implemented would facilitate the task of national administrations, contribute to legal certainty, and limit the risks of arbitrariness and discrimination against same-sex households or relationships.

Asylum and subsidiary protection

Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (the 'Qualification Directive') provides a definition of 'refugee' closely inspired by the 1951 Convention on the Status of Refugees. It states that the notion of 'social group' in that definition 'may include a group based on a common characteristic of sexual orientation'. A comparison of the national legislations implementing the Directive

highlights three areas where it is not interpreted uniformly (3.1.). First, although none of the EU Member States has refused to consider sexual orientation as a source of persecution for the purposes of granting the status of refugee, the inclusion of that ground of persecution remains implicit in the legislation of eight Member States. The interpretation given to this clause varies, particularly regarding the consequences to be drawn from the fact that homosexual behaviour is a criminal offence in the laws of the country of origin. Second, the Qualification Directive specifies that 'sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States' (Art. 10(1), d)). Despite certain hesitations in the implementing legislations of the Member States, it is implicit, but certain, that this exception could not be invoked by reference to any legislation which constitutes a violation of the right to respect for private life, or which constitutes a discrimination in the enjoyment of the right to respect for private life, under the European Convention on Human Rights. Third, the protection thus offered to gays and lesbians under the Qualification Directive should logically extend to transsexuals, since they too form a distinctive 'social group' whose members share a common characteristic and have a distinct identity due to the perception in the society of origin. But this interpretation is not uniformly recognised.

In addition to its stipulations on the recognition of refugee status, the Qualification Directive provides that States shall grant subsidiary protection status to persons who do not qualify as refugees, where such persons fear serious harm upon being sent back to their state of origin (3.2.). Serious harm includes, *inter alia*, the death penalty, as well as 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin' (Art. 15, a) and b)). According to the European Court of Human Rights, the EU Member States are not obliged to refrain from removing from their national territory any LGBT person merely because that person may be subjected to a climate of intolerance in the State of return. However, it should be acknowledged that harassment on grounds of sexual orientation may constitute either persecution, leading to recognise the individual concerned as a refugee if he/she seeks asylum, or (in accordance with the case-law of the European Court of Human Rights) a form of inhuman or degrading treatment leading to subsidiary protection, in according with the provisions of the Qualification Directive cited above.

According to Art 2/h of the Qualification Directive, family members in the context of asylum and/or subsidiary protection include both spouses and unmarried partners in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens (3.3.). 'Spouses' of refugees or individuals benefiting from subsidiary protection would include same-sex spouses in ten EU Member States. The situation is more doubtful in seven other Member States, where the definition of 'spouse' in this context still has to be tested before courts. In the ten Member States in which, by contrast, same-sex spouses would probably not be allowed to join their spouse granted

international protection, this portion of the Qualification Directive is implemented in violation of the prohibition of direct discrimination on grounds of sexual orientation. As regards the partners in unmarried same-sex couples, same-sex partners are not granted a right to residence in fourteen EU Member States. The refusal to grant residence rights to non-married partners is allowed under the Qualification Directive, at least in the absence of a difference in treatment between same-sex and opposite-sex unmarried couples. However, the regime thus established still has to be tested against the principle of equal treatment: In the overwhelming majority of cases, asylum-seekers originate from countries which do not allow same-sex marriages. This inability to marry, combined with the legislation of an EU Member State which refuses to treat unmarried couples in a way comparable to married couples in its legislation relating to aliens, leads to a situation where the family reunification rights of gay and lesbian asylum-seekers of beneficiaries of subsidiary protection are less extensive than those of heterosexual claimants in an otherwise similar position.

Family reunification

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ('Family Reunification Directive') ensures that spouses will benefit from family reunification (Art. 4/1/a). It is however for each Member State to decide whether it shall extend this right also to unmarried or registered partners of the sponsor. However, the Member States should take into account, in implementing the directive, their obligations under Article 6(2) EU[2]. Where a State does not allow a durable partnership to continue by denying the possibility for the partner to join the sponsor, the right to respect for private life is disrupted constituting a violation of Article 8 ECHR, since the relationship could not develop elsewhere, for instance due to harassment against homosexuals in the countries of which the individuals concerned are the nationals or where they could establish themselves (4.1.).

In addition, the directive should be implemented without discrimination on grounds of sexual orientation. A first implication is that the same-sex 'spouse' of the sponsor should be granted the same rights as would be granted to an opposite-sex 'spouse' (4.2.). But the practical impact of two other implications discussed below is more significant.

A second implication is that if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners (an option chosen by 12 EU Member States), this should benefit all such partners, and

---

[2] The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

not only opposite-sex partners. In addition, while the Family Reunification Directive implicitly assumes that it is not discriminatory to grant family reunification rights to the spouse of the sponsor, without extending the same rights to the unmarried partner of the sponsor, even where the country of origin of the individuals concerned does not allow for two persons of the same-sex to marry, the result of this regime is that family reunification rights are more extended for opposite-sex couples, which may marry in order to be granted such rights, than it is for same-sex couples, to whom this option is not open. This may be questioned: even though, in the current state of development of international human rights law, it is acceptable for States to restrict marriage to opposite-sex couples, reserving certain rights to married couples where same-sex couples have no access to marriage may be seen as a form of discrimination on grounds of sexual orientation (4.3.).

Finally, a third implication is that, an EU Member State cannot restrict to opposite-sex partners (4.4.) the benefits of the provisions of EC law on the free movement of persons to the partners of a third-country national residing in another Member State (and which that other Member State treats as family members).

Freedom of assembly

Article 11 of the European Convention on Human Rights protects the freedom of assembly and prohibits restrictions to that freedom based on the content of the message of the demonstrators. The only exception is when this freedom is used with the aim of obstructing rights and freedoms of the European Convention on Human Rights. Thus, demonstrations against LGBT people, which may be seen to incite directly to hatred or discrimination against this group may be prohibited without this leading to a violation of Article 11 ECHR (5.1.).

The report examines two issues. First, regarding the exercise of freedom of assembly by individuals or organisations demonstrating in favour of LGBT rights, it documents certain instances where the authorities (particularly at the local level) have imposed arbitrary or disproportionate restrictions on the organisation of events in favour of LGBT rights (5.2.). Vague or overbroad expressions describing the conditions under which a demonstration may be banned may lead to arbitrariness or discrimination, particularly where notions such as ‘public order’ in effect amount to giving a 'veto right' to counter-demonstrators, who are hostile to LGBT rights and threaten to disrupt 'pride parades' or other similar events. Second, while most EU Member States provide in their domestic legislation for the possibility or banning demonstrations which incite to hatred, violence or discrimination on grounds of sexual orientation, they sometimes make a reluctant use of these powers (5.3.).

Hate speech and criminal law

As illustrated in the area of combating racism and xenophobia through the criminal law, it is compatible with the requirements of freedom of expression to define as a criminal offence incitement to hatred, violence or discrimination against LGBT persons (6.1.). In twelve Member States (a figure which appears bound to increase in the future), the criminal law contains provisions making it a criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation (6.2.). This figure does not include the specific case of harassment in the workplace, which under the Employment Equality Directive should be treated as a form of discrimination and should be subjected to effective, proportionate and dissuasive sanctions, which may be of a criminal nature. In the other Member States, by contrast, hate speech against LGBT people is not explicitly defined as constituting a criminal offence, although in most cases, generally worded offences may equally serve to protect LGBT persons from homophobic speech: only in 4 States are the existing criminal law provisions against hate speech explicitly restricted to the protection of groups other than LGBT people. In addition, apart from criminal law provisions, protection may be sought under civil law in order to combat homophobic speech.

Another issue examined in this chapter concerns homophobic intent as an aggravating factor in committing common crimes (6.3.). Ten EU Member States define such intent as an aggravating circumstance, either for all common crimes, or for a specific set of criminal offences. In fifteen other States, homophobic intent is not an aggravating circumstance for criminal offences. The notion of 'hate crime' is known in six of these States, however, and in at least two States – who do not restrict explicitly the notion of 'hate crimes' to crimes committed with a racist or xenophobic intent – the general formulations used might allow an extension to crimes committed with a homophobic motivation.

Transgender issues

The situation of transgender people may be defined across two dimensions. First, transgender people should be protected from discrimination (7.1.). The view of the European Court of Justice is that the instruments implementing the principle of equal treatment between men and women should be interpreted widely in order to afford a protection against discrimination to transgendered persons. Following this approach, thirteen EU Member States treat discrimination on grounds of transgenderism as a form of sex discrimination, although this is generally a matter of practice of the anti-discrimination bodies or the courts, rather than an explicit stipulation of legislation; in eleven other States, discrimination on grounds of transgenderism is treated neither as sex discrimination nor as sexual orientation discrimination, resulting not only in a

situation of legal uncertainty as to the precise protection of transgender persons from discrimination, but also in a much lower level of protection of these persons, although this could be remedied by the domestic courts interpreting existing national legislation in conformity with the requirements of EC Law. In two Member States, discrimination on grounds of transgenderism is treated as sexual orientation discrimination. This may be more problematic, especially where it results in a lower level of protection. In one Member State there is a special discrimination ground, gender identity, for transgender people.

Categorising discrimination on grounds of transgenderism under sex discrimination means, at a minimum, that the EU instruments prohibiting sex discrimination in the areas of work and employment and in the access to and supply of goods and services, will be fully applicable to any discrimination on grounds of a person intending to undergo, undergoing, or having undergone, gender reassignment. However, such protection from discrimination could easily develop into a broader protection from discrimination on grounds of 'gender identity', encompassing not only transsexuals, but also other categories, such as cross dressers and transvestites, people who live permanently in the gender 'opposite' to that of their birth certificate without any medical intervention, and all those people who wish to present their gender differently. There seems to be a tendency towards broadening the protection of transsexuals in this direction.

Second, the legal rights of transsexuals regarding the conditions for the acquisition of a different gender and the official recognition of the new gender following gender reassignment must be recognised. According to the European Convention on Human Rights all States parties must allow the possibility, in principle within their jurisdiction, to undergo surgery leading to full gender-reassignment (7.2.1.). Most EU Member States impose strict conditions on the availability of gender reassignment operations, generally including waiting periods, and psychological and medical independent expertise, but also, in certain cases, prior judicial authorisation. While often undoubtedly necessary in order to protect individuals in psychologically vulnerable situations, these obstacles to obtaining access to such medical services should be carefully scrutinised, in order to examine whether they are justified by the need to protect potential applicants or third persons, or whether they are imposing a disproportionate burden on the right to seek medical treatment for the purposes of gender reassignment.

The European Convention on Human Rights guarantees the legal recognition of the new gender acquired followed a gender reassignment medical operation; in addition it recognises the right of the transgendered person to marry a person of the gender opposite to that of the acquired gender (7.2.2.). Although 4 EU Member States still seem not to comply fully with this requirement, the situation in the other Member States is generally satisfactory. But the approaches vary. Whereas in a few Member States, there is no requirement to undergo hormonal treatment or surgery of any kind in order to obtain an official recognition of gender reassignment, in other Member States, the official

recognition of a new gender is possible only following a medically supervised process of gender reassignment sometimes requiring, as a separate specific condition, that the person concerned is no longer capable to beget children in accordance with his/her former sex, and sometimes requiring surgery and not merely hormonal treatment. In certain Member States the official recognition of gender reassignment requires that the person concerned is not married or that the marriage be dissolved. This obliges the individual to have to choose between either remaining married or undergoing a change which will reconcile his/her biological and social sex with his/her psychological sex: it has therefore been proposed that the requirement of being unmarried or divorced as a prerequisite for authorisation for sex change should be abandoned. Finally, the ability to change one's forename in order to manifest the gender reassignment is recognised under different procedures. In most Member States, changing names (acquiring a name indicative of another gender than the gender at birth) is a procedure available only in exceptional circumstances, generally conditional upon medical testimony that the gender reassignment has taken place, or upon an official recognition or gender reassignment, whether or not following a medical procedure.

Other relevant issues

The lack of reliable statistical data, in almost all the EU Member States, about the extent of discrimination on grounds of sexual orientation or about the impact of legislation on the situation of LGBT persons, is mostly due to the fear that collecting such data will result in a violation of the domestic legislation protection personal data. Undeniably, it is indispensable to protect the personal data relating to sexual orientation, which are particularly sensitive given the risks of misuse of such data. The report recalls however that both the 1995 Personal Data Directive and the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data are only concerned with 'personal data', namely 'any information relating to an identified or identifiable individual.' No such personal data are involved where information is collected on an anonymous basis or once the information collected is made anonymous in order to be used in statistics, since such data cannot be traced to any specific person. Similarly, while the European Court of Human Rights has made clear that Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, is applicable to instances of processing of personal data, this does not extend beyond the situations where information is identified to one particular individual, or where it can be traced back to one individual without unreasonable efforts. Thus, personal data protection legislation should not be an obstacle, in the future, to improving our approaches to discrimination on grounds of sexual orientation by the collection and processing of data relating to their situation and to the effectiveness of the existing legal framework.

The report also identifies as a further challenge in the promotion of the rights of LGBT persons their access to reproductive health services, particularly for lesbian women seeking to benefit from artificial insemination.

Good practice

Four sets of good practices are highlighted. Two of these are means to overcome the underreporting of discrimination on grounds of sexual orientation, or the lack of reliable statistical data on this subject, as illustrated by the paucity of such data in the national contributions. A third set of good practices concern the proactive policies public authorities could take in order to promote the visibility of homosexuality and various gender identities, in order to create a climate where LGBT persons will have nothing to fear from being open about their identity. Finally, one good practice relates to the need to protect transgendered persons from investigations into their past, particularly into their past professional experiences in the context of job applications.

1. Implementation of Employment Directive 2000/78/EC

The Employment Equality Directive (Council Directive 2000/78/EC (27.11.2000)) prohibits both direct and indirect discrimination on grounds of sexual orientation – including harassment, victimisation, and the instruction to discriminate –, in both the private and the public sectors, in work and employment. This prohibition applies in relation to conditions for access to employment, to self-employment or to occupation, access to vocational guidance or vocational training, employment and working conditions, and membership of, and involvement in, organisations of workers or employers (Art. 3(1)). The directive was to be implemented by the EU Member States by 2 December 2003. The adoption of the Employment Equality Directive followed that of the Racial Equality Directive (Council Directive 2000/43/EC (29.6.2000)), which prohibits discrimination on grounds of race or ethnic origin not only in work and employment, but also as regards social protection (social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public, including housing.

The national contributions prepared by the FRALEX experts for this comparative study confirm the findings of other reports[3] that have illustrated the strong variations between the EU Member States in the implementation of the Equality Directives. This is true in particular as regards the requirement of non-discrimination on grounds of sexual orientation. Three groups of States of almost identical importance may be distinguished.

The first group consists of nine Member States (DK, EE, EL, FR, IT, CY, MT, PL and PT), that have implemented the Employment Equality Directive regarding sexual orientation discrimination, in the fields designated by Article 3(1) of the Directive, i.e., in matters related to work and employment. Three of these States, however, are currently debating the extension of the protection from discrimination on grounds of sexual orientation (EE, FR, PL) to other fields. In addition, in Greece, such an extension could take place relatively easily, since it requires only a presidential decree, under the terms of Law 3304/05. The situation in Cyprus is also specific, since, while the 2004 Equal Treatment in Employment and Occupation Law implementing the Employment Equality Directive does not go beyond employment, the equality body set up under a distinct

---

[3] See, eg, Mark Bell, Isabelle Chopin and Fiona Palmer (for Migration Policy Group), Developing Anti-Discrimination Law in Europe, 13.12.2007 (overview of the implementation in the EU-25 of the two Equality Directives, on the basis of information updated on 7.1.2007), see http://www.migpolgroup.com/documents/3949.html (last consulted on 3.5.2008).

legislation is competent to investigate complaints of discrimination on grounds of sexual orientation also in social insurance, healthcare, education, and access to, or provision of, goods and services, including housing.

The second group consists of eight Member States (BE, BG, DE, ES, AT, RO, SI and SK), where the scope of the protection from discrimination on grounds of sexual orientation has been extended to all the fields covered by the Racial Equality Directive (Council Directive 2000/43/EC (29.6.2000)), as described above, although the situation of two of these States (BE and DE) is complicated by the fact that, due to their federal structure, the implementation of the Employment Equality Directive is partly a competence of the sub-national entities. Austria may be said to belong to this category, although only seven of the nine provinces have adopted legislation extending the prohibition of discrimination on grounds of sexual orientation beyond employment (regulated at federal level through the Equal Treatment Act and the Federal Equal Treatment Act, except as regards civil servants in the provincial and communal administrations), to the other fields covered under the Racial Equality Directive.

The third group consists of the ten remaining Member States (CZ, IE, LV, LT, LU, HU, NL, FI, SE, UK), in which the protection of discrimination on grounds of sexual orientation has been partially extended beyond employment and occupation, in order to cover certain but not all fields to which the Racial Equality Directive applies. In three of these States (LV, FI and SE), the legislative framework prohibiting discrimination is currently undergoing a revision, however, which could lead to further extensions of the prohibition of discrimination.

The following table offers an overview of the most important pieces of legislation adopted by each EU Member State in order to implement the Employment Equality Directive (first column), explaining where these instruments limit their protection to the sphere of employment and occupation (second column, light blue), or where they go further (third column, dark blue):

Table 1.1: Implementation of the Employment Equality Directive in EU Member States

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Belgium	Act of 10 May 2007 aimed at combating particular forms of discrimination (federal level),[4] and six legislative instruments (decrees or ordinances) adopted by the Regions and Communities.	To the extent the federal legislator is competent, the 2007 federal anti-discrimination act applies to the provision of goods, facilities and services; social security and social benefits; employment in both the private and public sector; membership of or involvement in an employers' organisation or trade unions; official documents or (police) records; and access to and participation in economic, social, cultural or political activities accessible to the public.	
Bulgaria	The Закон за защита от дискриминация [Protection Against Discrimination Act (PADA)])[5].	The PADA is explicitly applicable to the exercise of any legal right, thus going beyond employment and occupation.	
Czech Republic	The Employment Equality Directive was transposed through the Labour Code (Zákoník práce) and the Employment Act (Zákon o zaměstnanosti). Specific legislations prohibit discrimination, inter alia on grounds of sexual orientation, in the armed forces or in public service (Act on Professional Soldiers (Zákon o vojácích z povolání);[6] Act on the Service Relationship of Members of the Security Corps (Zákon o služebním poměru bezpečnostních sborů);[7] Act on the Service of Public Servants (Služební zákon)[8]).	While no general legislation prohibits discrimination on grounds of sexual orientation beyond employment, the Consumer Protection Act (Zákon o ochraně spotřebitele)[9] contains a general prohibition of discrimination.	

4 Moniteur belge, 30.5.2007.

5 Bulgaria / Закон за защита от дискриминация (PADA), (1.01.2004).

6 Zák. č. 221/1999 Sb., o vojácích z povolání (Act No. 221/1999 Coll., Act on Professional Soldiers), available at http://portal.gov.cz/wps/portal/_s.155/701?number1=221%2F1999&number2=&name=&text= (Czech only) (opened on February 19, 2008).

7 Zák. č. 361/2003 Sb., o služebním poměru bezpečnostních sborů (Act no. 361/2003 Coll., Act on Service Relationships of Members of the Service Corps), available at http://portal.gov.cz/wps/portal/_s.155/701?number1=361%2F2003&number2=&name=&text= (Czech only) (opened on February 19, 2008).

8 Zák. č. 218/2002 Sb., Služební zákon (Act no. 218/2002 Coll., Act on Service of Public Servants), available at http://portal.gov.cz/wps/portal/_s.155/701?number1=218%2F2002&number2=&name=&text= (Czech only) (opened on February 19, 2008).

9 Zák. č. 634/1992 Coll., o ochraně spotřebitele (Act No. 634/1992 Coll., Consumer Protection Act (Sec. 6), available on http://portal.gov.cz/wps/portal/_s.155/701?number1=634%2F1992&number2=&name=&text= (Czech only) (opened at February 19, 2008).

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Denmark	Amendment to the Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.[Act on the Prohibition of Differential Treatment in the Labour Market, etc.], adopted in March 2004[10].	The implementation of the Employment Equality Directive does not extend beyond employment.	
Germany	The Transposition Law of 14 August 2006 contains the General Law on Equal Treatment [Allgemeines Gleichbehandlungsgesetz – AGG].		The scope of the AGG, which prohibits discrimination on grounds of sexual orientation, is equivalent to that of the Racial Equality Directive (Article 2 of the AGG), however, while discrimination on grounds on sexual orientation is prohibited in civil law transactions, certain civil law relationships for which affinities between the parties are considered paramount, are exempt from the prohibition.
Estonia	The Employment Equality Directive is currently implemented in part by Eesti Vabariigi töölepingu seaduse ja Eesti Vabariigi ülemnõukogu otsuse 'Eesti Vabariigi töölepingu seaduse rakendamise kohta' muutmise seadus [Amendment Act of the Republic of Estonia Employment Contracts Act and the Decision of the Supreme Council of the Republic of Estonia 'On the Implementation of the Employment Contracts Act'],[11] but it is expected that a more comprehensive Equal Treatment Act will be adopted in 2008.		When the Equal Treatment Act will be adopted, it will prohibit discrimination on grounds of sexual orientation not only in the area of employment but also in health care, social security, education, access to goods and provisions of services.
Greece	Law 3304/05[12] implements in Greece the Employment Equality Directive as well as the Racial Equality Directive.	Although Law 3304/05 prohibits discrimination on the basis of sexual orientation only in respect of employment and occupation, it foresees the extension of its scope of application by means of a presidential decree (Article 27).	

10 Denmark / Act No. 253 of 7. April 2004 Act on the Prohibition of Differential Treatment in the Labour Market, etc.

11 Estonia/Riigikantselei (30.04.2004) Riigi Teataja I, 37, 256.

12 Greece / Official Gazette (FEK) A 16, 27/01/05, p. 67-72

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Spain	The Employment Equality Directive was implemented by Law 62/2003 of 30 December 2003 on Medidas fiscales, administrativas y del orden social [Fiscal, Administrative and Social Measures][13], and a number of subsequent legislative measures.	Articles 511 and 512 of the Penal Code prohibit discrimination on grounds of sexual orientation committed by public servants, inter alia, in access to public services (art. 511), and by other persons in the exercise of their profession (art. 512). Furthermore Law 55/2003 of 16 December on the Estatuto Marco del personal estatutario de los servicios de salud [Framework Statute of Health Service Staff][14] prohibits discrimination in the field of healthcare.	
France	The Employment Equality Directive has been implemented by amendment to the Labour Code (Article L. 122-45).[15] The anti-discrimination legislative framework is currently undergoing a revision (Bill No. 514 filed at the National Assembly on 19 December 2007, currently examined by the French Parliament) in order to ensure compliance with the Equality Directives.	In the field of housing, Art. 158 of Law n° 2002-73 of 17 January 2002 prohibits discrimination on grounds of sexual orientation.	
Ireland	The Equality Act 2004 – which amended the pre-existing Employment Equality Act 1998 and the Equal Status Act 2000 – purports to implement Employment Directive 2000/78/EC.		The scope of protection from sexual orientation discrimination is broader than that required under the Employment Equality Directive in that access to goods, services and other opportunities are covered by the Equal Status Act 2000, as amended by the Equality Act 2004.
Italy	The Employment Equality Directive has been implemented by Decreto legislativo [Legislative Decree] n. 216 of 9.07.2003, in force since 28.08.2003[16].	The scope of the protection from discrimination on grounds of sexual orientation is equivalent to that prescribed under the Employment Equality Directive.	
Cyprus	The 2004 Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law[17] and the 2004 Equal Treatment in Employment and Occupation Law[18].	The equality body set up by the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law has the power to investigate complaints of discrimination on the ground of, inter alia, sexual orientation not only in employment and occupation, but also in social insurance, healthcare, education and access to goods and services including housing.	

13 Spain/Ley 62/2003 (30.12.2003).
14 Spain/Ley 55/2003 (16.12.2003).
15 France / Loi n° 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations, JORF n°267 du 17.11.2001, p. 18311, see http:// www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MESX0004437L (last consulted on 4.5.2008).
16 Official Journal on 13 08.2003.
17 Cyprus / The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law No. 42(1)/ 2004 (19.03.2004)
18 Cyprus / The Equal Treatment in Employment and Occupation of 2004 No. 58 (1)/2004 (31.3.2004).

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Latvia	The Employment Equality Directive has been implemented by the Latvian Labour Law of 2001[19] as amended in 200420 and in 2006, the latter in order to explicitly ban discrimination on grounds of sexual orientation[21] and to extend the prohibition of discrimination to the civil service.[22]	Although discrimination on grounds of sexual orientation is explicitly forbidden only in (private or public) employment, sexual orientation can be implicitly read also under the 'other conditions' in the Law on Social Security after amendments of 2005[23]. However, the Latvian legal framework is currently in a state of flux for the moment.	
Lithuania	The Employment Equality Directive has been implemented by the 2003 Lietuvos Respublikos Lygių galimybių įstatymas [Law on Equal Treatment of the Republic of Lithuania], in force since 1.1.2005,[24] which protects from discrimination on all grounds (including sexual orientation). Furthermore, the general principle of equality embodied in Art. 29 of the Constitution, which in principle is directly applicable by courts, is reiterated in the Darbo Kodeksas [Labour Code][25] and in the Civilinis kodeksas [Civil Code].	The Law on Equal Treatment ensures a protection from discrimination on the ground of sexual orientation in the fields of access to goods and services and education, although not as regards social advantages and social protection.	
Luxem-bourg	The Employment Equality Directive was implemented by the Law of 28 November 2006 on equal treatment.[26]	Although the Law of 28 November 2006 on equal treatment applies not only to employment, but also to social welfare benefits, social security, health care, education, access to and provision of public goods and services, including those related to housing, the prohibition of discrimination on grounds of sexual orientation does not apply to social security payments and benefits provided by public or assimilated entities.	

19 Latvia/Darba likums (20.06.2001), available at: http://www.ttc.lv/index.php?skip=75&itid=likumi&id=10&tid=59&l=LV (24.02.2008).

20 Latvia/Likums Grozījumi Darba likumā [Law Amendments to the Labour Law] (22.04.2004), available at: http://www.saeima.lv/saeima8/mek_reg.fre (24.02.2008).

21 Latvia/Likums Grozījumi Darba likumā [Law Amendments to the Labour Law] (21.09.2006), available at: http://www.saeima.lv/saeima8/mek_reg.fre (24.02.2008).

22 Latvia/Valsts Civildienesta likums [Civil Service Law] (07.09.2000), available at: http://www.likumi.lv/doc.php?id=10944&mode=KDOC (24.02.2008).

23 Latvia/Likums Grozījumi likumā Par sociālo drošību [Law Amendments to the Law on Social Security] (01.12.2005), Art. 2.1, available at: http://www.ttc.lv/index.php?skip=240&itid=likumi&id=10&tid=59&l=LV (24.02.2008).

24 Lithuania/Lietuvos Respublikos Lygių galimybių įstatymas. Official publication Valstybės žinios, 2003, No.114-5115. Available in English at: http://www.lygybe.lt/ci.admin/Editor/assets/Law%20on%20Equal%20Treatment.doc (14.02.2008)

25 Lithuania/Darbo kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Darbo Kodeksas. Official publication Valstybės Žinios, 2002 Nr. 64-2569. Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=311264 (14.02.2008).

26 Luxembourg/Loi du 28 novembre 2006 sur l'égalité de traitement (28.11.2006).

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Hungary	The equality directives have been implemented by the Act on Equal Treatment and the Promotion of Equal Opportunities (ETA), which came into force on 27.01.2004.[27]		The ETA prohibits discrimination on grounds of sexual orientation in the public sector, in all fields, and in the private sector, as regards employment, goods and services and any legal relationships established with state funding. The scope of the protection from discrimination on grounds of sexual orientation thus is almost equivalent to that of the Racial Equality Directive.
Malta	The Employment Equality Directive was implemented by the Employment and Industrial Relations Act 2002,28 as amended by Legal Notice 461 of 200429 in order to explicitly include a prohibition of discrimination on grounds of sexual orientation.	The prohibition of discrimination on grounds of sexual orientation does not extend beyond work and employment.	
Nether-lands	The 1994 Algemene Wet Gelijke Behandeling [General Equal Treatment Act (GETA)],[30] as amended in 2004 by the EG-Implementatiewet Awgb [EC Implementation Act (GETA)],[31] prohibits discrimination on grounds of sexual orientation.		The GETA prohibits discrimination on grounds of sexual orientation in the field of employment (Article 5), in the field of the liberal professions (Article 6), by organisations of employees, employers or professionals (Article 6a) and in the provision of goods or services, including education, or educational or careers guidance (Article 7). Only distinctions on grounds of race are prohibited in the fields of social protection, social security and social advantages (Art. 7a). Unilateral decisions by the authorities are not covered.

27 Hungary/2003. évi CXXV. törvény/(28.12.2003).
28 Chapter 452 of the laws of Malta
29 http://docs.justice.gov.mt/lom/Legislation/English/SubLeg/452/95.pdf - visited on the 15th February 2008
30 Staatsblad [Law gazette] (1994), 230.
31 Staatsblad [Law gazette] (2004), 119.

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Austria	At federal level, Part 2 of the Gleichbehandlungsgesetz [Equal Treatment Act (ETA)][32] and, as regards employment with federal public bodies, Part 2 of the Bundes-Gleichbehandlungsgesetz [Federal Equal Treatment Act].[33] The provinces are competent for the Directive's transposition into provincial law, in regard to the equal treatment of civil servants in provincial and communal administrations, and regarding the access to and supply of goods and services offered by the provinces and communities including social protection, social advantages, education and self employment.	Provincial legislation in seven of the nine provinces covers employment and occupation, but also access to and supply of goods and services offered by the provinces and communities, including social protection, social advantages, education and self employment.	
Poland	The Employment Equality Directive was implemented by amendments to the Act of 26.06.1974 – Kodeks pracy [Labour Code],[34] by the Act of 20.06.2004 – Ustawa o promocji zatrudnienia i instytucjach rynku pracy [Promotion of Employment and Institutions of the Labour Market Act],[35] and by amendments to the Act of 17.11.1964 – Kodeks Postępowania Cywilnego [Civil Procedure Code][36],	A new anti-discrimination law is currently under preparation by the Ministry of Labour[37] that would prohibit discrimination on different grounds, including sexual orientation, not only in work and employment, but also in social security and social protection, healthcare, and education, although the provision of and access to goods and services would only be subject to a prohibition of discrimination on grounds of race or ethnic origin.	
Portugal	Labour Code (which came into effect in 2003) and Law 35/2004 complementing the Labour Code.	The prohibition of discrimination on grounds of sexual orientation applies only to employment.	

32 Gleichbehandlungsgesetz [Equal Treatment Act], Austria/BGBl I 66/2004, last amended by BGBl I 82/2005 (10.08.2005).

33 Austria/BGBl I 100/1993 as last amended by BGBl I 96/2007, (28.12.2007).

34 Poland/Labour Code Unified text – Dziennik Ustaw [Journal of Laws] of 1998, No. 21, item 94 as amended, Journal of Laws of 2003, No. 213, item 2081.

35 Journal of Laws of 2004, No. 99, item 1001, as amended.

36 Poland/ Civil Procedure Code Unified text – Dziennik Ustaw [Journal of Laws] of 1964, No. 43, item 296, as amended, Journal of Laws of 2004, No. 172, item 1804.

37 Poland/Ustawa o równym traktowaniu (project) [Draft Law on Equal Treatment] of 31.08.2007, available at http://www.mps.gov.pl/bip/index.php?idkat=1372 (04.02.2008).

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Romania	A number of legislative acts were adopted since 2000 in order to implement the Employment Equality Directive.[38]	The existing prohibition of discrimination covers employment and labour-related issues, but also access to services, access to health, education etc., since it applies in relation to all 'human rights and fundamental freedoms or rights recognised by Romanian legislation, in the political, economic, social and cultural field or in any other domains of public life.'[39]	
Slovenia	The Employment Equality Directive was implemented by the Zakon o delovnih razmerjih [Employment Relationships Act],[40] in force since 1.1.2003, and by the Implementation of the Principle of Equal Treatment Act[41].	The Implementation of the Principle of Equal Treatment Act prohibits discrimination against any person in the exercise of his/her rights and duties and in the exercise of his/her fundamental freedoms in any aspect of the social sphere, in particular in the fields of employment, education, social security and access to and provision of goods and services.	
Slovakia	Act No. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination (Anti-discrimination Act),[42] recently amended[43].	The Act on Higher Education[44] and the School Act[45] were amended in 2007[46] in order to prohibit discrimination on grounds of sexual orientation. The Act on Providers of Health Care also includes such a prohibition.[47] In addition, the 2008 amendment to the Anti-discrimination act extends the prohibition of discrimination on grounds of sexual orientation beyond employment to other areas such as social care, medical treatment, access to goods and services and education.	

38 Romania/ Law 48/2002 concerning the adoption of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (31.01.2002); see also Romania/ Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (30.08.2003); see also Romania/ Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (11.04.2004); see also Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20.07.2006).

39 Article 3 of the Ordinance 137 and Art. 1.(2) of Romania/ Law 48/2002 concerning the adoption of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (31.01.2002).

40 Slovenia/Employment Relationships Act 42/02 and 103/07 as amended (03.05.2002)

41 Slovenia/Implementation of the Principle of Equal Treatment Act 93/07 (27.09.2007).

42 Slovakia/ Antidiskriminačný Zákon 365/2004 (20.05.2004).

43 This last amendment did not come into force yet. It was not published in the official journal of the collection of laws. The approved version is available at: http://www.nrsr.sk/exeIT.NRSR.Web.Webclass/Tmp/N%E1vrh%20z%E1kona_474.doc (25.02.2008).

44 Slovakia/zákon 131/2002 (21.02.2002).

45 Slovakia/zákon 29/1984 (22.03.1984).

46 Slovakia/zákon 363/2007 (03.07.2007).

47 Slovakia/zákon 578/2004 (21.10.2004).

Member State	Implementing legislation	... limited to employment and occupation (light blue)	... going beyond employment and occupation (dark blue)
Finland	The Employment Equality Directive was implemented primarily by the Non-discrimination Act [yhdenvertaisuuslaki (21/2004)] (and, as regards the public service in the Åland Islands, the Provincial Act on Prevention of Discrimination in the Province of Åland Islands [Landskapslag om förhindrande av diskriminering i landskapet Åland (66/2005)]). The Employment Contracts Act [työsopimuslaki (55/2001)], Civil Servants Act [valtion virkamieslaki (750/1994)], Act on Civil Servants in Municipalities [kunnallisista viranhaltijoista annettu laki (304/2003)] and Seaman's Act [merimieslaki (423/1978)], were amended in order to include the prohibition of discrimination; although the Civil Servants Act omitted to refer to sexual orientation until an amendment adopted in 2007 and in force since 1.1.2008.	The Non-discrimination Act applies to employment and education, as regards sexual orientation. The Provincial Act on Prevention of Discrimination in the Province of Åland Islands goes beyond prohibiting discrimination on grounds od sexual orientation in employment to include healthcare and social security, schools, provision of goods and services and housing.	
Sweden	The Employment Equality Directive has been implemented by the adoption in 2003 of amendments to the Prohibition of Discrimination Act (lag om förbud mot diskriminering, (SFS 2003:307)) and to the Act on Combating of Discrimination in Employment on the Grounds of Sexual Orientation (lag om ändring i lagen 1999:133 om förbud mot diskriminering i arbetslivet på grund av sexuell läggning (SFS 2003:310)), the latter last amended in 2005 (SFS 2005:479).	The Prohibition of Discrimination (Goods and Services) Act (SFS 2003: 307) (lag om förbud mot diskriminering(varor, tjänster, bostäder, samhällsservice) prohibits discrimination, beyond employment, in the provision of goods, services or housing by public authorities (Sec 9), in services provided by the social services including social insurance and related benefits systems (Sec 10), the unemployment insurance system (Sec 12), the health and medical care services (Sec 13) and student aid (Sec 12 a). A pending legislative proposal for uniform discrimination legislation (SOU 2006:22) would extend this prohibition to anyone providing goods and services.	
United Kingdom	2003 Sexual Orientation (SO) Regulations applicable in Great Britain (GB)[48] and 2003 Northern Ireland (NI) Regulations,[49] complemented by the Equality Act (Sexual Orientation) Regulations 2007[50] and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 as amended.[51]	The 2007 Regulations prohibit discrimination on grounds of sexual orientation in the provision of goods, facilities, services, education, management and disposal of premises and the exercise of public functions.	

[48] UK/ Employment Equality (Sexual Orientation) Regulations 2003, Statutory Instrument 2003 No.1661 (01.12.2003), available at: http://www.opsi.gov.uk/si/si2003/20031661.htm (15.02.2008).

1.1. The hierarchy of grounds under the equality directives

The hierarchy of grounds seemingly established under the two Equality Directives adopted in 2000 has been contested since the adoption of these instruments.[52] In this context two differences between the two directives can be noted: First, discrimination on grounds of race and ethnic origin is prohibited in a wider number of fields than discrimination on the other grounds listed in Article 13 EC. Second, only the Racial Equality Directive provides for the establishment by the Member States of an equality body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (Art. 13 of the Racial Equality Directive).

The fact that certain grounds of discrimination benefit from a better protection than others does not constitute *per se* a violation of the international law of human rights. Indeed, the idea that certain grounds are more 'suspect' than others, justifying a stricter degree of scrutiny of differences in treatment based on such characteristics, is familiar in international jurisprudence. However, even though the idea of a 'hierarchy of grounds' is not *per se* prohibited under international law, differences in treatment between different categories as to the degree of protection they are afforded can only be acceptable if they are reasonably and objectively justified, which requires that they pursue a legitimate aim and that a reasonable relationship of proportionality exists between the means employed and the aim sought.[53] In addition, and even more importantly, 'sexual orientation', just like 'gender identity',[54] clearly have acquired the status of 'suspect grounds' in

---

49 UK/ Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, Statutory Rules of Northern Ireland 2003 No. 497 (02.12.2003), available at: http://www.opsi.gov.uk/sr/sr2003/20030497.htm (15.02.2008).

50 UK/ Equality Act (Sexual Orientation) Regulations 2007 Statutory Instrument 2007 No. 1263 (30.04.2007), available at: http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1 (15.02.2008).

51 The Equality Act (Sexual Orientation) (Amendment No 2) Regulations (Northern Ireland) 2007, Statutory Rules of Northern Ireland 2006 No. 439 (01.06.2007), available at: http://www.opsi.gov.uk/sr/sr2007/nisr_20070261_en_1 (15.02.2008). See below for discussion of the successful challenge to part of these Regulations in Re Christian Institute and others' application for judicial review [2008] Industrial Relations Law Reports (IRLR) 36.

52 See recently the call of ILGA to the President of the European Commission, Mr Barroso: 'Put an end to hierarchy of anti-discrimination protections in EU!', 19.4.2008, www.socialplatform.org/News.asp?news=17201 (last consulted on 1 May 2008)

53 Eur. Ct. HR (GC), Burden v. the United Kingdom, Appl. No. 13378/05, judgment of 29 April 2008, para. 60.

54 Following the introduction of the Yogyakarta Principles, sexual orientation is understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender', while gender identity is understood to refer to 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.

international human rights law – and therefore, if any hierarchy is to exist, these grounds should be placed at its top, rather than at its bottom. The adoption in 2006 of the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* by a group of eminent human rights experts bears testimony to the consensus which exists in this regard.[55] Within the European Union itself, sexual orientation is explicitly included among the list of prohibited grounds of discrimination in Article 21(1) of the Charter of Fundamental Rights,[56] which again provides an indication of the importance attached to this ground and of the clear refusal to tolerate discrimination on grounds of sexual orientation in the EU.

The case-law of the European Court of Human Rights illustrates this in the context of Article 14 of the European Convention on Human Rights, which prohibits any discrimination in the enjoyment of the rights and freedoms of the Convention: partially for the same motives that interference with the sexual life of a person will only be justified by very serious reasons[57] – being related to the most intimate aspects of one's personality, such matters should in principle not concern the public sphere –, the Court has considered that differential treatment based on sexual orientation also requires a particularly serious justification.[58] Under the European Social Charter, the European Committee of Social Rights has considered that legislation prohibiting discrimination in employment must protect from discrimination either on all grounds or, at least, on the grounds of political opinion, religion, race, language, sex, age and health;[59] and the ECSR occasionally has expressed doubts as to the compatibility with para. 2 of Article 1 ESC of a legislation outlawing discrimination only with respect to certain of these grounds. Notably, while this list of 'suspect' grounds goes otherwise beyond that of Article 13 EC in certain respects, it does not include sexual orientation. But this is an

---

55 See www.yogyakartaprinciples.org (last visited 1.5.2008). While these Principles have no legal status, they are an indication of the consensus of the legal community.

56 OJ C 103, 13.12.2007, p. 1.

57 See, e.g., Eur. Ct. HR, Smith and Grady v. the United Kingdom, judgment of 27 September 1999; Lustig-Prean and Beckett v. the United Kingdom (Appl. N° 31417/96 and 32377/96), judgment of 27 September 1999; and Eur. Ct. HR (3d sect.), A.D.T. v. the United Kingdom (Appl. N° 35765/97), judgment of 31 July 2000, ECHR 2000-IX, para. 37.

58 See Eur. Ct. HR (1st section), L. and V. v. Austria (Appl. N° 39392/98 and 39829/98), judgment of 9 January 2003, para. 45; Eur. Ct. HR, S.L. v. Austria (Appl. N° 45330/99), judgment of 9 January 2003, para. 36; Eur. Ct. HR (1st sect.), Karner v. Austria (Appl. N°40016/98), judgment of 24 July 2003, para. 37.

59 In recent Conclusions relating to Italy, the European Committee of Social Rights examined the provisions which protect from discrimination in employment in the Italian legal system. Finding that neither Article 3 of the Constitution nor Article 15 of Act No. 300/1970 (the Workers' Statute) – which prohibits any agreement or act discriminating against a worker because of his or her political opinions, religion, race, language or sex – offer a protection against discrimination based on age or health, the ECSR concluded that this omission should be remedied under para. 2 of Article 1 of the Charter (Concl. 2002 (Italy), p. 75). In its Conclusions relating to Romania on the same provision of the Charter and during the same cycle of control, the ECSR noted expressly that health-based discrimination was prohibited in the Romanian legal system, despite it not being explicitly mentioned in the applicable regulations (Concl. 2002 (Romania), pp. 117-121).

exception, and the ECSR might reasonably be expected to explicitly add sexual orientation to the list.

What makes the current situation particularly difficult to defend is that there appears to be no justification, other than political, for treating discrimination on grounds of sexual orientation any differently from discrimination on grounds of race or ethnic origin. The principles of subsidiarity and proportionality regulating the exercise by the European Community of powers in the areas in which it has no exclusive competence,[60] and indeed the very wording of Article 13 EC which refers to 'the limits of the powers conferred by [the EC Treaty] upon the Community', could have explained the adoption of legislative instruments prohibiting discrimination only in employment, arguably because this area bears the closest relationship with the objective of the establishment of the internal market. But since the Racial Equality Directive, which has the same legal basis as the Employment Equality Directive, goes beyond these spheres, such a justification simply cannot be invoked. It should therefore come as no surprise that in certain Member States, the idea that all discrimination grounds should benefit an equivalent degree of protection has been influential in guiding the implementation of the equality directives. When legislation was adopted in Germany in order to implement the equality directives, the extension to sexual orientation (as well as to religion and belief, age, or disability) of the scope of the prohibition of discrimination was considered to be required, in order to avoid the exclusion of fundamental areas of legal life from the protection against discrimination.[61] In Belgium, the Constitutional Court (Court of Arbitration) took the view, in its judgment n° 157/2004 of 6 October 2004, that the list of protected grounds contained in anti-discrimination legislation should not arbitrarily exclude certain grounds which are found in international human rights instruments (political opinion and language). As we have seen, already in eight EU Member States (and this number may soon be growing), the scope of the protection from discrimination on grounds of sexual orientation has been extended to all fields covered by the Racial Equality Directive, precisely in order to avoid a hierarchy of grounds of prohibited discrimination.

---

60 Art. 5 al. 2 EC; and Protocol (n°30) on the application of the principles of subsidiarity and proportionality, appended to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, OJ C 340, 10.11.1997.

61 See official reasoning, in: BT-Drs 16/1780 from 6th June 2007, p. 2.

1.2. The establishment of equality bodies with a competence extending to discrimination on grounds of sexual orientation

As already mentioned, apart from their different scope of application *ratione materiae*, the Racial Equality Directive and the Employment Equality Directive also differ in that only the former imposes on the Member States an obligation to establish an equality body. The table at the end of this section identifies the type of equality body for each Member State and examines if an equality body is competent to address discrimination on grounds of sexual orientation, if it is specialised on sexual orientation or competent for a number of grounds, and what its powers are. From this comparative analysis we can draw a number of conclusions.

There is a general convergence towards the model of *a single equality body, competent to deal with all discrimination grounds*. This is the model already in place in 17 Member States (BE, BG, DE, EL, FR, IE, CY, LV, LT, LU, HU, NL, AT, RO, SI, SK, and most recently, with the replacement of specialised bodies concerning race, sex and disability by the single Commission for Equality and Human Rights, the UK). In addition, while nine other Member States do not have in place at the time of writing an equality body competent to address discrimination on grounds of sexual orientation, four of these States are moving in this direction: in Denmark an Act establishing the Equality Treatment Board has been adopted and will enter into force in January 2009[62]; in Estonia, the Equal Treatment Act current submitted to Parliament would develop the Gender Equality Commissioner into an Equality Commissioner with a competence extended to all grounds of discrimination; in Italy, it is likewise envisaged to extend the competences of the Office against Racial Discrimination (UNAR); and in Portugal, the Commission for Citizenship and Gender Equality is considering to similarly expand the scope of its activities.

Currently only Sweden has a body specifically tasked to deal with discrimination on grounds of sexual orientation, namely HomO, one of the four Equality Ombudspersons. But this exceptional situation may not last, since there are proposals, currently pending, to merge all four Ombudspersons into one single ombudsinstitution. In sum, we may within the next year or two arrive at a situation in which 22 Member States will have a single equality body competent to address all grounds of discrimination.

Nine Member States do not have an equality body competent to address discrimination on grounds of sexual orientation in place (CZ, DK, EE, ES, IT, MT, PL, PT, FI). In five of these, an Ombudsperson institution might be competent to receive complaints about

---

62 Law nr 387 of 27/05/2008 on Equal Treatment.

discrimination on grounds of sexual orientation (CZ, EE, ES, PL, FI). While there are significant variations in both the powers of these institutions and in the resources they have at their disposal, it is clear that the establishment of a certain type of ombudsinstitutions cannot be considered as an adequate substitute for equality bodies, such as those envisaged by the Racial Equality Directive regarding discrimination on grounds of race or ethnic origin. The reason is that those Ombudspersons may only receive complaints about either maladministration by public bodies, or violations of human rights by these bodies. With the possible exception of the Chancellor of Justice in Estonia, who may be requested to act as a mediator in private disputes, these Ombudsinstitutions cannot address discrimination in the private sector.

Ombudsinstitutions are not in principle an adequate alternative to the establishment of equality bodies competent to address discrimination based on sexual orientation. It should therefore come as no surprise that equality bodies have been set up in a number of States that have ombudsinstitutions, often established in the late 1980s and 1990s following the 'Scandinavian model'. This may create problems of a different sort, however, since the functions of both institutions may partly overlap. This is particularly the case since *Recommendation No. R(85)13 on the Institution of the Ombudsman* adopted by the Committee of Ministers of the Council of Europe recommends the Member States of the Council of Europe to 'consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved'. This results in a clearly identifiable tendency to assign ombudsinstitutions with broad mandates, covering the full range of human rights rather than only the right to good administration. This explains why in some cases, the 'equality body' has in fact been established in the form of an Ombudsperson, albeit with larger competences than those normally attributed to such an institution (LV, LT, SE). Another consequence, as can be seen in at least four Member States, which have set up an equality body competent to deal with discrimination on grounds of sexual orientation, is that this body coexists with one or more ombudsinstitution which may receive complaints about discrimination in similar conditions regarding the activities of public bodies (EL, HU, RO and SI). It would be interesting to examine these cases in detail, in order to see how exactly relationships between equality bodies and ombudsinstitutions have evolved, and highlight the best practices available in this regard.

Similar questions of coexistence arise due to the competences attributed to labour inspectorates. These bodies, which are typically mandated to supervise compliance with employment legislation, may perform inquiries on the basis of complaints received or on their own initiative. In a number of Member States (including at least EL, LV, LT, LU, HU, FI), this includes monitoring compliance with the equality provisions of the Labour Code or other equivalent employment legislation.

As the table below shows, eighteen Member States have put in place an equality body competent to address discrimination on grounds of sexual orientation (in Sweden, this is a specialised body). But this classification obfuscates significant differences between these States, and the table illustrates certain of the most striking variations.

The first important choice Member States have to make when establishing equality bodies beyond the minimal prescriptions of Article 13 of the Racial Equality Directive, in order to ensure that such a body will be competent to address sexual orientation discrimination, is between establishing an equality body with a *general* competence, or instead a body *specialised on the specific ground of sexual orientation*. The advantages of having bodies specialised on sexual orientation discrimination are obvious: Such bodies will build up more rapidly their expertise, and may also be perceived by the LGBT community as more relevant to them and also open to their concerns. In that respect, it should come as no surprise that, in the only Member State that opted for a specialised body on sexual orientation discrimination – HomO in Sweden –, the number of complaints received from alleged victims of discrimination on grounds of sexual discrimination is significantly higher than in any other Member State, with figures which are even more impressive if we consider them in proportion to the country's population of 9 millions. There is therefore no doubt that the establishment of a specialised body will attracts complaints from members of the community for whom the institution will be both more visible, and presumably more attentive to their concerns.

On the other hand, there are advantages in the establishment of single equality bodies with a general competence covering all grounds of discrimination, as is well illustrated in the debate leading up to the establishment of the Commission for Equalities and Human Rights (CEHR)[63] for Great Britain: although the risk of a fragmented understanding of the requirements of anti-discrimination legislation is real, if such bodies interpret notions such as harassment or indirect discrimination in a way not shared by bodies established for other grounds, economies of scale may be realised by merging all grounds of discrimination into one single equality body and cases of multiple discrimination may be dealt with more efficiently.

The second important choice confronting States seeking to set up an equality body concerns the nature of its tasks. Equality bodies may be charged with (1) promoting equality legislation and good practice, including the preparation of reports or surveys and addressing recommendations to the authorities; (2) assisting victims, *inter alia* by facilitating the filing of claims in court; (3) offering mediation, i.e., seeking to arrive at a friendly settlement between the victim and the offender; and/or (4) offering quasi-judicial

---

[63] See on this Christopher McCrudden (2005), 'The Contribution of the EU Fundamental Rights Agency to Combating Discrimination and Promoting Equality', in Philip Alston and Olivier De Schutter (eds), Monitoring Fundamental Rights in Europe. The Contribution of the Fundamental Rights Agency, Hart Publ., Oxford, pp. 131-157.

services by the adoption of (non-binding) 'opinions' for the resolution of disputes, or even by the adoption of binding sanctions or orders, subject to review by courts. These are four distinct functions, the first two of which should, as a minimum, be exercised by the equality bodies set up under Article 13 of the Racial Equality Directive. Each of these functions is important, and ideally, they should all be present in an equality body.[64] But these functions may not be easy to reconcile with one another when they are exercised by one single body. Equality bodies assisting and counselling victims may not be perceived by the alleged offenders as impartial bodies or mediators, and where they have the power to deliver opinions avoiding the costs and delays of adjudication, the authority of such opinions may suffer, if these bodies are primarily seen as 'taking sides with the victim'. It is significant for instance that the Dutch Equal Treatment Commission, one of the most effective equality bodies in the EU, and whose case-law is considered highly authoritative even by courts, does not assist victims of discrimination, since this latter function is seen as contradictory to its main task which is to hear and investigate impartially cases of (alleged) discriminatory practices or behaviour.

Certain equality bodies do manage to combine the assistance to victims with the exercise of mediation functions or quasi-adjudicatory functions through the adoption of opinions. In Latvia for example, the *Tiesībsarga birojs* [Ombudsman's Office] may represent victims of discrimination before courts, yet it may also mediate between the alleged victim and the offender and deliver non-binding opinions on cases of alleged discrimination submitted to it. The position of the Centre for Equal Opportunities and Opposition to Racism (CEOOR) in Belgium is similar, although the CEOOR has no authority to adopt quasi-judicial 'opinions'. In Romania, the National Council on Combating Discrimination (NCCD) may assist victims, but may also mediate and decide to impose administrative sanctions where it finds a discrimination to have occurred, under the supervision of administrative courts. As they combine functions which require on the one hand that they act as advocates (or at least, as counsellors) of the victims and on the other hand functions which require that they act impartially, these equality bodies must maintain a fine balance between supporting victims as best they can, whilst fulfiling their roles as mediators or quasi-adjudicatory bodies with the impartiality and objectivity befiting of such duties.

A good example of a system that is in principle well equipped to deal with both dilemmas is the Austrian Equal Treatment Commissions (ETCs) and ombudsinstitutions. First, two

---

64 Ireland presents an extreme case where the Equality Authority has only promotional tasks to perform, without any handling of complaints of victims of discrimination, whereas the Equality Tribunal are quasi-judicial bodies adjudicating on such complaints. Neither the function of assisting victims, nor the function of acting as a mediator between the victim and the offender, seem to be recognised the importance they should in this system. A similar situation exists in Slovenia, where the Council of the Government for the Implementation of the Principle of Equal Treatment has promotional duties and the Equality Advocate may address opinions and recommendations to the author of the discrimination on the basis of complaints, but without explicitly being tasked with providing assistance to victims.

institutions coexist in this system: the ETCs are essentially set up as independent and impartial bodies, consisting of members of ministries and social partners, and competent to adopt recommendations which, although not legally binding, will be perceived as quasi-judicial in nature and, in general, will allow the parties to avoid the burden of litigation; the ombudspersons are entrusted with counselling tasks, and may represent the victims before the ETCs.[65] Thus, instead of one single body having simultaneously the task both to assist the victim and appear impartial in the treatment of complaints filed with it, the two functions are kept clearly separate. Second, while there are separate ETCs and Ombudspersons for (a) equal treatment between men and women in the employment area, (b) equal treatment irrespective of ethnic origin, religion, belief, age and sexual orientation in employment, and (c) equal treatment irrespective of ethnic origin outside the sphere of employment, the risks of inconsistent approaches by these different bodies are mitigated by the possibility for members of the Senates of the ETC and the ombudsinstitutions for Equal Treatment to apply for a *Gutachten* (general opinion) of the Equal Treatment Commission in matters of general interest regarding discrimination. While this procedure has been hitherto dormant, it nevertheless would appear to constitute an adequate compromise between the risks of overspecialisation and fragmentation, and the dangers of dilution of certain forms of discrimination within bodies with a general competence.

Finally, it should be noted that complaints statistics regarding discrimination on grounds of sexual discrimination with the equality bodies, collected by the FRALEX experts, do not offer an adequate basis for useful comparisons. Reasons for the paucity of statistical data can be sought either to the fact that it is still early for the equality bodies examined to have received an adequate number of complaints; or to the fact that the powers of such bodies as regards discrimination on grounds of sexual orientation still remain little known to those most directly concerned, namely the victims. In the area of sexual orientation discrimination perhaps more than in any other area (with the exception perhaps of certain invisible disabilities), it takes courage to present oneself to an authority in order to complain, since this in almost all cases means revealing one's sexual orientation, which the individual concerned may seek to hide. Therefore, fewer registered complaints clearly does not mean that there is less discrimination; rather it indicates that the victims are largely unaware of the recourses available to them or are unwilling to use such mechanisms, due to the personal cost involved in terms of revealing their sexual identity. One partial solution to this problem of underreporting would be to allow equality bodies either to act on their own initiative, or to act on the basis of anonymous complaints, without the identity of the victim being revealed to the offender. Another solution could be to ensure that individuals alleging that they are

[65] Victims of discrimination on grounds of sexual orientation can thus decide freely whether they want to file a court claim, or an application with the ETC, or to make use of the counselling services of the OET.

victims of discrimination on grounds of sexual orientation are heard, within the equality body, by trained LGBT staff, in order to build up trust.

Table 1.2.: Equality bodies for sexual orientation discrimination in the EU Member States

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Belgium	The Centre for Equal Opportunities and Opposition to Racism (CEOOR) is established at federal level (originally since 1993), the Regions and Communities are negotiating cooperation agreements in order for the CEOOR to fulfil its tasks also as regards the legislation adopted at regional/ Community level. The CEOOR is competent as regards all grounds of prohibited discrimination, although separate departments deal with discrimination on grounds of race and ethnicity on the one hand, other grounds on the other hand.	The CEOOR receives complaints from victims of discrimination, and may provide counselling; investigate situations of (alleged) discrimination; act as a go-between or even mediate between the defendants and plaintiffs of discrimination; or, with the consent of the victim, take cases to both civil or criminal courts. In addition the CEOOR is to publish reports and recommendations on discrimination.	Over the period 2003-2007, the CEOOR has received 419 complaints for sexual orientation discrimination, mostly relating to media (98) and goods and services (82).
Bulgaria	The Комисията за защита от дискриминация (КЗД) [Protection Against Discrimination Commission (PADC)] covers all grounds.	The PADC's powers include: receiving and investigating complaints by victims, as well as third parties and, on that basis, issuing binding rulings declaring discrimination and imposing financial sanctions or issuing binding instructions to prevent, stop or require abstention from discrimination; carrying out surveys and publishing independent reports; bringing court action and joining court proceedings in an amicus curiae capacity; making recommendations to other authorities to reform legislation or practice; giving opinions on draft legislation; and providing independent assistance to victims of discrimination.	No statistics available

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Czech Republic	There is no equality body or special Ombudsman against Discrimination on the grounds of Sexual Orientation, although the Office of the Ombudsman (Public Defender of Rights) of the Czech Republic, a general ombudsman, was established in January 2001, to deal with issues of maladministration, and could conceivably be confronted with issues related to sexual orientation discrimination by the public administration.		To this date no complaint was filed related to sexual orientation discrimination.
Denmark	At the time of writing there is no equality body in Denmark that deals with discrimination on the ground of sexual orientation in the labour market. However, a bill on a new Equality of Treatment Board [Ligebehandlingsnævnet][66] enters into force by January 2009. The board is an equality body with general competence.	The new Equality of Treatment Board will handle complaints about cases of differential treatment (in and outside the labour market) on the basis of gender, race, skin colour, religion, faith, political view, sexual orientation (in the labour market), age, disability or national, social or ethnic origin. The Equality of Treatment Board will be able to handle cases of differential treatment - both in and outside the labour market on race, ethnicity and gender.	Not applicable
Germany	Article 25 para. 1 of the General Law on Equal Treatment [Allgemeines Gleichbehandlungsgesetz - AGG] establishes the Federal Anti-discrimination Office (Antidiskriminierungsstelle) as an independent body in the Federal Ministry of Family, Senior Citizens, Women and Youth.	The Federal Anti-discrimination Office assists victims of discrimination, inter alia on grounds of sexual orientation. It can provide information on claims and possibilities of legal action, as well as seek an amicable settlement between those involved. It also produces studies and reports.	While a more complete database is still being built, in the period from 31.7.2006 to 15.12.2007, there were 3,659 consultation inquiries, of which 5.15 per cent related to the ground of sexual identity.

[66] Law nr 387 of 27/05/2008 on Equal Treatment [Lov nr. 387 om Ligebehandlingnævnet]

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Estonia	At the time of writing there is no equality body in Estonia that deals with discrimination on the ground of sexual orientation in the labour market, although the Chancellor of Justice (Ombudsman) may receive complaints about sexual orientation discrimination committed by State entities, and may be requested to act as a mediator in private disputes. However, Chapter 4 of the Equal Treatment Act, still under discussion, would rename the Gender Equality Commissioner as Võrdõiguslikkuse volinik [Equality Commissioner] and extend its competence to include discrimination based on sexual orientation.		Over the period 2000-2007, the Office of the Chancellor has received only three petitions concerning discrimination based on sexual orientation (1 in 2006 and 2 in 2007).
Greece	Chap. 5 of Law 3304/05 provides that alleged cases of discrimination by public bodies may be submitted to the Greek Ombudsman (Συνήγορος του Πολίτη). In the field of employment, the Employment Inspection Body (Σώμα Επιθεώρησης Εργασίας) fulfils the tasks of an equality body. In the other cases, the 'Equal Treatment Committee' (Επιτροπή Ίσης Μεταχείρισης), a body created within the Ministry of Justice, shall be competent – although this body seems to be understaffed and practically dormant. All three bodies are competent for all grounds of alleged discrimination.	For discrimination committed by public bodies, the Ombudsman has the power to investigate cases of discrimination and to undertake mediation, concluded by the adoption of non-binding 'opinions'. The Employment Inspection Body may participate in any conciliation effort between the parties, emit a summary report on the reasons due to which such a conciliatory effort failed, give its opinion, on the interpretation of the Law, and draw reports on the application and promotion of equal treatment. The Equal Treatment Committee has the same powers and functions as the Employment Inspection Body.	In 2005, one case submitted to the Ombudsman related to sexual orientation discrimination. In 2006, while the total number of complaints submitted to the Ombudsman relating to discrimination had doubled (total 51), not a single case related to sexual orientation discrimination.

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Spain	There exists no equality body per se, however since the mission of the Defensor del Pueblo [Ombudsman] and of the Defensores del Pueblo Autonómicos [Ombudsmen of the Autonomous Communities] is to protect the rights and liberties of Title I of the Constitution (including Article 14 of the Constitution that prohibits any form of discrimination), they may offer a certain protection for victims of discrimination by public bodies.		No statistics available
France	The High Authority for Equality and the Elimination of Discrimination (HALDE) was created by law n°2004-1486 of 30 December 2004 as an equality body competent to deal with all grounds of discrimination.	The HALDE may receive complaints and launch investigations, and on that basis propose mediation between the alleged victim and the offender or request that a prosecution be launched. It may also file suit on its own initiative, particularly following 'situation tests' it is authorised to perform under the equal opportunity law of 2 April 2006. It also publishes reports and makes recommendations to authorities.	Although HALDE in principle does not release statistics concerning complaints specifically for sexual orientation discrimination, it would appear that in 2005, 38 complaints dealing with discrimination based on sexual orientation were received by the HALDE (2.7% of all complaints received) while in 2006, 61 such complaints were received (1.50%).

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Ireland	The Equality Authority, an independent statutory body, was established on under the Employment Equality Act 1998. Its powers were expanded under the Equal Status Act 2000 and the Intoxicating Liquor Act 2003. In addition there exists a body of quasi-judicial specialist tribunals know collectively as the Equality Tribunal, which deal with complaints of discrimination (except in relation to licensed premises such as bars, clubs and hotels) on all of the nine grounds mentioned in the Equality Act 2004, including sexual orientation.	The Equality Authority has activities of a promotional nature geared towards the fulfilment of equality.	Over the period 1.1.2000-31.12.2007, 34 complaints in total were made to the Equality Tribunal under the Employment Equality Act, and 26 under the Equal Status Act.
Italy	A decree of 11.12.2003 set up the Ufficio Nazionale Antidiscriminazioni Razziali (UNAR) [Office against Racial Discrimination] within the Department for Rights and Equal Opportunities.[67] An extension of the competences of UNAR to discrimination on grounds other than race and ethnic origin is currently envisaged.	UNAR currently provides legal assistance for civil and administrative proceedings undertaken by victims of discrimination, through a specific Contact Center; and it has promotional and monitoring activities, including by research and surveys.	No statistics available

[67] See http://www.pariopportunita.gov.it/defaultdesktop.aspx?page=91 (24.02.2008).

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Cyprus	The Equality Commissioner was set up by the Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law, covering all grounds of discrimination.	The Commissioner may receive complaints alleging discrimination and, following an investigation, adopt a report on the case, address recommendations or orders, or impose fines.	Only one complaint to date filed with the Commissioner concerned discrimination on grounds of sexual orientation.
Latvia	The 2005 amendments to the Law on the Latvian National Human Rights Office68 had transformed the Valsts Cilvēktiesību birojs (VCB) [National Human Rights Office (NHRO)] into an equality body for all grounds of prohibited discrimination. On 01.01.2007, the Tiesībsarga birojs [Ombudsman's Office] was established on the basis of NHRO and took over the duty of the NHRO to work as a specialised body for the implementation of the principle of equal treatment.69 In addition, the Valsts Darba inspekcija [State Labour Inspectorate (SLI)] monitors compliance with the law in employment relations, and may adopt binding rulings, issue orders and express warnings within the scope of its competence.	The NHRO could, with the consent of the victim, file claims on the victim's behalf. It also had promotional activities. The Ombudsman's Office inherited both functions, but in addition may seek to mediate between the victim and offender (conciliation proceedings) or deliver non-binding opinions about the alleged discrimination.	Over the period 1.1.2000-31.12.2007, 48 complaints related to sexual orientation discrimination were filed with the NHRO or (after 2007) the Ombudsman's Office.
Lithuania	The Office of the Equal Opportunities Ombudsperson was created in 2005 by the Law on Equal Treatment, which expanded the mandate of the previous institution (the Ombudsman of Equal Opportunities for Men and Women) to all grounds of discrimination. In addition, the Valstybinė darbo inspekcija [State Labour Inspectorate], which in principle could impose administrative sanctions for violation of the anti-discrimination provisions of the Employment Code (although this in practice is quite infrequent)	The Equal Opportunities Ombudsperson may act on the basis of complaints, including anonymous complaints, or ex officio, and impose sanctions (fines) or injunctions which are of a binding nature. It may also provide information to investigatory bodies. It provides advice to victims. And it supervises the implementation of the Law on Equal Treatment, by reports, recommendations, or surveys.	During the period 2005-2007, the Office of the Equal Opportunities Ombudsperson received 4 complaints for sexual orientation discrimination, and launched one investigation ex officio.

68 Latvia/Likums Grozījumi Likumā par Valsts Cilvēktiesību biroju [Law Amendments to the Law on the National Human Rights Office] (15.12.2005), available at: http://www.saeima.lv/saeima8/mek_reg.fre (24.02.2008).

69 Latvia/Tiesībsarga likums (06.04.2006), available at: http://www.saeima.lv/saeima8/mek_reg.fre (25.02.2008).

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Luxem-bourg	The Law of 28 November 2006 on equal treatment establishes a Centre for Equal Treatment (CET), which is operational since late 2007. The Labour and Mine Inspection Authority (Inspection du Travail et des Mines) supervises compliance with the Labour Code, including its Title V ('Equal Treatment in Employment and Occupation')	The CET is empowered to publish reports, opinions, recommendations, and carry out studies regarding discrimination issues, and assist victims of discrimination, although it cannot file legal proceedings.	No statistics available
Hungary	Article 13 of the ETA establishes the Egyenlő Bánásmód Hatóság (EBH) [Equal Treatment Authority] under the remit of the Minister of Social and Labour Affairs as an independent body, for all grounds of discrimination. It is assisted by the Equal Treatment Advisory Board, a group of independent experts. In addition, the Ombudsman for Civil Rights is competent where the alleged discrimination is committed by State bodies. Finally, Under the Act on Labour Supervision[70] munkaügyi felügyelőségek [labour inspectorates] examine compliance with non-discrimination provisions.[71]	The EBH is vested with the power to assist and advise victims, to investigate complaints against alleged discriminations and to impose binding decisions,[72] to file actions before courts on their own initiative. It also makes recommendations and publishes reports on discrimination. The Ombudsman may act on the basis of complaints or ex officio, request explanations from the public authorities, petition the Constitutional Court, seize the public prosecutor, or make recommendations. Finally, the labour inspectorates may impose injunctions or sanctions, in the form of fines, on the employer, where it appears that it has violated anti-discrimination provisions.	Over the period 1.1.2005-1.1.2007, 6 complaints (2 each year) related to sexual orientation discrimination were filed with the EBH.

70 Hungary/1996. évi LXXV. törvény/(18.10.1996). Hereinafter referred in the body text as LSA.

71 Article 3, Hungary/1996. évi LXXV. törvény/(18.10.1996).

72 'In terms of Article 14 Paragraph (1) Point (a) of the ETA, the Authority has the mandate to conduct independent investigations both ex officio and also based on individual complaints. [...] This is a quasi judicial function, so in this regard the service provided by the Authority goes beyond simple assistance in asserting claims.': EU Network of Independent Legal Experts (2007) Report on Measures to Combat Discrimination – Directives 200/43/EC and 2000/78/EC – Country Report/Update 2006 – Hungary – State Of Affairs Up To 8 January 2007, p. 76, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/hurep07_en.pdf (10.02.2008). In practice the importance of this task, combined with the paucity of resources, results in a situation where the EBH cannot adequately perform its other tasks, particularly the counselling of victims.

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Malta	The National Commission for the Promotion of Equality (NCPE), set up in 2004, monitors the implementation of the Cap 456 Act to Promote Equality for Men and Women and of LN 85 of 2007 Equal Treatment of Persons Order. It is not competent as regards sexual orientation discrimination.	Not applicable	No statistics available
Nether-lands	The Equal Treatment Commission (ETC) is established as a semi-judicial independent body.	The opinions of the ETC, following (1) complaints from victims, (2) requests for guidance from courts or persons or organisations, or (3) ex officio inquiries, are non-binding but nevertheless authoritative. If the ETC finds discrimination to have occurred, the aggrieved victim may go before a court to ask for this opinion to be 'enforced' in order to obtain damages.	Over the period 2000-2007, the ETC has received 45 complaints for sexual orientation discrimination, mostly relating to goods and services (26) and employment (17). In 19 of these cases, it found that discrimination had occurred.
Austria	At federal level are the Gleichbehandlungskommission (GBK) [Equal Treatment Commission (ETC)] – consisting of three Senates[73] – and the Gleichbehandlungsanwaltschaft (GAW) [Ombud for Equal Treatment (OET)] – consisting of three ombudspersons with equivalent areas of responsibility.[74] Similarly, in the provinces, Equal Treatment Commissions adopt Gutachten (opinions) on individual discrimination cases, while Equal Treatment/Anti-discrimination Contact Points or Equal Treatment/Anti-discrimination Commissioners operate in order to support individuals.	Senate II of the ETC may receive complaints and following separate hearings of each party adopt non-enforceable recommendations rather than effective sanctions[75], while the Anwältin für Gleichbehandlung in der Arbeitswelt (GAW II) [Ombud for Equal Treatment in employment irrespective of ethnic belonging, religion or belief, age or sexual orientation (OET II)] may represent victims.	To date, 2 complaints related to sexual orientation discrimination have been filed with the competence ETC.

73 Senate I is responsible for equal treatment between men and women in the employment area, Senate II is responsible for equal treatment irrespective of ethnic origin, religion, belief, age and sexual orientation in employment, Senate III is responsible for equal treatment irrespective of ethnic origin outside employment.

74 OET I is responsible for equal treatment between men and women in the employment area, OET II is responsible for equal treatment irrespective of ethnic origin, religion, belief, age and sexual orientation in employment, OET III is responsible for equal treatment irrespective of ethnic origin outside employment.

75 Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft [Act on the Equal Treatment Commission and the Ombud for Equal Treatment], Austria/BGBl I 108/1979 as amended by BGBl I 66/2004 last amended by BGBl I 82/2005 (10.08.2005).

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Poland	Since the removal in 2005 of the Office of the Plenipotentiary for the Equal Status of Men and Women, which since 2000 had been developing promotional activities in the anti-discrimination field, there is no independent equality body as such in Poland. However, the Ombudsman, elected for five years by Parliament, may undertake certain interventions before the courts with respect to discrimination cases.	Not applicable	In 2000-2007 the Ombudsman received 26 complaints concerning discrimination of LGBT people, 10 of which were considered to warrant further investigation.
Portugal	While the Statute Law [Decreto-Lei n.º 164/2007 (03.05.2007)][76] expanding the competences of the Commission for Citizenship and Gender Equality (CCGE) to citizenship, beyond its original focus on gender equality, without explicitly referring to sexual orientation, the CCGE would seem to envisage to include sexual orientation discrimnation within its activities.	The CCGE may assist victims of discrimination, but not represent them in court or bring legal proceedings on their own initiative. The CCGE may issue opinions and recommendations.	No statistics available
Romania	The National Council on Combating Discrimination (NCCD) was established in 2001.[77] Its independence was strengthened in 2006, when it became an autonomous public authority under the control of the Parliament. For victims of discrimination by acts of public bodies, another avenue would seem to be the Avocatul Poporului [the Romanian Ombudsman], although no case of sexual orientation discrimination seem to have been presented to the Ombudsman.	In addition to promotional activities, the powers of the NCCD include mediating between the parties, providing support for the victims of discrimination, investigating complaints or acting ex officio, and adopting administrative sanctions (which may be appealed before the courts), as well as making recommendations about harmonisation of legal provisions with the equality principle.	Since 2001, the NCCD has received 34 complaints of discrimination on grounds of sexual orientation, has started one case ex officio, following media reporting and has issued decisions in 31 of them. Of this total, the NCCD found discrimination to have occurred in six different cases.

[76] Available at: http://www.dre.pt/pdf1sdip/2007/05/08500/29422946.PDF (15.02.2008).

[77] Romania/ Government Decision 1194 from 2001 establishing the National Council on Combating Discrimination (12.12.2001).

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Slovenia	The Zakon o delovnih razmerjih [Employment Relationships Act][78] establishes the Svet vlade za uresničevanje načela enakega obravnavnja [Council of the Government for the Implementation of the Principle of Equal Treatment]; and it provides that complaints may be filed with the Zagovornik načela enakosti [Equality Advocate]. In addition, since the Ombudsman is to protect human rights and basic freedoms in matters involving state bodies, local government bodies and statutory authorities, it too may provide an avenue to victims of sexual orientation discrimination.	While the Council of the Government for the Implementation of the Principle of Equal Treatment has promotional duties, the Equality Advocate may act on the basis of complaints leading to opinions and recommendations addressed to the author of the discrimination, and may also adopt advisory opinions.	In total, 4 complaints were filed with the Equality Advocate since 2000 based on sexual orientation discrimination (data for 2007 not available). None of these led to a finding of discrimination.
Slovakia	The Anti-discrimination Act[79] provides that the national human rights institution for Slovakia, the Slovenské národné stredisko pre ľudské práva (SNSĽP) [Slovak National Centre for Human Rights (SNCHR)], shall assume the powers of an equality body, for all discrimination grounds.	SNCHR provides legal assistance to victims of discrimination, which may include representation in legal proceedings, and preparation of expert opinions on compliance with the principle of equal treatment. It may prepare reports and recommendations on the implementation of the principle of equal treatment.	The only data available, which cover the years 2004 and 2005, do not mention any complaint for sexual orientation discrimination.

78 Slovenia/Employment Relationships Act 42/02 and 103/07 as amended (03.05.2002).
79 Slovakia/ Zákon 365/2004 (20.05.2004).

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
Finland	There is no equality body in Finland dealing with discrimination on the ground of sexual orientation: the Ombudsman for Minorities deals only with discrimination on the grounds of ethnic origin and the Ombudsman for Equality deals with gender equality, including discrimination on the grounds of transsexuality but not sexual orientation. However, where discrimination is committed by State bodies a complaint may be filed before the Parliamentary Ombudsman or the Chancellor of Justice of the Government. And as regards employment, compliance by employers with anti-discrimination law is supervised by the Occupational Health and Safety Authority which may receive communications from employees, and carry out on-site inspections in the private sector.	Not applicable	No statistics available
Sweden	The Office of the Ombudsman against Discrimination on grounds of Sexual Orientation (Swedish acronym - HomO) (one of the four ombudsinstitution, which it is now proposed to merge into one single institution).	In addition to its promotional activities, HomO gives advice and support to victims, comments upon proposals for new legislation, and may file court actions in cases of discrimination on the grounds of sexual orientation.	In 2007, HomO received 52 complaints, and made 11 inquiries on its own initiative. These figures were 45 and 11 respectively for 2006; 47 and 15 for 2005; and 39 and 8 for 2004. However, the total number of sexual orientation cases examined, including requests for guidance etc., is much higher: 907 in 2006 and 858 for 2005.

Member State	Equality body for sexual orientation discrimination	Competences	Statistics
United Kingdom	In Great Britain the Commission for Equality and Human Rights (CEHR) was established under the Equality Act 2006 to replace specialised bodies concerning race, sex and disability discrimination with one generic equality body covering all heads of unlawful discrimination. In Northern Ireland responsibilities similar to those of the CEHR fall within the remit of the Equality Commission for Northern Ireland (ECNI).	In addition to promotional activities, the CEHR has powers to assist an individual who is, or may become, a party to legal proceedings.[80] It may also conduct inquiries where discrimination may be occurring[81] and issue an 'unlawful act' notice to an organisation where it considers an act of discrimination has occurred and can apply to a court or tribunal to enforce that notice.[82]	The CEHR's mandate to address issues relating to sexual orientation discrimination only began in October 2007, and so far only two applications for legal assistance in cases of discrimination on the grounds of sexual orientation have been made to the Commission

1.3. The prohibition of discrimination on grounds of sexual orientation and the status of same-sex couples

1.3.1. The general framework

In three Member States (the Netherlands since 2001,[83] Belgium since 2003,[84] and Spain since 2005[85]), same-sex couples may marry. A number of other Member States have established institutions distinct from marriage, but allowing same-sex partners to publicly manifest their commitment to one another and to achieve the same degree of material security, as if there were spouses. The legal recognition of same-sex partnerships is

80 Under the Equality Act, s. 28(4) the Equality Commission for Northern Ireland has similar powers.

81 See UK/ Equality Act 2006 c.3 (16.02.2006), s16 and s20, available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1.htm (15.02.2008).

82 UK/ Equality Act 2006 c.3 (16.02.2006), s21, available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en_1.htm (15.02.2008).

83 Netherlands / Wet openstelling huwelijk [Act on the Opening Up of Marriage] of 21.12.2000 Staatsblad (Law gazette) 2001/ 9.

84 Belgium / Law of 13.2.2003 extending marriage to persons of the same-sex (Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil), Moniteur belge, 28.2.2003.

85 Spain / Ley 13/2005 (1.7.2003) (Law 13/2005 of 1 July, amending the Código Civil [Civil Code] as regards the right to marry).

examined in other reports[86]. In this section we shall examine whether the prohibition of sexual orientation discrimination entails a prohibition of differential treatment between married couples and non-married couples, in those Member States where same-sex marriage is not recognised, and if so, whether the advantages recognised to married couples should be extended to *de facto* durable relationships between two partners of the same-sex, or only to the same-sex couples which are officially registered, at least where such registered partnership is possible.

The Employment Equality Directive does not clearly specify whether, in States where same-sex marriage is not allowed, differential treatment based on whether a person is married or not may be tolerated, or whether such differential treatment should be considered as a form of indirect discrimination on grounds of sexual orientation. Recital 22 of the Preamble does mention that this instrument is 'without prejudice to national laws on marital status and the benefits dependent thereon'. However, while it is clear that it is compatible with the Directive to define marriage exclusively as a civil union between a man and a woman, it remains an open question whether, in countries where homosexuals are excluded from the institution of marriage, it is compatible with the Directive that they are denied access to the benefits which they would have if they were able to marry, in the areas to which the Employment Equality Directive applies. The following section examines this question successively on the basis of the case-law of the European Court of Justice, and under international human rights law.

1.3.2. The interpretation of the Employment Equality Directive by the European Court of Justice

The case-law of the European Court of Justice has evolved towards assimilating to marriage other forms of union (such as registered partnerships, civil unions, or legal cohabitation) open to same-sex couples. This change has been recent, and it has been gradual. When in 2001, AG Mischo delivered his opinion in the case of *D. and Kingdom of Sweden v. Council of the EU*, he took the view that a registered partnership under Swedish law should not be assimilated to marriage for the purposes of advantages recognised to 'married officials' under the Staff Regulations of Officials of the European Communities. Relying on the Court's judgment in *Grant*,[87] he stated that 'since a person

---

[86] See, for a worldwide review of these developments, R. Wintemute and M. Andenaes (eds), Legal recognition of same-sex partnerships. A Study of National, European and International Law, Hart Publ., Oxford – Portland, Oregon, 2001; and K. Waaldijk (coord.), for Institut d'études nationales démographiques (Paris) (2005), More or less together. Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries, available online: www.ilga-europe.org/europe/notice_board/resources/more_or_less_together_2005 (last consulted on 1.5.2008).

[87] ECJ, Case C-249/96, Lisa Jacqueline Grant v. South-West Trains Ltd., judgment of 17.2.1998, [1998] ECR I-636.

(...) who has entered into a registered partnership is not, according to the case-law of the Court of Justice, in a situation comparable to that of a married official, the general principle of equal treatment does not require that the first be treated in the same way as the second'.[88] This position was followed by the European Court of Justice in its judgment of 31 May 2001 where, essentially evading the question of sexual orientation discrimination, it considered that 'the existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same-sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union'.[89]

The judgment delivered by the Court on 1 April 2008 in the case of *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*[90] overrules this earlier case-law. Here, the Court takes the view that Articles 1 and 2 of Directive 2000/78 preclude legislation 'under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same-sex in a situation comparable to that of spouses so far as concerns that survivor's benefit' (para. 73). In the main proceedings, Mr. Maruko for years had lived with his partner in registered partnership. After his partner had died the VddB, the pension scheme for German theatres, refused to pay him a survivors pension, as such pension are provided only for married partners. Mr. Maruko sued the VddB and the Bavarian Administrative Court Munich referred the case to the European Court of Justice for interpretation of the Employment Equality Directive. Before the Court, Mr Maruko and the Commission had maintained that 'refusal to grant the survivor's benefit at issue in the main proceedings to surviving life partners constitutes indirect discrimination within the meaning of Directive 2000/78, *since two persons of the same-sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses*. In their opinion, spouses and life partners are in a comparable legal situation which justifies the granting of that benefit to surviving life partners' (para. 63, emphasis added). The European Court of Justice substantially agrees, although it treats this as a case of direct rather and indirect discrimination.

The judgment of the Court in *Maruko* states, in essence, that where a Member State has created a form of union comparable to marriage, and open to same-sex partners, they may not create an arbitrary difference in treatment between marriage, which is not open to same-sex couples, and the form of union open to them, as regards advantages falling

---

88 ECJ, Joined Cases C-122/99 P and C-125/99, D. and Kingdom of Sweden v. Council of the EU [2001] ECR I-4319, para. 89 of the opinion of AG Mischo.

89 Ibid., para. 50 of the judgment.

90 Case C-267/06.

under the material scope of application of the Employment Equality Directive.[91] On the one hand, this does not amount to stating that the Member States must create for the benefit of same-sex couples an institution equivalent to marriage, allowing them to benefit the same advantages as those recognised to married couples when they form a stable and permanent relationship. On the other hand, however, the Court clearly rejects the idea that Recital 22 of the Employment Equality Directive would justify any difference of treatment between marriage and other forms of union. On the contrary, the Court notes that the exercise by the Member States of their competence to regulate matters relating to civil status and the benefits flowing therefrom 'must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination' (para. 59).

The paradox of the position of the Court, as expressed in the case of *Tadao Maruko,* is that, while States which have created a form of union open to same-sex couples are prohibited from denying to those having entered such unions the benefits recognised to married couples, it would be acceptable under the Directive not to create any such institution alternative to marriage, thus making it impossible for same-sex partners to manifest publicly the existence between them of close and permanent links. An interpretation of the Employment Equality Directive in conformity with international human rights law, however, would require that, in States where they cannot marry, same-sex couples be allowed to benefit the same material protection as that recognised to married couples, whether by the conclusion of a civil union, registered partnership, or other institution equivalent to marriage, or by the simple extension, to same-sex partners living in a *de facto* stable relationship, of the advantages recognised to married couples. This solution respects fully the exclusive competence of the Member States in the definition of civil status, while at the same time ensuring equality of treatment between LGB persons[92] and heterosexual persons. It is this solution which best complies with the requirements of international human rights law, as explained in the following section.

---

91 It should be noted however that the prohibition of discrimination under the Employment Equality Directive in reality is a specific manifestation of a broader principle of equality, which is not limited to the material scope of application of the directive. According to the Court: '... Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States' (Case C-144/04, Mangold v. Helm, judgment of 22 November 2005, at para. 74).

92 As will be noted below, the situation of transsexuals is notably different, since they have a right to marry with a person of the sex opposite to their acquired gender.

1.3.3. The requirements of international human rights law

Under international human rights law, differences in treatment between heterosexual couples (whether married or forming a 'de facto marital union') and same-sex couples are considered a direct discrimination on grounds of sexual orientation.[93] This is also the position adopted by individual members of the European Court of Justice[94]. In addition, international human rights law seems to have recently moved towards considering the exclusion of same-sex couples, which cannot marry, from certain advantages reserved to married couples, in order to protect 'marriage' or a traditional notion of the family – objectives which are recognised as legitimate in principle[95] – as discrimination on grounds of sexual orientation. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate *choice* not to marry.[96] Such reasoning, of course, does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying. Therefore, *a contrario*, it might be argued that advantages recognised to married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

This view is gaining support within human rights bodies. In the case of *Joslin v. New Zealand*,[97] two members of the Human Rights Committee, Messrs Lallah and Scheinin, underlined in their concurring opinion that differential treatment between married couples and same-sex couples not allowed under the law to marry, '… may very well, depending

---

93 See, under the International Covenant on Civil and Political Rights, Human Rights Committee, X v. Colombia, Communication n° 1361/2005, U.N. Doc. CCPR/C/89/D/1361/2005, final views of 30 March 2007; under the European Convention on Human Rights, see Eur. Ct. HR, Karner v. Austria (Appl. no. 40016/98), judgment of 24 July 2003.

94 See, in particular, the opinion of AG Elmer of 30 September 1997 in Case C-249/96, Lisa Jacqueline Grant v. South-West Trains Ltd. [1998] ECR I-636, at para. 35.

95 In the case-law of the European Court of Human Rights, see Eur. Ct. HR, Mazurek v. France (Appl. N° 34406/97), judgment of 1 February 2000, at paras. 50-51 (although the Court concludes that discrimination has occurred on grounds of birth); or Eur. Ct. HR, Karner v. Austria, judgment of 24 July 2003, para. 40 (although the Court concludes with a finding of discrimination on grounds of sexual orientation).

96 In the case-law of the Human Rights Committee under the International Covenant on Civil and Political Rights, see Danning v. the Netherlands, Communication No. 180/1984 (decision of 9 April 1987) (U.N. Doc. Supp. No. 40 (A/42/40) at 151 (1987)), Sprenger v. the Netherlands, communication n° 395/1990, Communication No. 395/1990 (decision of 31 March 1992) (U.N. Doc. CCPR/C/44/D/395/1990 (1992)), and Derksen v. the Netherlands, communication n° 976/2001 (decision of 1 March 2004) (U.N. Doc. CCPR/C/80/D/976/2001 (2004)) ('a distinction between married and unmarried couples does not amount to a discrimination [prohibited under Article 26 of the Covenant], since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the cohabiting persons' (para. 9.2., emphasis added)).

97 Communication n° 902/1999, decision of 30 July 2002 (UN doc. CCPR/C/75/D/902/1999).

on the circumstances of a concrete case, amount to prohibited discrimination. (…) […] [When] the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences (Danning v. the Netherlands, Communication No. 180/1984). No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognised same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under Article 26, unless otherwise justified on reasonable and objective criteria'.

The same reasoning seems to be applicable under the European Convention on Human Rights. In *Shackell*, a woman which had cohabited with a man for 17 years until his death unsuccessfully complained that she was denied the widow's benefits she would have a right to had the couple been married. The European Court of Human Rights considered the application manifestly ill-founded in 2000,[98] and the validity of this view was recently reaffirmed.[99] The European Court of Human Rights found in *Shackell* that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since 'marriage remains an institution which is widely accepted as conferring a particular status on those who enter it'. On at least one occasion, the privileged status of marriage has been invoked by the Court to justify a difference in treatment between an unmarried same-sex couple and a married couple.[100] It is however noteworthy that, in *Shackell*, the couple *had the choice* whether or not to marry. In the 2008 case of *Burden*, the Court expressly notes that 'there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples *who choose to live together but not to become husband and wife or civil partners*' (para. 65, emphasis added). In that case, the applicants were two sisters sharing a common household, who complained that when the first of them would die, the survivor would be required to pay inheritance tax on the dead sister's share of the family home, whereas the survivor of a married couple or a homosexual relationship registered under the Civil Partnership Act 2004, would be exempt from paying inheritance tax in these circumstances. The applicants argued that the very reason that they were not subject by law to the same corpus of legal rights and obligations as other couples was 'that they were prevented, on grounds of consanguinity,

---

98 Eur. Ct. HR (1st sect.), Shackell v. the United Kingdom (dec.), Appl. no. 45851/99, 27 April 2000.

99 Eur. Ct. HR (GC), Burden v. the United Kingdom, Appl. No. 13378/05, judgment of 29 April 2008, para. 63.

100 Eur. Ct. HR (4th sect.), Mata Estevez v. Spain (Appl. No. 56501/00), dec. (inadmissibility) of 10 May 2001, Rep. 2001-IV. In this case, a same-sex couple was unable to benefit from the advantages (surviving spouse benefits) they would be recognised had they been married, which they could not under Spanish law at the time.

from entering into a civil partnership' (para. 53). But the Court rejects this argument on the grounds that 'the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners' (para. 62). Therefore, this judgment cannot be invoked to avoid the conclusion that non-married same-sex couples should not be treated on a par with married couples, where marriage is unavailable to same-sex couples: the 'qualitative difference' between a couple of two sisters results, in the view of the Court, from the fact of their consanguinity, which is an obstacle to marriage, and not merely from the existence of a legal obstacle to marriage.

It follows from the above that any measures denying to same-sex couples benefits which are available to opposite-sex married couples, where marriage is not open to same-sex couples, should be treated presumptively as a form of indirect discrimination on grounds of sexual orientation: individuals with a homosexual orientation are particularly disadvantaged by such measures, since they have not made the choice not to marry, but are facing a legal prohibition to do so.

The Equality body established in Cyprus went even further than this on a complaint concerning Regulation 12 of the Educational Officers (Placements, Transfers and Movements) regulations of 1987 to 1994. This regulation defines the family status of the employee (i.e. whether he/she is married and has dependent children) as one of the criteria in determining whether such employee will be transferred to a teaching post away from his/her base. The Equality body found that differential treatment of unmarried employees vis-à-vis married ones amounts to indirect discrimination against persons who remain single out of personal conviction, or who choose to cohabit with their partners outside marriage or who do not marry due to their sexual orientation. It concluded that this amounted to discrimination on the ground of belief and/or sexual orientation and recommended the revision of this regulation.[101] In this particular case the Equality body established that discrimination on grounds of civil status occured, regardless of whether those disadvantaged would have had the possibility to marry. This reasoning is not without foundation in international human rights law, since the right not to marry – which is is well established as a human right – could be seen to imply that the exercise of such a choice should not be penalised by the imposition of disadvantages. Therefore, while this would seem to go beyond the terms of the Employment Equality Directive, particularly considering Recital 22 of its Preamble, it cannot be excluded that, in the future, regulations reserving certain benefits only to those who are married should be more carefully scrutinised, even in situations where those disadvantaged by such regulations had made a deliberate choice not to marry.

The following conclusions can be reached by combining the recent case-law of the European Court of Justice with the requirements of international human rights (and,

---

[101] Report of the equality body No. A.K.I 11/2004.

specifically, with the equality clauses of the International Covenant on Civil and Political Rights and of the European Convention on Human Rights). The ECJ clearly rejects the idea that Recital 22 of the Employment Equality Directive would justify any difference of treatment between marriage and other forms of union: when regulating matters relating to civil status and the benefits flowing therefrom, the Member States on the contrary must comply with the provisions relating to the principle of non-discrimination under EC law. States which have created institutions, such as registered partnerships equivalent to marriage, are thus not allowed to discriminate between those partnerships and marriage. But this does not mean that Member States are obliged to create such institutions for the benefit of same-sex couples so as to allow them to benefit the same advantages as those recognised to married couples, when they form a stable and permanent relationship. However, it is at this point that international human rights law complements EU law, by requiring that same-sex couples either have access to an institution such as a registered partnership that would provide them with the same advantages that they would have if they had access to marriage; or, failing such official recognition, that their *de facto* durable relationships extends such advantages to them. This follows from the fact that where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate *choice* not to marry – a reasoning which does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying. Advantages recognised to married couples should thus be extended to unmarried same-sex couples either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

2. Freedom of movement

2.1. The general framework

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (Free Movement Directive)[102] defines the conditions under which EU citizens and their family members may move and reside freely within the territory of the Member States. The decisive question for the purposes of this report is whether the directive complies with the requirements of fundamental rights as defined in Article 6(2) EU, and particularly with the requirement of non-discrimination on grounds of sexual orientation; and if so, under which interpretation of the terms of the directive.[103]

The problem may be stated as follows. The Free Movement Directive grants a number of rights of free movement and of temporary or permanent residence to a) the citizens of the Union who move to or reside in a Member State other than the State of which they have the nationality, and to b) their family members (Art. 3). A 'family member', for the purposes of the directive, is a) the 'spouse', b) 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State', and c) certain descendants or dependent ascendants of either the citizen of the Union who has exercised his or her right to free movement or of his/her spouse or partner (Art. 2).

The wording of the Free Movement Directive raises three separate questions, depending on the status of the same-sex couple in the Member State of origin.[104] A first question

---

[102] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

[103] On the question of the free movement of same-sex couples in the European Union, see, inter alia, E. Guild, 'Free Movement and Same-sex Relationships: Existing EC Law and Article 13 EC', in R. Wintemute and M. Andenaes (eds), Legal Recognition of Same-sex Partnerships, cited above, at 678-689; K. Waaldijk, 'Towards Equality in the Freedom of Movement of Persons', in K. Krickler (ed), After Amsterdam: Sexual Orientation and the European Union (Brussels, ILGA-Europe, 1999); A. Elman, 'The Limits of Citizenship: Migration, Sex Discrimination and Same-sex Partners in EU Law', 28 Journal of Common Market Studies 729 (2000). See also, more recently, Helen Toner, Partnership Rights, Free Movement, and EU Law, Hart Publ., 2004, 286 pages.

[104] For overviews of the various regimes adopted by the EU Member States, see M Bonini Baraldi, Le nuove convivenze tra discipline straniere e diritto interno, Milano: IPSOA, 2005; K Boele-Woelki, A Fuchs (eds.), Legal Recognition of Same-sex Couples in Europe, Antwerp, Oxford, New York:

arises where a citizen of the Union is married, under the law of his or her Member State of origin, with a person of the same-sex. At present, this question arises when same-sex couples are married under the laws of Belgium, the Netherlands, or Spain. Should the same-sex married person be considered a 'spouse' for the purposes of the Free Movement Directive, by the host Member State? Or may the host Member State refuse to extend the definition of the 'spouse' to the married same-sex partner, and deny to that partner a right to join his or her partner in that State?

A second question is raised in the situation where a same-sex couple, although they cannot marry in their State of origin, has access to registered partnership, or to some equivalent form of civil union, and has actually entered into such an institution. In this case, the wording of the Free Movement Directive seems to imply that the host State is not in principle obliged to recognise as 'family members' registered partners: under the directive, only when the host State 'treats registered partnerships as equivalent to marriage' in its domestic legislation, should it treat registered partnerships concluded in another Member State as equivalent to marriage for the purposes of family reunification. The same rule would seem to be imposed on host Member States where same-sex couples can marry. The relevant question here is what constitutes a registered partnership 'equivalent' to marriage, for the purposes of family reunification.

A third question arises when no form of registered partnership is available to the same sex couple in their State of origin and thus their relationship is purely *de facto*. In this case, the obligation of the host Member State is to 'facilitate entry and residence' of the partner, provided either the partners share the same household (Art. 3(2), a)), or there exists between them a 'durable relationship, duly attested' (Art. 3(2), b)). This obligation, which requires from the host State to carefully examine the personal circumstances of each individual seeking to exercise his or her right to family reunification, is not conditional upon the existence, in the host Member State, of a form of registered partnership considered equivalent to marriage. It follows that, where a registered partnership has been concluded between two persons of the same-sex in one Member State, the host Member State either has to treat this union as equivalent to marriage (if the host Member State treats registered partnerships as equivalent to marriage in its own domestic civil law), or must at least 'facilitate entry and residence' of the partner, either because the partners share the same household (Art. 3(2), a)), or because such a registered partnership establishes the existence of a 'durable relationship, duly attested' (Art. 3(2), b)) as a matter of course.

The following table provides a simplified summary of the obligations of host States under the Free Movement Directive, in accordance with the classification of the preceding paragraphs:

Intersentia, 2003; Y Merin, The Legal Recognition of Gay Partnerships in Europe and the United States, Chicago: University of Chicago Press, 2002.

Table 2.1.: Obligations of host Member States under the Free Movement Directive

		MEMBER STATE OF ORIGIN...		
		... allows same sex marriage	...provides registered partnership	... provides no status for same sex couples
HOST MEMBER STATE...	... allows same sex marriage	Host MS recognises same sex married partner as 'spouse'	Host MS recognises registered partnership as giving rise to family reunification rights	Host MS examines if a 'durable relationship duly attested' obliges it to 'facilitate entry and residence' of the partner
	... provides registered partnership or other institution equivalent to marriage	Host MS recognises same sex married partner as 'spouse'	Host MS recognises registered partnership as giving rise to family reunification rights	Host MS examines if 'durable relationship duly attested' obliging it to 'facilitate entry and residence' of the partner
	... provides no status for same sex couples	Host MS recognises same sex married partner as 'spouse'	Host MS recognises registered partnership as 'durable relationship duly attested' and therefore must 'facilitate entry and residence' of the partner	Host MS examines if 'durable relationship duly attested' obliging it to 'facilitate entry and residence' of the partner

It is this framework which should be kept in mind in the interpretation of the data collected for the preparation of this report. The results, covering the 27 EU Member States, are summarised in the table below. They are analysed in the sections below by distinguishing between three situations.

2.2. A married partner of the citizen of the Union seeks to join him or her in another EU Member State

In the first of the three situations distinguished above – where a married partner of the citizen of the Union seeks to join him or her in the host State –, the host State must recognise that married partner as 'spouse'. A refusal to do so would constitute direct

discrimination on grounds of sexual orientation, in violation of Article 26 of the International Covenant on Civil and Political Rights and of the general principle of equality, as reiterated in Article 21 of the Charter of Fundamental Rights. Indeed, since the sole reason for refusing to recognise as 'spouse' the same-sex married partner of a citizen of the Union is the fact that they belong to the same-sex, it constitutes differential trreatment based on the sexual orientation of the individuals concerned, which cannot be justified. It may be noted in this regard that although the 'spouses' would presumably nevertheless be considered members of the same household, in the meaning of Article 3 of the Free Movement Directive, this would constitute for them a far lesser guarantee that they will benefit from family reunification, since the obligations of the host State in this situation are defined in looser terms: instead of an 'automatic' right of entry and residence in the host Member State, which is recognised to 'spouses', the host Member State should in this case examine the request to enter, 'on the basis of its own national legislation, in order to decide whether entry and residence should be granted [to the applicant], taking into account their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'.[105]

The problem, however, is that Directive 2004/38/EC, while listing the persons who count as 'family members' of the citizen of the Union who exercises his/her freedom of movement into another Member State, failed to impose a clear obligation on the host Member State to recognise as 'spouse' a person of the same-sex validly married under the laws of the Member State of origin. As a result of this omission in the wording of the Directive, in certain Member States, 'public policy' exceptions, or an insistence on a definition of marriage as limited to unions between two persons of the opposite sex, are invoked in order to refuse to recognise same-sex marriages validly concluded under the laws of another Member State. A recent evaluation of the Dutch *Aanpassingswet geregistreerd partnerschap* [Registered Partnership Adjustment Act] and the *Wet openstelling huwelijk* [Act on the Opening Up of Marriage] commissioned by the Dutch Ministry of Justice[106] came thus to the conclusion that legal recognition of same sex marriages and registered partnerships abroad, even within the European Union, is problematic.

This is illustrated in the following example from Italy: Italian courts oppose the claim of two male Italian citizens married in the Netherlands, to have their 'marriage' recognised in Italy – something which, according to the Italian courts, would be contrary to the conception of marriage in the Italian Constitution, as a union between a man and a

---

105 Directive 2004/38/EC, 6th Recital of the Preamble.

106 K. Boele-Woelki et al. (2007), Huwelijk of geregistreerd partnerschap?, Evaluatie van de wet openstelling huwelijk en de wet geregistreerd partnerschap, Deventer: Kluwer.

woman.[107] Although that case concerned the marriage of Italians, the same solution would presumably prevail if the marriage were concluded between a citizen of another EU Member State having moved to Italy and a third-country national, the latter seeking to benefit from family reunification. Altogether 11 Member States appear to reject the recognition of same-sex marriage concluded abroad, and might refuse to consider as 'spouses', for the purposes of family reunification, the same-sex married partner of a citizen of the Union (EE, EL, IE, IT, LV, LT, MT, PL, PT, SI, and SK). In contrast, 12 other Member States would probably recognise such marriage (apart from BE, ES, NL, the three States which have opened marriage to same-sex couples in their domestic legislation, this group includes CZ, DK, DE, FR, LU, RO, FI, SE and UK). In four Member States, the situation is unclear (BG, CY, HU, AT).

This results in a situation in which the freedom of movement of LGBT persons is restricted and not uniformly recognised throughout the European Union. It is also the source, in many cases, of legal uncertainty: in the vast majority of Member States, the legislation relating to freedom of entry and residence of 'spouses' of citizens of the Union does not clearly address the situation when these 'spouses' are of the same-sex as the sponsor and there is no case-law to guide those wishing to exercise their free movement rights.[108] Finally, in the absence of clear guidance to the EU Member States about their obligations under EU law in this situation, discrimination against same-sex couples, in violation of the principle of equal treatment on grounds of sexual orientation, persists in at least eleven Member States, and may exist in an even larger number.

2.3. A same-sex registered partner of the citizen of the Union seeks to join him or her in another EU Member State

In the second situation – where the same-sex couple has formed a registered partnership in their State of origin –, there should normally be no difficulty either if the host State allows same-sex couples to marry, or if in its domestic law, it has a regime of registered partnerships which is equivalent to marriage. Although the Free Movement

---

[107] See the decisions published in Famiglia e Diritto 4 (2005), 411; and in Famiglia e Diritto 2 (2007), 166, cited by Matteo Bonini Baraldi, Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children, March 2008.

[108] It is significant in this regard that the study referred to above, which was prepared for the the Dutch Ministry of Justice, arrived at different conclusions than does this comparative study, noting for example, that it was unclear whether the Dutch same-sex marriage and/or same-sex registered partnership would be recognised at all in France, and that in Sweden and the United Kingdom, the Dutch same-sex marriage would not be recognised as a marriage, but as a registered or civil partnership (see Boele-Woelki et al., 2007, p. 190). This is an indicator of the considerable legal uncertainty which exists in this area.

Directive explicitly mentions only the latter case, it would be clearly unacceptable for a State not to allow family reunification of a same-sex registered partnership under the pretext that that State allows gays and lesbians to marry persons of the same-sex, instead of having created an institution specific to them. Where the host Member State neither authorises same-sex marriage nor has a form of registered partnership equivalent to marriage under domestic law, it is not obliged to grant an automatic right of entry and residence.[109]

Seven Member States have established forms of registered partnership in their domestic legislation with effects equivalent to marriage – i.e., with consequences identical to those of marriage with the exception of the rules concerning filiation and adoption. This includes CZ, DK, RO, FI, SE, and the UK (civil partnership), but also HU, although the partnership introduced in Hungarian legislation will only enter in force in 2009. These States must recognise registered partnerships concluded in another Member State for the purposes of family reunification with a citizen of the Union. BE, ES, and the NL – although BE has no 'registered partnership' in its legislation, but only a weak form of 'legal cohabitation' – should also be added bringing the Member States, where registered partners may fully exercise their free movement rights, because they allow same-sex marriage to ten.

In 13 other Member States there is no registered partnership in domestic legislation: in these States, the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence (BG, EE, EL, IE, IT, CY, LV, LT, MT, AT, PL, PT, and SK). One of these States – Austria – might shortly join the first group, as one party of the governing coalition unveiled plans to introduce registered partnerships. Two other States of this group plan to introduce registered partnerships, but reserve them exclusively to opposite-sex couples (EL and LT). The question is whether, following the introduction of such legislation, they would be obliged to recognise same-sex registered partnerships concluded abroad, when their own legislation excludes same-sex couples from this institution. The answer to this question is similar to the one given above, about States unwilling to recognise same-sex marriage under the pretext that their own domestic legislation only provides for marriage between two persons of the opposite sex: differential treatment of same-sex and opposite-sex registered partners would constitute a distinction based exclusively on sexual orientation, which presumably constitutes discrimination prohibited under EU law.

Four Member States provide for some form of recognition of partnerships, the effects of these are too weak to consider that they are equivalent to marriage, and these States

---

[109] The Committee on Petitions of the European Parliament confirms this in its response of 3 July 2006 to petition 0724/2005 ('a Member State which does not recognise registered partnerships under its own law will not be required to automatically grant partners registered in another Member State the right of residence as family members').

therefore are not obliged under Directive 2004/38/EC to grant the registered partner of a citizen of the Union automatic rights of entry and residence (DE, FR, LU, and SI).

In conclusion, while ten Member States (including three States which allow for same-sex marriage in their domestic legislation) currently must recognise registered partnerships concluded abroad as giving rise to family reunification rights, seventeen other Member States are not under such obligation, either because they have no such institution in their domestic law, or because the forms of partnership they allow are not equivalent to marriage. This does not mean that States belonging to the latter category may simply ignore the existence of a registered partnerships. Article 3(2), of the Directive states that a State must 'facilitate entry and residence' of the partner, provided either the partners share the same household, or there exists between them a 'durable relationship, duly attested'. As the following section illustrates, these terms are open to interpretation and might lead to varying implementation across the EU. What however does seem clear – and has been confirmed by the Petitions Committee of the European Parliament in its response of 3 July 2006 to petition n° 0724/2005 – is that by its very existence, a registered partnership establishes that there is a 'durable relationship' between the partners, which the partnership 'duly attests of'.

2.4. A de facto same-sex cohabitant of the citizen of the Union seeks to join him or her in another EU Member State

In the third situation – where the same-sex partners are neither married nor united under a registered partnership, but live together –, the host State again must 'facilitate entry and residence' of the partner, provided either the partners share the same household (Art. 3(2), a)), or there exists between them a 'durable relationship, duly attested' (Art. 3(2), b)). These are two separate grounds for admission, and a situation such as that of Estonia, which only takes into account *de facto* relationships to the extent that the members of the family share the same household, without providing the possibility to provide evidence of other elements demonstrating the existence of a 'durable relationship', may therefore be incompatible with this provision of the directive. In addition, it is axiomatic that the nature of the evidence to be provided by the individuals concerned should be the same, and should be weighed according to the same criteria, whether the partners are opposite-sex or same-sex: any differential treatment between the two situations would constitute a form of direct discrimination on grounds of sexual orientation.

The problem however is that, in the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a

common household or of a 'durable relationship' may be proven. While this may be explained by the need not to artificially restrict such means – i.e., by the need to allow for such proof to be provided by all available means –, the risk is that the criteria relied upon by the administration may be arbitrarily applied, and lead to discrimination against same-sex partners, which have been cohabiting together or are engaged in a durable relationship. Furthermore, the vague wording of Article 3(2) of the Directive may be the source of legal uncertainty for the national administrations themselves. It seems clear that the absence of any reference in the domestic legislation implementing the directive to the possibility for partners which have been cohabiting together or are engaged in a durable relationship to have their case examined is a violation of the requirements of the directive (EE, PL), and that denying to same-sex partners the rights which, in the similar circumstances, would be recognised to opposite-sex partners, would equally result in such a violation – since this would create a direct discrimination on grounds of sexual orientation (IT) –. But it is less clear, for instance, whether the imposition of a one-year cohabitation requirement is acceptable under the directive (HU) – although it could be said that a condition such as this one does not take into account the fact that sharing a common household and having a durable relationship are two separate grounds which the Member States should consider for the purpose of facilitating entry and residence of the partner. In some Member States (LU and PT), the implementation of Article 3(2) of the Directive leads the national authorities to require the production of a certificate from the authorities of the State of origin. This may create a serious obstacle to the effectiveness of this provision, in cases where the authorities of the State of origin refuse to recognise any form of partnership between persons of the same-sex or deny the delivery of such certificates on discriminatory grounds.

2.5. The same-sex marriage or partnership concluded by a citizen of the Union in a Member State other than the State of which he/she is a national

Finally, a supplementary problem results from the fact that same-sex marriage or registered partnerships are open in a number of EU Member States to non-nationals, including of course non-nationals of other EU Member States. Certain States opposing same-sex unions may be tempted to obstruct the possibility for their nationals to benefit from these institutions abroad. For instance, in order to register their partnership or marriage abroad, Polish citizens usually need to present a certificate issued by the *Urząd Stanu Cywilnego* [the Civil Status Office] stating that the person concerned is

unmarried. The Polish Ministry of Internal Affairs and Administration however has instructed[110] that such a certificate shall only be issued to persons who wish to enter into heterosexual marriage, and not same-sex partnership, as the latter is not regulated or recognised by Polish law. As a result of this situation, people wishing to enter into same-sex marriage or partnership must obtain special notary certificates, confirming that they are not married to anyone. This imposes a supplementary burden and additional notary costs.

The table below provides a more systematic overview of the position of each Member State, as regards their recognition, as host States in the context of the exercise of free movement rights by same-sex couples, of a) same-sex marriage[111]; b) registered partnerships; c) 'durable relationships'.

[110] Instruction of the Deputy Director of Departament Rozwoju Informatyki i Systemu Rejestrów Państwowych Ministerstwa Spraw Wewnętrznych i Administracji [Department of IT Development and State Registries of the Ministry of Interior] of 03.04.2002, addressed to all governors of voivodships, Statement of 03.04.2002, No. DIR-V-6000-21-2731/2002.

[111] On the position of the EU-15 Member States as regards the use of the public policy exception in order to oppose recognition of same-sex marriage, reference is made to the Opinion n° 2-2003 of the EU Network of Independent Experts on Fundamental Rights (Opinion on the possibility for each Member State to recognise the samesex marriage open in Belgium and the Netherlands and the role of the public policy exception of the private international law of each Member State, 30 June 2003), see ec.europa.eu/justice_home/cfr_cdf/index_en.htm (1.5.2008)).

Table 2.2.: Movement rights of same-sex couples in the EU Member States

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Belgium	Belgium ecognises as 'spouse' the same-sex partner married in another Member State.	Article 40bis, § 2 of the Aliens Act, as inserted by the Act of 25 April 2007, includes among the 'family members' of the citizen of the Union the alien with whom a registered partnership has been contracted, considered to be equivalent to marriage.[112] In addition, the partner who accompanies or joins the EU citizen, with whom the EU citizen has contracted a registered partnership in accordance with a law, shall be recognised as a 'family member' provided that it concerns a durable and stable relationship that is lasting already for at least one year, that both partners are older than 21 years and that they have no durable relationship with another person.	A circular of the Minister of the Interior of 1997 provides for a residence permit to be granted to unmarried partners who live together in a stable relationship,[113] which can be proven by any means.

[112] According to the travaux préparatoires of the Act of 25 April 2007, the registered partnerships covered by point a are in particular those that exist in Scandinavian countries (Parliamentary Documents, House of Representatives 2006-2007, no 51-2845/1, p. 39). The King is to determine which partnerships, registered abroad, are considered equivalent to marriage (art. 40bis, § 2 Aliens Act, as inserted by the Act of 25 April 2007).

[113] Circular of 30 September 1997 regarding the granting of a residence permit on the basis of cohabitation in the framework of a durable relationship.

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Bulgaria	The applicable legislation (Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства [Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act]),[114] in force since 1.1.2007, does not specify the meaning of 'spouse', which can be presumed to extend to same-sex married couples	Bulgarian family law does not include registered partnerships or other similar forms of civil unions between same-sex partners; therefore it is uncertain how registered partnerships concluded abroad will be treated.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.
Czech Republic	Act No. 161/2006 Coll. amending the Aliens' Act implements the Free Movement Directive; Sec. 15a of the Aliens' Act defines 'family members' of EU citizens for purposes of family reunification, without specifying who will be considered 'spouse'.	The Act on Registered Partnership (Zákon o registrovaném partnerství) was adopted in 2006, and Section 180f of the Aliens' Act assimilates registered partners to 'spouses'	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.
Denmark	Same-sex spouses legally married (or registered) under the laws of another EU Member State are considered spouses for the purposes of family reunification in Denmark	Since 1989 Danish law has allowed two persons of the same-sex to register their relationship (known as 'registered partnership') and with some few exceptions obtain the same legal status as a traditional different-sex marriage.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.

[114] Bulgaria/Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства [Entry, Residence and Exit of EU Citizens and Accompanying Members of Their Families Act], (01.01.2007).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Germany	Under Art. 14 of the Law Introducing the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch], the effects of marriage are regulated by the law of the State of which the spouses are nationals or where they have their principal residence or with which they are most closely connected. Therefore, same-sex partners having married in another Member State are considered 'spouses' in accordance with Article 2 para. 2 of the Law on Freedom of Movement/EU.	The *Gesetz über die Eingetragene Lebenspartnerschaft* (Act on registered Life Partnership) of 16 Feb 2001 (BGBl. 2001 p. 266) entitles two same-sex persons to enter into a registered life partnership. Same-sex life partners are not considered family members (Article 3 para. 2 of the Law on Freedom of Movement/EU), and the life partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	In order for the same-sex partner of the EU citizen to be granted a right to join him/her, a partnership cohabitation must actually exist or be earnestly intended. A common address is in principle required (Article 27 of the Law on Freedom of Movement/EU).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Estonia	The Citizen of European Union Act implementing the Free Movement Directive does not define the term 'spouse', however the Perekonnaseadus [Family Law Act][115] defines marriage as a union between a man and a woman, and the Chancellor of Justice has legitimised in an opinion of 2006 the difference in treatment between same-sex and different-sex couples.[116] Although § 55 (2) of Rahvusvahelise eraõiguse seadus [Private International Law Act][117] states that marriages concluded abroad shall be recognised valid as long as they comply with the laws of the residences of both spouses, this may lead the Estonian authorities and courts to refuse to recognise a same-sex marriage concluded abroad	There is no registered partnership or other institution equivalent to marriage open to same-sex couples in Estonian law.	The Citizen of European Union Act does not recognise any other 'durable relationship' but marriage or membership of a same household

115 Estonia/Riigikantselei (1994) Riigi Teataja I, 75, 1326. See also paragraph 54 (4) of the Government of the Republic Regulation of 19.08.1997 no. 159 Perekonnaseisuaktide koostamise, muutmise, parandamise, taastamise ja tühistamise ning perekonnaseisutunnistuste väljaandmise korra kinnitamine [The Confirmation of the Rules on the Compilation, Modification, Correction, Recovery and Annulment of Vital Records and Issuance of Vital Statistics Certificates], confirming that marriage is reserved to persons of the opposite sex (Estonia/Riigikantselei (1997) Riigi Teataja I, 62, 1067).

116 Estonia/Õiguskantsleri kantselei, 01.2006 no. 6-1/060166/0600782.

117 Estonia / Riigikantselei (24.04.2002) Riigi Teataja I, 35, 217.

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Greece	The reference to 'spouses' in PD 106/2007 (FEK A 135, 21/6/07) which transposes into Greek law Directive 2004/38/EC, probably would be interpreted not to include same-sex spouses, even validly married in another EU Member State.	There is currently no registered partnership in Greek law and a draft law put forward by the current government for the recognition of registered partnerships (cohabitation pact) specifically excludes from its scope same-sex couples. The registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.
Spain	Royal Decree 240/2007 of 16 February on Entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo [Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area] implements Directive 2004/38/EC. Spouses of citizens of the Union moving to Spain shall be considered family members, and this includes same-sex spouses.	Partners registered under the laws of another State shall be considered family members for the purposes of family reunification, provided the registered partnership is exclusive of both marriage and any other registered partnership concluded in another State.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
France	There is no unanimity about the question whether same-sex marriages validly concluded in another Member State should be recognised in France for the determination of the quality of 'spouses', however the introduction of the 'PACS' (pacte civil de solidarité) would seem to lead to an affirmative answer, since affirming that same-sex marriage would be contrary to French public policy would seem difficult to justify in this context[118]	The French 'PACS' (pacte civil de solidarité)[119] does not produce effects equivalent to marriage, and France therefore is not required to apply mutual recognition of partnerships	Article 12bis, para. 17, of the Ordinance of 2 November 1945 relative to conditions of entry and residence of foreign nationals in France, provides a temporary 'private and family life' residence visa shall be issued to the foreign national whose personal and family ties are such that refusal to authorise residence would disproportionately infringe upon his/her right to respect of his/her private and family life
Ireland	Irish law does not recognise same-sex marriage concluded elsewhere, as this would seem to conflict with the definition of marriage as derived from Article 41 of the Irish Constitution 1937.[120]	There is currently no registered partnership in Irish law and the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.

[118] See H. Fulchiron, 'La séparation du couple en droit international privé', Petites Affiches, 2001, n°62, p.5; H. Fulchiron, 'Réflexions sur les unions hors mariage en droit international privé', Journal de droit international, 2000, p.889.

[119] France / Loi n°99-944 du 15 novembre 1999 relative au pacte civil de solidarité, JORF n°265 of 16.11.1999, p. 16959 (www.legislation.cnav.fr/textes/loi/TLR-LOI_99944_15111999.htm, 1.5.2008)

[120] The narrow definition of 'family' was considered recently in a case involving two women married in Canada who wished to be treated like a married opposite sex couple for the purposes of Irish tax law but the case did not succeed and is now on appeal to the Supreme Court (Zappone & Gilligan v. Revenue Comissioners and Others, Unreported High Court decision of 14th December 2006).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Italy	Directive 2004/38/EC has been implemented by Decreto legislativo [Legislative Decree] 30/2007.[121] However, Italy does not recognise same-sex marriage, since would be seen to conflict with Article 29 of the Costituzione della Repubblica Italiana [Constitution of the Republic of Italy], and with the definition of marriage in the Codice Civile [Civil Code][122]	There is currently no registered partnership in Italian law and the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	Although the wording of Article 3(2) of the Free Movement Directive has been reproduced in Art. 3 of Decreto legislativo [Legislative Decree] 30/2007, there is case-law suggesting that a de facto relationship between two persons of the same-sex could not give rise to family reunification, as this would conflict with the public policy of the Italian legal system.[123]
Cyprus	The applicable legislation[124] does not define the notion of 'spouse', and the authorities have decided to examine the question of recognition of same-sex marriage in family reunification cases when the question will arise, based on the experience of other States	Cypriot family law does not include registered partnerships of other similar forms of civil unions between same-sex partners; therefore it is uncertain how registered partnerships concluded abroad will be treated.[125]	Article 4(2)(b) of the Law 7(1)/2007 allows for a Union citizen to apply for the exercise of freedom of movement for 'his/her partner with whom a Union citizen has a continuous relationship duly proven', which is subject to the Migration and Aliens Law.[126]

121 Italy/Decreto legislativo 30/2007 (06.02.2007).

122 According to a decision of the Tribunale di Latina [Tribunal of Latina] of 10.6.2005, it is not possible in Italy to recognise a same-sex marriage of two Italian citizens concluded in the Netherlands, since the two individuals are not of the opposite sex, an essential prerequisite for marriage in the Italian legal system. On appeal, the Corte di Appello di Roma [Court of Appeal of Rome] of 13.07.2006 confirmed this view.

123 After the Tribunale di Firenze [Tribunal of Florence], by a decree of 07.07.2005, recognised the right of a citizen of New Zealand to receive a visa/ residence permit on the basis of a de facto partnership, attested by the New Zealand authorities, between him and an Italian citizen, appeal was made before the Corte d'appello di Firenze [Court of Appeal of Florence], which on 12.5.2006 took the view that the Italian system recognises exclusively partnerships between a woman and a man, and that it would be against public order to recognise, on the basis of the legislation of a third country, same-sex partnerships and related rights. An appeal filed by the applicants before the Supreme Court is still pending.

124 Cyprus/ Law on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely in the Territory of the Republic N. 7(1)/2007 (09.02.2007).

125 There is a complaint pending at the time of writing before the Cyprus Equality Body by a gay third country national who had registered a civil partnership agreement in U.K. with a U.K. national whose application to the immigration authorities for the rights of movement and residence afforded to partners of EU citizens under Directive 2004/38/EC was rejected by the Cypriot immigration authorities on the ground that national legislation does not recognise same sex marriages.

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Latvia	Latvian Civil Law explicitly prohibits same-sex marriage,[127] and this would seem to constitute an obstacle to the recognition as 'spouse', by the immigration authorities, of a same-sex partner married to a citizen of the Union having moved to Latvia	There is currently no registered partnership in Latvian law and the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.
Lithuania	Article 3.7 of the Lithuanian Civil Code defines marriage as the union between a man and a woman, thereby probably excluding the recognition of same-sex marriage validly concluded abroad.	Although the Civil Code, in force since 1.7.2001, provided for the adoption of a subsidiary law on partnerships, such law has never been passed. Therefore, the registered partner of a citizen of the Union is not granted automatic rights of entry and residence. Article 3.229 of the Civil Code states that only a union between a man and a woman can be recognised as a partnership.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.

126 Cyprus/ Aliens and Immigration Law, as amended by Law 8(I)/2007 (14.02.2007).

127 Latvia/Civillikums [Civil Law] (28.01.1937), Art. 35(2), available at: http://www.ttc.lv/index.php?skip=0&itid=likumi&id=10&tid=59&l=LV (24.02.2008).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Luxembourg	Pending the imminent adoption of a specific law implementing Directive 2004/38/EC, Luxembourg uses the Grand-Ducal Regulation of 28 March 1972, related to conditions of entry and stay of certain categories of foreigners which are the subject of international agreements, as last amended on 21 December 2007, to regulate the freedom of movement of EU Member State citizens and third-country nationals (the 'Temporary Regulation').[128] It is expected that 'spouses' from a same-sex marriage will be considered as family members for the purposes of family reunification.	Although the Law of 9 July 2004 on the legal effects of certain partnerships (the 'Partnership Law')[129] creates in Luxembourg an institution resembling the French 'PACS' rather than a union equivalent to marriage, the Temporary Regulation provides that partners of EU citizens in Luxembourg are considered members of the family when the EU citizen residing in Luxembourg has duly registered the partnership as required under the Partnership Law.	It would appear that, as currently drafted, the Temporary Regulation requires the production of a registered partnership certification for the purposes of the partner of the EU citizen having moved to Luxembourg joining him/her. This is problematic as regards the partners originating from countries who do not provide for any official recognition of same-sex unions.
Hungary	Act 1 of 2007 on the right to free movement, residence and entry of EU and EEA Member States' citizens[130] implements Directive 2004/38/EC in Hungary. It refers to 'spouses' as family, without it being clear whether this will be interpreted to include same-sex spouses validly married in another Member State.	The Hungarian government introduced registered partnership in November 2007 (Act No. 184 of 2007 on registered partnership) and the amendment will come into force on 01.01.2009.[131] As a result, after this date, a registered partner of a citizen of the Union should be assimilated to family members for the purposes of family reunification.	Under the Act 1 of 2007 on the right to free movement, residence and entry of EU and EEA Member States' citizens, registered partners of EU/EEA citizens who have lived together for at least one year are granted the right to free movement and residence.[132]

128 Luxembourg/Règlement grand ducal du 28 mars 1972 relatif aux conditions d'entrée et de séjour de certaines catégories d'étrangers faisant l'objet de conventions internationales (RGD 28.03.1972), as last amended on 21 December 2007.

129 Luxembourg/Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats (09.07.2004).

130 Hungary/2007. évi I. törvény/(05.01.2007). Hereinafter referred to in the body text as FMA (Free Movement Act).

131 Under Article 2 of the Act No. 184 of 2007 on registered partnership, the provisions of Act No. 4 of 1952 on marriage, family and guardianship concerning marriage shall be applied to couples living in registered partnership except the rules governing special forms of adoption ("közös gyermekké fogadás") and the use of name following marriage

132 Article 1 (1) db), Hungary/2007. évi I. törvény/(05.01.2007).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Malta	It would appear that Malta probably would not consider as 'spouses' for the purposes of family reunification the same-sex partner married in another EU Member State to an EU citizen.	There is currently no registered partnership in Maltese law and the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	Contrary to what is required under Article 3(2) of the Directive, there is no procedure under the Immigration Act to allow for the partner with whom the Union citizen has a durable relationship, duly attested, to have his/her situation examined in order to be granted, where appropriate, a right to entry.
Nether-lands	In 2001 civil Marriage was opened up for same-sex couples since 2001.[133] The notion of 'spouse' in the Vreemdelingenbesluit [Aliens Decree]), implementing Directive 2004/38/EC, therefore extends to same-sex married partners.	Since 1998 Dutch law has provided for a registered partnership for both same-sex and different-sex couples.[134] But the assimilation of partners registered in another EU Member State to family members follows in any event, from the recognition of same-sex marriage in the Netherlands.	Under Article 8.7, Vreemdelingenbesluit [Aliens Decree], the unmarried and unregistered partner with whom the EU citizen is in a duly attested stable long-term relationship has a right to residence. Applicants can simply submit a standard form in which they solemnly declare that they have such a relationship.
Austria	The Niederlassungs- und Aufenthaltsgesetz [Settlement and Residence Act][135] is not explicit on whether same-sex married partners would be recognised as 'spouses'.	On 1 October 2007, the ÖVP announced its support for a registered partnership (a form of civil union); it is thus likely that the registered partnerships or civil unions will be legalised in the course of 2008, following which Austria would have to consider partnerships concluded in another MS as equivalent to marriage	The existence of such a partnership can be proved, e.g., by providing witnesses, documents, photos or a registration card; there is no legal minimum period of time for which the 'stable partnership' must have lasted in the country of origin.

133 Wet openstelling huwelijk [Act on the Opening Up of Marriage] of 21.12.2000 Staatsblad (Law gazette) 2001/ 9.

134 Aanpassingswet geregistreerd partnerschap [Registered Partnership Adjustment Act] of 17.12.1997 (Staatsblad 1997, nr. 660). In force since 01.01.1998.

135 Austria/BGBl I 157/2005, last amended by BGBl I 4/2008 (04.01.2008).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Poland	Although Article 2 Section 4 of the Law of 14.07.2006 on entry to Polish territory, residence on and exit from this territory by European citizens and their family members136 includes the 'spouse' of the citizen of the Union among the family members benefiting from the right to entry and residence, this may not be interpreted as same-sex spouses for reasons of public policy and because of Article 18 of the Polish Constitution	There is currently no registered partnership in Polish law and the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	The Law on Entry into Polish Territory does not envisage any mechanism facilitating the implementation of Art. 3(2) of Directive 2004/38/EC, therefore no criteria are set in Polish law
Portugal	Article 2(e) of Lei 37/2006 implements Directive 2004/38/EC. It is silent about the meaning of 'spouses', however same-sex marriage presumably would not be recognised as giving rise to a right to family reunification.	There is currently no registered partnership in Portuguese law, the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	The partner with whom an EU citizen lives in a de facto union or permanent relationship duly attested to by the Member State in which they reside will be granted a right to family reunification.

136 Poland/Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin, Dziennik Ustaw [Journal of Laws] of 2006, No. 144, item 1043.

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Romania	Ordinance 30/2006 on the free movement of citizens of the EU and of the EEA[137] implements Directive 2004/38/EC. It is anticipated that the validity of a marriage between two persons of the same-sex, for the purposes of family reunification, will follow the principles of Law 105/1992,[138] which provides in Article 11 that 'the status, the capacity and the family relations of the individual are ruled by his or her national law, with the exception of cases when there are special norms prescribing differently.'	Article 2.(1)7 of Law 500/2006 introduces the concept of partnership into Romanian legislation.[139] Partners of citizens of the Union registered under the laws of their State of origin shall be granted rights of entry and residence.	By defining the 'partner' as 'a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved',[140] Romanian legislation extends the rights of entry and residence of registered partners to de facto partners, although the means of proving the existence of a durable relationship are not specified.
Slovenia	The Zakon o tujcih [Aliens Act][141] implements Directive 2004/38/EC in Slovenian law. The term 'spouse' which appears in this legislation is reserved for the marital relationship between heterosexual partners.	The registered partnership (same-sex union) as defined by the Slovenian Zakon o registraciji istospolne partnerske skupnosti [Registration of Same-sex Partnership Act]142 is not equivalent to marriage, and therefore the registered partner of a citizen of the Union is not granted automatic rights of entry and residence.	No information is available concerning the way Article 3(2) of the Free Movement Directive will be implemented in practice.

137 Romania/Governmental Ordinance 102/2005 on the freedom of movement and of residence of EU citizens (14.07.2005) was approved and amended by Romania/Law 500/2006 on amending and approving Ordinance 30/2006 (28.12.2006).

138 Romania/Law 105/1992 on private international law regulations (22.09.1992).

139 Art.3 of Romania/Governmental Ordinance 102/2005 on the freedom of movement and of residence of EU citizens (14.07.2005).

140 Art. 2.(1)7 of Romania/Law 500/2006 on amending and approving Ordinance 30/2006 (28.12.2006).

141 Slovenia/Aliens Act 107/06 (17.10.2006), Art. 36.

142 Slovenia/Same-sex Partnership Act 65/06 (08.07.2005).

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Slovakia	Directive 2004/38/EC was transposed into Slovak legislation primarily by the Act on Residence of Aliens[143]. It is anticipated that the notion of 'spouse' under this legislation shall not extend to same-sex married partners of the citizen of the Union moving to Slovakia, since according to Family Law (Slovakia/zákon 36/2005 (19.01.2005)) only a man and a woman can be married.	There is currently no registered partnership in Slovak law, the registered partner of a citizen of the Union is therefore not granted automatic rights of entry and residence.	The members of his/her household[144] are considered 'family members' of the citizen of the Union moving to Slovakia for the purposes of family reunification. While the means of proving such cohabitation are not specified, it may be presumed that the Act on Residence of Aliens, which provides that the declared relationship can be proved by a certificate or by 'honest statement' confirming that the person is a dependant family member or member of the household of the relevant person,[145] will be applied by analogy.
Finland	Same-sex partners validly married under the laws of another EU Member State would be considered 'spouses' under section 154 of the Aliens Act [ulkomaalaislaki (301/2004)]	In accordance with sections 8 and 12 of the Act on Registered Partnerships [laki rekisteröidystä parisuhteesta (950/2001)], which creates registered partnerships under Finnish law, registered partnerships validly concluded abroad, have the same legal effect as marriage unless otherwise provided for by law.	Under section 154 of the Aliens Act individuals who, irrespective of their sex, live in the same household in marriage-like circumstances, provided that they have lived in the same household for at least two years, shall be considered as members of the family

143 Slovakia/zákon 48/2002 (13.12.2001).
144 Art 45b(2). Slovakia/zákon 48/2002 (13.12.2001).
145 Art. 45b(3)c of the Act No. 48/2002 Coll.

Member State	Same-sex marriage concluded in another EU Member State	Registered partnership concluded in another EU Member State	Recognition of de facto relationships as 'durable' and 'duly attested'
Sweden	The Aliens Act (SFS 2005:716) Chapter 3(a), section 2, includes 'spouses' among the family members authorised to join the citizen of the Union moving to Sweden.	The term 'spouse' includes people who are registered partners within the meaning of chapter 3, section 1 of the Act on Registered Partnerships (SFS 1994: 1117), i.e. same-sex partners	'Cohabiting partners', i.e. those who are living together in a durable relationship and who share the same household (Cohabiting Partners Act SFS 2003:376, section 1 paragraph 1), including same-sex partners (Cohabiting Partners Act section 1 paragraph 3), benefit family reunification rights.
United Kingdom	The Immigration (European Economic Area) Regulations 2006[146] implement Directive 2004/38/EC. The definition of 'family members' would include the LGBT partners of EU citizens who have entered a same-sex marriage legally recognised in another Member State.	Under the Civil Partnership Act 2004,[147] same-sex couples are able to obtain legal recognition of their relationship by forming a civil partnership, whose effects are equivalent to marriage.	Under Reg. 8, partners who are not married or in a civil partnership with an EU citizen they must be able to show that they are in a 'durable relationship' with each other.

146 UK/ The Immigration (European Economic Area) Regulations 2006, Statutory Instrument 2006 No.1003 (30.03.2006), available at: http://www.opsi.gov.uk/si/si2006/20061003.htm (15.02.2008).

147 UK/The Civil Partnership Act 2004 c.33 (18.11.2004), available at: http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1.htm (11.02.2008). The act applies to England and Wales. Similar provisions have been introduced in Scotland and Northern Ireland.

3. Asylum and subsidiary protection

3.1. Asylum: the general framework

Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (the 'Qualification Directive')[148] seeks essentially to ensure that the EU Member States apply common criteria for the identification of persons in need of international protection. Building on Art 1A(2) of the 1951 Convention on the Status of Refugees, the directive defines the 'refugee' as 'a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country. The directive also defines as 'refugee' a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it', unless that person is excluded from this qualification by virtue of Article 12 of the Directive.

The formulation 'member of a particular social group' in the above definition implies that the members of that group share a common characteristic or belief fundamental to the members' identity, and that the group is perceived to have a distinct identity in the society of origin. 'Depending on the circumstances in the country of origin', the notion of 'social group' 'may include a group based on a common characteristic of sexual orientation'. This regime is well illustrated by the case-law of the French Refugee Appeals Board (CRR) (replaced in 2007 by the National Court for the Right of Asylum (CNDA)), which considered that the prohibition of homosexual conduct under the laws of Mauritania or Sierra Leone constituted sufficient indicia for the persecution of homosexuals as members of a social group characterised by its sexual orientation.[149] The practice of the Member States is, however, not uniform: in the Netherlands, while the risk of criminal prosecution against homosexuals may constitute a ground for the recognition of the status of refugee, the criminal sanction must attain a certain gravity in

---

148 OJ L 304/12 of 30.9.2004.

149 CRR, 1 December 2006, 579547, Ms N.; CRR, 18 May 2006, 559666, Mr J. On 16 April 1999, the Recourse Commission (Commission des recours) of the OFPRA had already recognised that Algerian homosexuals were persecuted and that they belonged to a social group subject to harassment and potential criminal prosecution.

order to lead to such recognition;[150] in Sweden, the existence of criminal provisions prohibiting homosexual conduct is not sufficient to justify the granting of refugee status. However, if an asylum-seeker has lived openly according to his/her sexual orientation in Sweden it will in principle be sufficient to justify the granting of asylum, since it cannot be expected that this person must hide his/her sexual orientation upon return to the country of origin in order to escape prosecution.

As illustrated in the case-law of United Kingdom courts, a number of questions emerge once sexual orientation is recognised as a ground for persecution: these regard proof of sexuality,[151] concepts of identity versus activity,[152] the imposition of discretion upon same-sex relationships (e.g. 'closeting'),[153] or the existence of internal relocation alternatives.[154] Despite these uncertainties concerning the precise scope of protection under the Qualification Directive, the fact that certain countries are considered 'safe countries of origin' – leading to asylum-seekers originating from these countries having their claims fast-tracked and their rights of defence restricted – despite the fact that they still have homophobic legislation in force (for example, Benin, Ghana, India, Mauritius, Senegal and Tanzania) is clearly a source for concern.

Table 3. 1. shows that none of the EU Member States has explicitly refused to consider sexual orientation as a source of persecution for the purposes of granting refugee status, since this would constitute a clear violation of the Qualification Directive. However, in eight Member States, this inclusion is not explicit in their legislation (EE, EL, ES, LV, MT, PL, PT and UK), although in Spain and the United Kingdom, this interpretation has been confirmed by courts. Where the domestic legislation does not explicitly include sexual orientation, and instead replicates the definition of the 1951 Geneva Convention on the Status of Refugees, the reference to 'social group' should therefore be interpreted in accordance with the Qualification Directive.

The Qualification Directive specifies that 'sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States' (Art. 10(1), d)). It is implicit, but certain, that this exception could not be invoked by reference to any legislation which constitutes a violation of the right to respect for private life, or which constitutes discrimination in the enjoyment of the right to respect for private life, under Article 8 ECHR alone or read in combination with Article 14 ECHR. The European Court of Human Rights protects sexual life as an element of private life and firmly condemns not only the criminalisation of consensual same-sex sexual

150 's-Gravenhage Regional Court, location 's-Hertogenbosch, 12.10.2004, AWB 02/3863, LJN: AR6786.
151 R v Secretary of State for the Home Department ex. parte Vraciu 1995 Appeal No. HX/70517/94.
152 J v Secretary of State for the Home Department [2006] EWCA Civ 1238.
153 RG (Colombia) v Secretary of State for the Home Department [2006] EWCA Civ 57.
154 Amare v Secretary of State for the Home Department [2005] EWCA 1600.

relationships between adults,[155] but also any differential treatment of homosexual and heterosexual sexual conduct.[156] This qualification may be important where the legislation of a Member State remains in violation of the standards of the European Convention on Human Rights: for example, whereas according to the Cypriot criminal code sexual intercourse between two men where one of them is under 17 years of age is a criminal offence punishable with three years of imprisonment,[157] it would not be justified to deny refugee status to an asylum-seeker – referring to the rule that, under the Qualification Directive, 'sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States' – because prosecution is possible in his State of origin based on a similar provision of the criminal law. The same would apply to the provisions of Article 347 of the Greek Penal Code, which incriminates sexual intercourse between men a) when induced by an abuse of a relation of dependency, b) when one party is under the age of 17 or when it serves to generate profit and c) when practised on a professional basis. Indeed, given the plural form used in the Qualification Directive ('acts considered to be criminal in accordance with national law of *the Member States*' (emphasis added)), it may even be questioned whether a Member State may invoke its own legislative provisions in order to deny refuge status, when these provisions do not correspond to those in force in all the EU Member States.[158]

It may also be relevant to note that under the Qualification Directive the forms of persecution, which may lead to granting refugee status, may include, *inter alia*, the infliction of acts of physical or mental violence or acts of discrimination (Art. 9(2), a) and b)) by non-State actors provided governmental authorities or parties or organisations controlling the State or a substantial part of the territory of the State are unwilling or unable to protect victims of such acts (Art. 6). This is sometimes interpreted restrictively, however, since the possibility of internal flight of the asylum-seeker – who may choose

---

155 Eur. Ct. HR, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45; Eur. Ct. HR (3d sect.), Smith and Grady v. the United Kingdom judgment of 27 September 1999, Appl. nos. 33985/96 and 33986/96, para. 90.

156 Eur. Ct. HR, S.L. v. Austria judgment of 9 January 2003, Appl. No. 45330/99, paras. 36-46 (concluding that Article 209 of the Austrian Criminal Code, which establishes a higher age of consent for sexual relationships between two men than for other relationships, constitutes a violation of the non-discrimination clause of Article 14 ECHR in combination with Article 8 ECHR); and see already the Report adopted by the European Commission of Human Rights in Sutherland v. the United Kingdom, Appl. No. 25186/94, in which the Commission had arrived at the same conclusion before the case was struck off the Court's list before it reached a judgment.

157 Criminal Code Article 171; Law amending the Criminal Code N.145(I)/2002. Prior to 1998, intercourse between two men irrespective of age was a criminal offence punishable with up to five years of imprisonment. The change in the law came after the European Court of Human Rights decided against Cyprus in the case of Modinos v. Republic of Cyprus, judgement 22.04.1993, 16 EHRR 485.

158 Comp. for instance, for Romania, the text of Governmental Decision 1251 from 2006 approving the methodological norms for Law 122/2006 on Asylum, which provides in relevant part that, 'Sexual orientation cannot trigger the existence of a social group under the definition of the current provision when the activities specific to sexual orientation are criminal and penalised by Romanian legislation.'

to reside in a part of the country where he / she would be safe from harm inflicted by non-State actors, such as members of his / her family or clan – may lead to a rejection of his asylum claim.[159]

The protection offered to gays and lesbians under the Qualification Directive should logically extend to transsexuals, as they also form a distinctive 'social group' whose members share a common characteristic and have a distinct identity due to the perception in the society of origin. Discrimination, in sum, constitutes the relevant 'social group' whose members, if subject to persecution, may claim a right to asylum. This extension of the notion of 'social group' to transsexuals has been accepted in France[160] and in Austria.[161] Gender may also be considered, according to the same understanding of 'social group' in the refugee definition provided under Art. 2/c of the Qualification Directive, as ground for persecution leading to recognition of refugee status. In Sweden, transsexuals and generally 'trans-persons' fall, according to the *travaux préparatoires*[162] within the term 'gender' – which is explicitly included as a ground for persecution in the refugee definition under Swedish law –, meaning that persecution of a person because they are a transsexual can entitle that person to refugee status.

3.2. Subsidiary protection: the general framework

Chapter IV of the Qualification Directive provides, in addition to its stipulations on the recognition of refugee status that States shall grant subsidiary protection status to persons who do not qualify as refugees, where such persons fear serious harm upon their return to their country of origin. Serious harm includes, *inter alia*, death, as well as 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin' (Art. 15, a) and b)). This protection would thus apply if, for example, an individual is sentenced to death by a criminal court in his or her country of origin, because he or she is an LGBT person or has engaged in homosexual conduct. The protection would also apply, if that person faces risk of inhuman or degrading treatment inflicted either by State agents or by non-State actors who the State or other parties or organisations controlling the State or a substantial part of its territory are unable or unwilling to control (Article 6). This provision of the qualification directive is in line with the case-law of the European Court of Human Rights, according to which 'expulsion by a

---

159 Luxembourg/Tribunal administratif du Grand-Duché de Luxembourg/22023 (03.05.2007) (Nigerian gay man fearing reprisals from his family for having refused to marry a girl).

160 CRR, 15 February 2005, 496775, Mr B. (Algerian citizen, having publicly manifested his transsexuality and having suffered persecution from both State agents and non-State agents).

161 Austria / Unabhängiger Bundesasylsenat [Federal Independent Asylum Tribunal], 244.745/0-VIII/22/03 (28.3.2006) (asylum granted to a transsexual Iranian).

162 Prop. 2005/06:6 p. 22.

Contracting State may give rise to an issue under Article 3 [ECHR], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country'.[163]

In implementing the provisions of the Qualification Directive on subsidiary protection, the EU Member States should be mindful of their obligations under fundamental rights as stipulated, in particular, in the European Convention on Human Rights.[164] In an inadmissibility decision of 22 June 2004, the European Court of Human Rights considered that an individual fearing persecution in Iran due to the intolerance of homosexuality in that country and the resulting risk of harassment, unless he concealed his sexual orientation, did not constitute an obstacle to his removal from the territory. 'On a purely pragmatic basis', said the Court, 'it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention'.[165] The Court seems thus to suggest that, as a gay person can conduct him/herself homosexually in the private private sphere in his home country, the mere obligation imposed on that person to refrain from publicly exhibiting homosexual conduct in his home country should not be seen as a sufficiently severe restriction on his right to respect for private life to justify prohibiting the return of that person to his home country – a position adopted, for instance, by certain courts in Italy and in Germany.[166] This position may

---

163 Eur. Ct. HR, Soering v. the United Kingdom judgment of 7 July 1989, Series A No. 161, p. 35, para. 88, Eur. Ct. HR, Chahal v. the United Kingdom judgment of 15 November 1996 (Appl. No. 22414/93), para. 74.

164 For a partial codification of this case-law, see the Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe on 4 May 2005, at the 925th Meeting of the Ministers' Deputies.

165 Eur. Ct. HR (4th sect.), Fashkami v. the United Kingdom, Appl. No. 17341/03.

166 In Italy, the Court of Cassation considers that in order to be granted asylum on grounds of persecution based on sexual orientation, the asylum-seekers must demonstrate that homosexuality in private is punishable – i.e., that it is not merely punishable as a form of 'public indecency' (Italy/Corte di Cassazione (18.01.2008) and Corte di Cassazione (25.07.2007)). In Germany, certain courts have adopted this position, although it is clear that a similar restriction of homosexuality to the private sphere would be unacceptable in any Member State of the Council of Europe under the European Convention on Human Rights (Court of Administration (Verwaltungsgericht) Düsseldorf, judgment of 5th September 2005, case no.: 5 K 6084/04.A; Court of Administration (Verwaltungsgericht) Bremen, judgment of 28th April 2006, case no.: 7 K 632/05.A; Court of Administration (Verwaltungsgericht) Düsseldorf, judgment of 14th September 2006, case no.: 11 K 81/06.A.). But even in Germany, the courts are by no means unanimous in this regard (for the view that homosexuals cannot be expected to conceal their sexual orientation in order to escape the risk of criminal prosecution or other forms of harassment, see Court of Administration (Verwaltungsgericht) Frankfurt an der Oder, judgment of 27th January 2005, case no.: 4 K 652/01.A; similarly, with regard to Nigeria, Court of Administration (Verrwaltungsgericht) Leipzig, judgment of 21st December 1998, case no.: A 2 K 30357/95 in InfAuslR 1999, p. 309; as well as Court of Administration (Verwaltungsgericht) Chemnitz, judgment of 9th May 2003, case no.: A 6 K 30358/97; similarly, with regard to Yemen, Court of Administration Gießen, decision of 26th August 1999, case no.: 10 E 30832/98 in NVwZ-Beilage I 1999, p. 119; similarly, with regard to Lebanon, Court of

also be influenced by the perception that the public morals of the country of return must be taken into account in evaluating the severity of the infringement on the rights of the individual facing the threat of deportation.[167] However, even if, according to that decision, EU Member States are not obliged to refrain from deporting an LGBT person merely because that person may be subject to a climate of intolerance in the State of return, harassment on grounds of sexual orientation may constitute either persecution, leading to recognise the individual concerned as a refugee if he/she seeks asylum, or a form of inhuman or degrading treatment leading to subsidiary protection, in according with the provisions of the Qualification Directive cited above. In the 1999 cases of *Smith and Grady* and *Lustig-Prean and Beckett*, the European Court of Human Rights did not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may fall within the scope of Article 3 ECHR, which prohibits inhuman or degrading treatment or punishment, provided the ill-treatment attains a minimum level of severity.[168] According to the case-law of the Court, a treatment may be considered degrading, if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.[169] No specific intent from the part of the author is required for this qualification to apply: it is sufficient if the victim is humiliated in his or her own eyes.[170]

In addition, the real risk of ill-treatment inflicted by private (non-State) actors in the country of origin prohibits the removal of a person to that country. Indeed, the protection afforded by Article 3 ECHR extends to situations 'where the danger emanates from persons or groups of persons who are not public officials [where] the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[171] This can be illustrated in the September 2005 decision by the Danish Flygtningenævnet (the Danish Refugee Appeals Board), which granted a residence permit to a male citizen from Iran. The man had entered into a homosexual relationship with a school friend. The

---

Administration (Verwaltungsgericht) Düsseldorf, judgment of 1st September 2004, case no.: 5 K 1367/00.A; with regard to Sudan, Court of Administration Potsdam, judgment of 11th September 2006, case no.: 9 K 189/03.A). A particularly worrying development in this case-law is the attempt to make distinctions between a mere homosexual tendency, which the individual can repress, and 'irreversible' homosexuality, which would have to be proven by a psychiatric expertise, and which would lead to recognise the individual concerned as deserving of international protection.

167 For such an approach, see in the case-law of the German courts: Federal Court of Administration (Bundesverwaltungsgericht), BVerwGE 79, pp. 143ff.; Court of Administration Frankfurt an der Oder, judgment of 27th January 2005, case no.: 4 K 652/01.A; Court of Administration Potsdam, judgment of 11th September 2006, case no.: 9 K 189/03.A.

168 Eur. Ct. HR (3d sect.), Smith and Grady v. the United Kingdom judgment of 27 September 1999, Appl. nos. 33985/96 and 33986/96, para. 121; see also Eur. Ct. HR (3d sect.), Lustig-Prean v. the United Kingdom and Beckett v. the United Kingdom judgment of 27 September 1999, Appl. nos. 31417/96 and 32377/96.

169 Eur. Ct. HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 66-67, para. 167.

170 Eur. Ct. HR, Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 16, para. 32.

171 Eur. Ct. HR, H.L.R. v. France, judgment of 29 April 1997 (Appl. No. 24573/94), para. 40.

Board decided that there was no reason to assume that the applicant would risk being persecuted by the authorities because of his homosexuality if he returned to Iran. However, the Board found that the applicant would risk assault as included in paragraph 7(2) of the Danish Aliens Act, if he returned to Iran. The decision was based on former assaults by the brothers of the applicant's boyfriend and the fact that the brothers and the applicant's father had threatened the applicants' life.

In theory, LGBT individuals not subject to persecution on grounds of sexual orientation, in conditions which would lead to a successful asylum claim, could benefit from the subsidiary protection afforded under the Qualification Directive as a complementary status. However, in practice it would not be necessary to evoke this latter form of international protection in the case of EU Member States that comply with the requirements of the Qualification Directive regarding the notion of 'social group' whose members are protected from persecution by granting them refugee status. Nevertheless, there are cases where, following a refusal of the authorities to recognise that LGBT belong to a distinctive social group for the purposes of the recognition of the status of refugee, subsidiary protection could be invoked, since the individuals concerned run a real risk of being subjected to ill-treatment upon return to their country of origin.[172]

Finally, it should be emphased that the Qualification Directive imposes minimum standards on EU Member States, which provide more extensive protection to persons claiming to be at risk because of their homosexuality or transsexuality (Art. 3). Thus, in the Netherlands, persons who do not qualify either for protection under the Geneva Convention relating to the Status of Refugees or for subsidiary protection, but for whom the competent Minister and the Parliament consider expulsion to result in exceptionally severe consequences (the so-called discretionary ground for obtaining asylum of Article 29 (1)(d), Aliens Act), are authorised to remain on the territory. Since 18 October 2006 this categorical protection has been applied to Iranian LGBT people by the declaration of a moratorium on their deportation (*vertrekmoratorium*).

---

[172] In France, a Bosnian citizen, Mr S., not having ostensibly manifested his homosexuality and not having been subject to legal proceedings, was not considered as belonging to a circumscribed group of persons that is sufficiently identifiable to constitute a social group in the spirit of the Geneva Convention. He nevertheless was able to establish that in his country he was at risk of reprisals from individuals by reason of his sexuality, and that the Bosnian authorities would not be able to offer him protection; he thereby established that he was exposed to the type of grave threat addressed by the provisions of b) of Article L. 712-1 of the French Immigration and Asylum Code (CESEDA). The CRR thus granted subsidiary protection to Mr S. (CRR, 12 May 2006, 555672, Mr S.). See for a similar case, concerning an asylum-seeker from Gabon, CRR, 3 July 2006, 497803, Mr B.

3.3. Family members of the individual seeking international protection

According to Art 2/h of Council Directive 2004/83/EC of 29 April 2004, family members in the context of asylum and/or subsidiary protection include both spouses and unmarried partners in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens. The EU Member States must ensure that family unity can be maintained: they must therefore grant residence permits to the family members of the refugee or to the person benefiting from a subsidiary form of protection, and they must provide assistance in cases where the individuals concerned seek to be repatriated (Art. 23, 24 and 34 of the Qualification Directive).

As the table below shows, 'spouses' of refugees or individuals benefiting from subsidiary protection would include same-sex spouses in ten EU Member States (BE, CZ, DK, DE, ES, LU, NL, AT, FI, and UK); the situation is more doubtful in seven other Member States, where the definition of 'spouse' in this context still has to be tested before the courts (EE, FR, IT, PL, PT, RO, SE). In ten Member States, by contrast, same-sex spouses would probably not be allowed to join their spouse who was granted international protection (BG, EL, IE, CY, LV, LT, HU, MT, SI, and SK); this, although the number of jurisdictions allowing for same-sex marriages is extremely limited and thus statistically insignificant, should be considered as direct discrimination on grounds of sexual orientation.

Nine EU Member States allow the same-sex partner to join the person to whom international protection is granted, although the conditions between these jurisdictions as to the precise conditions for establishing the existence of a 'durable relationship' may vary (BE, CZ, DK, DE, ES, LU, NL, FI, and UK). The situation is doubtful in four other Member States (BG, FR, PT, SE). In the 14 remaining States, same-sex partners are not granted a right to residence (BG, EE, EL, IE, IT, CY, LV, LT, HU, MT, AT, PL, RO, SI). In at least two of the States of this group, there is differential treatment between opposite-sex and same-sex partners living in a durable relationship, because only opposite-sex partners are granted the right to reunite: this constitutes direct discrimination on grounds of sexual orientation and cannot be justified (LT and SI). In the 12 other States of this group, neither opposite-sex nor same-sex partnerships give rise to a right of the partner to reunite with the sponsor who was granted a form of international protection. These States are thus not establishing a direct difference in treatment on grounds of sexual orientation. However, while the refusal to grant residence rights to non-married partners is allowed under the Qualification Directive, the regime thus established still has to be tested against the principle of equal treatment: where, as would be the case in the overwhelming majority of cases, asylum-seekers originate from jurisdictions which do not allow for same-sex marriages. Such inability to marry, combined with the legislation

of an EU Member State, which refuses to treat unmarried couples in a way comparable to married couples in its legislation relating to aliens (as is the case in 14 EU Member States), leads to a situation where the family reunification rights of gay and lesbian asylum-seekers or potential beneficiaries of subsidiary protection are less extensive than those of heterosexual claimants in an otherwise similar position. This may be especially questionable since the Qualification Directive allows the EU Member States to ignore same-sex stable relationships even where such relationships take the form of registered partnerships. Indeed, even in States (such as CZ or LU) which recognise as family members 'partners' living in a stable relationship with the person to whom refugee status or subsidiary protection has been granted, a problem may still arise where the definition of 'partner' is restricted to 'registered partners', i.e., persons presenting a certification that they are living in partnership, when such persons originate from a country in which, due to discrimination against LGBT persons, no such institution exists and where no such certificate can be obtained.

The overall situation of the EU Member States as regards the questions above is presented in the following table:

Table 3.1 Persecution on grounds of sexual orientation in the granting of asylum and family reunification rights of same-sex couples in the EU Member States

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Belgium	Sexual orientation may be a ground for recognising the status of refugee (Art. 48/3 of the Act of 15 December 1980 concerning access to the territory, residence, settlement and removal of aliens, as amended).	While only spouses and partners under the registered partnership laws of Germany, Denmark, Finland, Iceland, Norway, Sweden or the United Kingdom, will allow for family reunification during the procedure for the determination of refugee status, once that status is granted, the usual rules on family reunification with third-country sponsors apply.
Bulgaria	Persecution on grounds of sexual orientation may lead to recognise the status of refugee (Decision N12294 of 30.12.2003 of the Върховен административен съд [Supreme Administrative Court]).	Art.24, Para 1, item 14 of the Act on Foreigners in the Republic of Bulgaria in principle restricts the notion of 'family members' to opposite-sex spouses or partners, although, since the Entry, Residence and Exit of Citizens of the EU and Accompanying Members of Their Families Act of 01.01.2007 requires that cohabitation be proven by a formal certificate delivered by the authorities of the State or origin, it cannot be excluded that this restrictive interpretation will be changed where such certificates will be granted to same-sex couples.
Czech Republic	Directive 2004/83/EC was transposed into Czech law by Act No. 165/2006, which amended the Asylum Act (Zákon o azylu). The Ministry of Interior has issued several decisions since 2005 where the well-founded fear of being persecuted on the grounds of sexual orientation was recognised as a reason for granting asylum and several applicants were granted asylum. This interpretation is followed by the Supreme Administrative Court.[173]	Under Sec. 13 (14b) of the Asylum Act, the term 'family members' encompasses a spouse or a partner; the term 'partner' is defined in the Asylum Act in Sec. 2 (13) as a person who can prove that, prior to the entry of the sponsor into the Czech Republic, he/she entered into a registered partnership, i.e., a certified stable relationship of same-sex partners.

[173] Decision of Supreme Administrative Court of 05.10.2006, No. 2 Azs 66/2006-52, www.nssoud.cz, Decision of Supreme Administrative Court of 23.11.2007, No. 5 Azs 50/2007-71, www.nssoud.cz (opened at February 19, 2008).

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Denmark	In accordance with Articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in Directive 2004/83/EC. Although DK is bound by the 1951 Geneva Convention, 'sexual orientation' is not deemed to fall within the Udlændingeloven (Aliens Act) section 7(1) (the social group criteria), and therefore those persecuted on this basis are not considered 'refugees' according to the 1951 Geneva Convention. However, if there exists a real risk of execution or inhuman or degrading treatment in the country of origin the person will be considered a refugee according to Udlændigeloven (Aliens Act) section 7(2) (so called B-status or protection status) and be granted a residence permit on equal terms with section 7(1) refugees. The mere definition of homosexual conduct in the country of origin as a criminal offence would not at the time being constitute an obstacle for denial of refugee status.	Same-sex partners are accepted as family members in the context of asylum and /or subsidiary protection in so far that they are co-habiting partners, on equal footing as different sex partners.
Germany	Since 1988 in the case-law, and now in Article 60 para. 1, 5th sentence of the Residence Law,[174] homosexuality constitutes a recognised ground for claiming asylum on behalf of membership of a specific social group, although the mere definition of homosexual conduct in the criminal law of the State of origin does not constitute a sufficient ground.[175]	Under Article 11 of the Life Partnership Law, a life partner is subsumed under the term 'family member' of the other life partner.
Estonia	The Act on Granting International Protection to Aliens, which implements Council Directive 2004/83/EC, while it replicates in para. 4 (1) the definition of the 'refugee' stipulated in the Directive, does not specify whether sexual orientation may constitute a ground of persecution of the individual as a member of a 'social group'. Nevertheless this legislation should be read in conformity with the requirements of the directive in this respect.	Under 7 of the Act on Granting International Protection to Aliens, 'spouses' are included among the 'family members' of the refugee or person benefiting from subsidiary protection. However, unmarried partners, whether or not in a registered partnership, are not included.
Greece	Implementation of Directive 2004/83/EC is still pending. However, Greece applies the definition of 'refugee' of the 1951 Geneva Convention on the Status of Refugees, which allows for the inclusion of sexual orientation among the grounds of persecution which may lead to granting asylum.	It would seem that Greece does not recognise same-sex couples, even married or under registered partnerships, for purposes of family reunification.

[174] See the preparatory works: Bundestag, document no. 15/420, p. 91.
[175] Federal Court of Administration (Bundesverwaltungsgericht), BVerwGE 79,143 (146-147).

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Spain	Law 5/1984 of 26 March on Derecho de asilo y de la condición de refugiado [Right to Asylum and Refugee Status] (amended by Law 9/1994 of 19 May) refers to the 1951 Geneva Convention for the definition of the refugee, and courts interpret this to extend to persecution on grounds of sexual orientation.	Article 10.1 of Law 5/1984 extends the right to residence to 'the refugee's spouse, or to the partner with whom the individual has a similar relationship of affection and cohabitation'.
France	France anticipated the implementation of Directive 2004/83/EC in Law 2003-1176 of 10 December 2003 amending law n° 52-893 of 25 July 1952 relative to the right of asylum. Persons with a particular sexual orientation are recognised in case-law as forming a 'social group', leading to grant the status of refugee where that group is subjected to harassment or risks criminal prosecution. This protection extends to transsexuals.	No information available
Ireland	Under the Refugee Act 1996 the ground of membership of a social group as a basis upon which refugee status could be recognised includes social groups defined by sexual orientation.	Irish law does not recognise same-sex partners – whether married or not – as family members in the context of asylum and/or subsidiary protection.
Italy	Directive 2004/83/EC has been implemented by Legislative Decree 251/2007.[176] Article 8 acknowledges that persecution for belonging to a particular social group characterised by sexual orientation is to be considered as among the grounds for protection.	The Italian legal system provides family reunification only for the spouse, without specifying if same-sex marriage is included (Art. 29 a, Legislative Decree 286/1998). Partners are not considered family members.
Cyprus	Council Directive 2004/83/EC of 29.04.2004 was transposed into Cypriot law in 2007, by amending the existing refugee law.[177] Article 10/1/d of the Directive was transposed in Article 3D(1)(d)(ii) of the Refugee Law, as amended,[178] verbatim. The administrative practice appears favourable to treating favourably claims to refugee status filed by individuals on grounds on persecution due to their sexual orientation.	Unmarried partners in a stable relationship are not considered 'family members', since Cyprus does treat unmarried couples in a way comparable to married couples under its law relating to aliens. In addition however, Cypriot authorities do not recognise same-sex marriages lawfully conducted elsewhere: 'spouses' from same-sex marriages therefore are not treated as family members in Cyprus.

176 Italy/Decreto legislativo 251/2007 (19.11.2007).
177 Cyprus/ Refugee Law N.6(I)/2000 (28.01.2000), as amended by, inter alia, Law N.112(I) of 2007.
178 Art. 4 of the amending law N. 112(I) of 2007.

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Latvia	The 2002 Asylum Law replicates the definition of 'refugee' of the Geneva Convention without specifying whether persecution on grounds of sexual orientation should lead to the recognition of the status of refugee.[179] However, draft legislation currently awaiting adoption would make this inclusion explicit.	Latvian law does not recognise same-sex partners – whether married or not – as family members in the context of asylum and/or subsidiary protection.
Lithuania	Article 10(1)(d) of the 2004 Qualification Directive was literally transposed into national laws on 04.05.2007.[180] It can be expected therefore that persecution on grounds of sexual orientation will lead to the recognition of the status of refugee.	The Law on the Legal Status of Aliens defines the family members of an asylum seeker as covering the spouse of the registered partner of the asylum seeker, in so far as the family already existed in the country of origin (Article 2). However it would seem that this would not benefit same-sex couples under existing practice.
Luxem-bourg	Luxembourg's law of 5 May 2006 on the right to asylum and complementary forms of protection, as amended, replicates the definition of the refugee of Directive 2004/83/EC and should extend to persecution on grounds of sexual orientation.	The Asylum Law defines as a family member the unmarried partner of the beneficiary of international protection when that partner is engaged in a shared community of life (vie commune) recognised by the country of origin of one of the partners. However, the legislation does not allow for the fact that some countries do not recognise any civil union or registered partnership, making it impossible for the couple to substantiate any long-standing officially recognised relationship.
Hungary	Homosexuality is recognised as a valid ground for the granting of asylum, although the practice in recent years of the Bevándorlási és Állampolgársági Hivatal (BÁH) [Office of Immigration and Nationality (OIN)] to submit the asylum-seeker to psychiatric expertise constitutes a worrying development.	Act No. 80 of 2007 on asylum[181] in force since 01.01.2008, does not include among 'family members' the spouse of the same-sex, or the cohabiting (or registered) partner.
Malta	Maltese law[182] borrows from the 1951 Geneva Convention the definition of the 'refugee'; it should be interpreted in accordance with Directive 2004/83/EC.	The Maltese Refugees Act includes the spouse among the family members, however this would not extend to same-sex spouses; nor would the (registered) same-sex partner qualify.

179 Latvia/Patvēruma likums [Asylum Law] (07.03.2002), Art. 23, available at: http://www.likumi.lv/doc.php?id=60721&mode=KDOC (25.02.2008).

180 Amendments of the Order concerning examination of asylum applications, issuing and execution of the decisions, No. 1V-169 (04.05.2007).

181 Hungary/2007. évi LXXX. törvény (29.062007). Hereinafter referred to in the body text as AA.

182 Chapter 420 of The Laws of Malta, Refugees Act, ACT XX of 2000, as amended by Act VIII of 2004 and Legal Notice 40 of 2005.

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Nether-lands	The definition of being persecuted for reasons of membership of a particular social group in the sense of Article 1A of the Geneva Convention includes being persecuted for reasons of sexual orientation (Vreemdelingencirculaire [Aliens Circular] C1/4.2.10.2).[183]	Under Article 29(1)(e)(f), Aliens Act, the spouse or the partner of the refugee may be granted a right of residence, without any restriction as to the sex.
Austria	Under the Asylgesetz 2005 [Asylum Act 2005],[184] LGBT people are considered to be a particular social group.[185] The extension of the notion of 'social group' to transgender persons was confirmed by the Federal Independent Asylum Tribunal in a decision of 28 March 2006.[186]	Austrian legislation and practice does not treat unmarried couples in a way comparable to married couples under its law relating to aliens. Therefore, only married same-sex partners would benefit from family reunification with the LGBT person recognised as refugee or as having to be granted subsidiary protection.
Poland	The Law on Granting Protection to Aliens on the Territory of the Republic of Poland[187] refers back to the Geneva Convention for the definition of the refugee.	Article 13 Section 2 of the Law recognises the spouse among the family members authorised to reside with the refugee, without however specifying whether this may extend to same-sex spouses.
Portugal	Law 15/1998 of 26.03.1998, which borrows from the Geneva Convention for the definition of the refugee, seems to lend itself to an interpretation including persecution on grounds of sexual orientation as a basis for the status of refugee.	Article 4 of Law 15/98 includes the 'spouse' among the family members granted a right of residence. It is uncertain whether this would extend to same-sex spouses. It is also unclear whether same-sex partners would be granted the same right, although in Portugal, Law 7/2001 of 11.05.2001 recognises the concept of de facto durable relationships.
Romania	Romania replicated the provisions of Article 10(1) of Directive 2004/83/EC in Article 10 d) (iii) of Governmental Decision 1251/2006 approving the methodological norms for Law 122/2006 on Asylum.[188]	Article 2.j of Law 122/2006 on Asylum[189] includes spouses among family members, however without extending this to persons living in a stable relationship outside marriage.

183 This policy was the result of a decision by the Afdeling Rechtspraak Raad van State [Judicial Division of the Council of State] of 1981: ARRvS, 13.08.1981, no. A-2.1113, RV 1981, 5.

184 Austria/BGBl I 2005/100, last amended by BGBl 2008/4 (14.01.2008).

185 See, inter alia, Austria/Unabhängiger Bundesasylsenat/240.479/0-VIII/22/03, (10.05.2004); Austria/Unabhängiger Bundesasylsenat/261.132/4-VIII/40/05, (14.07.2005); Austria/Unabhängiger Bundesasylsenat/234.179/0-IV/44/03, (03.12.2004).

186 Austria/ Unabhängiger Bundesasylsenat [Federal Independent Asylum Tribunal], 244.745/0-VIII/22/03, decision of 28.3.2006.

187 Poland/Ustawa z dnia 13 czerwca 2003 o udzielaniu cudzoziemcom ochrony na terytorium Rzeczpospolitej Polskiej, Dziennik Ustaw [Journal of Laws] of 2006, No 234, item 1695, as amended.

188 Romania/ Law 122/2006 on Asylum in Romania (18.05.2006).

189 Romania/ Law 122/2006 on Asylum in Romania (18.05.2006).

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Slovenia	The Zakon o mednarodni zaščiti [International Protection Act]190 replicates the definition of the refugee contained in Directive 2004/83/EC, including the reference to sexual orientation as a ground of persecution.	Article 3 of the International Protection Act includes 'spouses' and 'extra-marital partners in long-term relationships as defined by regulations on the right to residence of aliens in Slovenia' among the family members, however this would not extend to same-sex spouses or partners.
Slovakia	The Asylum Act replicated the provisions of Article 10(1) of Directive 2004/83/EC.[191]	While spouses are among the family members authorised to reside in Slovakia with the person granted international protection, this would not extend to same-sex spouses. However, 'temporary refuge' may be granted to persons who were living in the same household and were fully or partly dependant on him/her.[192]
Finland	Persecution on grounds of sexual orientation is to be considered persecution on the grounds of 'membership in a particular social group' within the meaning of section 87 of the Aliens Act.[193] Section 88 in turn establishes a form of subsidiary protection, which would appear to extend to situations where homosexuality is criminalised in his/her home country or country of permanent residence, or because he/she would be subjected to harassment in that country.	Under the said Article 'Family members' to whom a right of residence will be recognised include: (i) the spouse (which extends to individuals in registered relationships[194]), (ii) persons living continuously in a marriage-like relationship within the same household regardless of their sex, provided that they have lived together for at least two years or that they have a child in joint custody or that there is some other 'weighty reason' for it (see sections 37 and 114 of the Aliens Act).

190 Slovenia/International Protection Act 111/07 (29.11.2007), Art.1.

191 Art. 9. Slovakia/zákon 480/2002 (20.06.2002)

192 Art. 31a. Slovakia/zákon 480/2002 (20.06.2002).

193 Explanatory memorandum to the Government proposal for the Aliens Act, HE 205/2006. Similarly, Tapio Kuosma, Uusi ulkomaalaislaki (Helsinki: Lakimiesliiton kustannus, 2004), p. 395.

194 This is expressly written down to section 37. See also the explanatory memorandum to the Government proposal for Aliens Act, HE 205/2006, p. 139 and the Act on Registered Partnerships.

Member State	Recognition of persecution on grounds of sexual orientation leading to refugee status	Recognition as family members of same-sex spouses and unmarried partners in a stable relationship
Sweden	The Aliens Act (SFS 2005:716) replicates the 1951 Geneva Convention definition of the refugee, but mentions explicitly sexual orientation as a ground of persecution (section 4, paragraph 1); transpersons are included under the rubric of 'gender', also explicitly stated among the recognised grounds of persecution.	No information available
United Kingdom	The relevant asylum legislation[195] defines the refugee in accordance with the 1951 Geneva Convention, which has been interpreted to cover sexual orientation as a ground of persecution in the case of Shah and Islam.[196]	The civil partner of an individual who has been granted refugee status may join him, provided the civil partnership predates the claim to asylum and provided the partners have been living together permanently (Part 11, paragraph 352A, of the Immigration Rules HC 395); the same rules are extended to parties who have lived together in a relationship akin to marriage or a civil partnership for two or more years (paragraph 352AA). The same regime benefits partners of a person having been granted subsidiary protection.

[195] UK/ Immigration Act 1971 c.77 (28.10.1971); UK/ Immigration Act 1988 c.14 (10.05.1988); UK/ Asylum and Immigration Appeals Act 1993 c.23 (01.07.1993); UK/ Immigration and Asylum Act 1999 c.33 (11.11.1999); UK/ Nationality, Asylum and Immigration Act 2002 c.41 (07.11.2002); UK/ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 c.19 (22.07.2004); UK/ Immigration, Asylum and Nationality Act 2006 c.13 (30.03.2006), Immigration rules HC 395.

[196] Islam v Secretary of State for the Home Department; Regina v Immigration Appeal Tribunal and Another, Ex parte Shah [1999] 2 WLR 1015, [1999] 2 AC 629.

4. Family reunification

4.1. The general framework

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ('Family Reunification Directive')[197] seeks to contribute to the harmonisation of the conditions for entry and residence of third country nationals in EU Member States.[198] It ensures that the spouse will benefit from family reunification (Art. 4/1/a). It is for each Member State to decide whether it shall extend this right also to unmarried or registered partners of the sponsor (i.e., the person who seeks to be reunited on the territory of a Member State with members of his family, or with whom the latter seek to be reunited): each State may grant a right to family reunification to 'the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership […], and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons' (Art. 4/3). Art. 5/2 of the Directive adds that 'When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof'.

The Family Reunification Directive thus leaves it to the Member States to choose whether or not to extend the right to family reunification to the unmarried partner of the sponsor. However, in implementing the directive Member States should take into account their obligations under the European Convention on Human Rights, and more generally, the fundamental rights which are part of the EU legal order. It may be noted in this regard that, under the ECHR, granting a right to family reunification is an obligation for the States parties, and not merely a favour they may concede, where the right to respect for private or family life would be violated in the absence of family reunification.[199] Specifically, where the refusal by a State to allow a durable partnership to continue by denying the possibility for the partner to join the sponsor results in a disruption of the right to respect for private life such that this would constitute a violation

---

197 OJ L 251 of 3.10.2003, p. 12.

198 However, Denmark, Ireland and the United Kingdom do not take part in this directive.

199 See for example Eur. Ct. H.R., Sen v. Netherlands, judgment of 21 December 2001, application n° 31465/96.

of Article 8 ECHR[200] – which would be the case typically where the relationship could not develop elsewhere, for instance due to harassment against homosexuals in the countries of which the individuals concerned are the nationals or where they could establish themselves –, States are under an obligation to allow the reunification of the partner with the sponsor, notwithstanding the terms of the Directive which leave this to the appreciation of the State.

Where a State decides to allow for the extension of the right to family reunification to the unmarried partner and his or her children, this is without prejudice of the possibility for any other EU Member State, who does not recognise the family ties in such situations, not to grant to the persons concerned the benefits of the free movement of persons, as defined by EC law.[201]

The directive should be implemented in conformity with the requirements of fundamental rights, and, in particular, without discrimination on grounds of sexual orientation.[202] The following sections examine the different implications of this proposition.

4.2. The extension to same-sex spouses of the family reunification rights recognised to opposite-sex spouses

A first implication is that the same-sex 'spouse' of the sponsor should be granted the same rights as would be granted to an opposite-sex 'spouse'. Whether the national legislations of the EU Member States comply with this obligation is difficult to evaluate, because the reference to the 'spouse' in domestic law does not specify whether this notion should be restricted or not to opposite-sex spouses, and because the courts have not been given an opportunity to rule on this issue. It would appear however that, in at

---

200 Since 1996, the European Court of Human Rights considers that the right to respect for private life, and not only the right to respect for family life, may impose restrictions to the ability of States to remove non-nationals from their territory or to deny to non nationals the right to entry and to residence on the national territory (see Eur. Ct. HR, Chorfi v. Belgium, judgment of 7 August 1996). On a number of occasions, the European Commission of Human Rights has noted that separating two same-sex partners from one another might constitute a potentially disproportionate interference with the right to respect for private life: see application n°9369/81, X and Y v. United Kingdom, decision of 3 May 1983, D.R., 32, p. 220; application n°12513/86, W.J. and D.P. v. United Kingdom, decision of 13 July 1987; application n°16106/90, B. v. United Kingdom, decision of 10 February 1990, D.R., 64, p. 278; application n°14753/89, C. and L.M., decision of 9 October 1989.

201 Preamble, paras. 9-10.

202 Preamble, paras. 2 and 5.

least 13 Member States (EE, EL, FR, IE[203], IT, LT, LV, HU, MT, PL, PT, SI, and SK), the notion of 'spouse' would probably not extend to same-sex spouses, even where the marriage has been validly concluded in a foreign jurisdiction. These States, representing almost half of the EU Member States, could thus be considered to be in violation of the principle of non-discrimination. The restriction of the right to family reunification to opposite-sex spouses should therefore be removed in order to comply with this principle. This issue might have to be addressed in the future before courts. Belgium recognises same-sex marriage since 2003, and according to Belgian administrative practice, aliens can obtain a special visa, valid for three months, in order to marry in Belgium a third country national who resides there lawfully or whose national law allows for same-sex marriage.[204] As a result, we may see in the future a growing number of same-sex couples of two third country nationals, validly married in Belgium, and seeking to have their marriage recognised in another EU Member State for purposes of family reunification.

4.3. The extension to same-sex partners of family reunification rights recognised to opposite-sex partners

A second implication of the non-discrimination requirement is that if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners, this should not only benefit opposite-sex partners.[205] At the time of writing, 12 Member States have decided to extend the right to family reunification to unmarried partners. Four States in this group restrict this possibility to registered partnerships (CZ[206], DE, CY, LU), but eight other States allow for family reunification on the basis of any durable relationship, even if not authenticated by

---

203 As regards Ireland, there is however anecdotal evidence to the effect that exceptional leave to enter for the purpose of reunifying same-sex or unmarried opposite sex partners has been granted on an ad hoc discretionary basis by the Minister for Justice, Equality & Law Reform.

204 See Belgium / Circular of the Minister of the Interior of 11 July 2001 concerning the documents to be submitted in order to obtain a visa with the view of contracting marriage in Belgium or to obtain a visa 'family reunification' on the basis of a marriage contracted abroad. Under Belgian legislation, a same-sex marriage may be validly concluded in Belgium either when one or both spouses are Belgian nationals, or even when both spouses are foreign nationals, provided either (1) one of the two spouses is legally residing in Belgium, or (2) the national legislation of one of the spouses allows for same-sex marriage.

205 The converse proposition is not true, however. It may be acceptable for the EU Member States (as in Cyprus) to restrict to same-sex couples only the possibility to be granted family reunification rights on the basis of a partnership, since opposite-sex couples in principle always have the possibility to marry.

206 Under the Czech Aliens' Act however, partners who live in a stable and durable relationship without registering/marriage would nevertheless obtain a different type of visa pursuant to the provisions of the Aliens' Act allowing for a visa for 'another reason'.

official registration (BE, BG, DK, FR, NL, FI, SE, and UK). Fifteen Member States, forming a second group, do not provide for the extension of family reunification rights to unmarried partners (EE, EL, IE, IT, CY, LT, LV, HU, MT, AT, PL, PT, RO, SI, and SK), although in some of these States this restriction can be compensated by the possibility to join the sponsor where the partner can prove that he/she is in a position of economic or social dependency (EE, SK), or for other reasons of a humanitarian nature (ES). This possibility is foreseen by the Family Reunification Directive which only defines minimum standards, which EU Member States can exceed (Art. 3/5).[207] As already mentioned, in certain cases, the refusal to allow for 'family reunification' with unmarried partners may constitute an interference with the right to respect for private life under Article 8 ECHR which, if disproportionate, could result in a violation of that provision.

The Family Reunification Directive implicitly assumes that it is not discriminatory to grant family reunification rights to the spouse of the sponsor, without extending the same rights to the unmarried partner of the sponsor, even where the country of origin of the individuals concerned does not allow for two persons of the same-sex to marry. It remains to be seen whether this is indeed compatible with the requirements of equal treatment.[208] Indeed, the result of the regime of the directive is that family reunification rights are more extended for opposite-sex couples, which may marry in order to be granted such rights, than it is for same-sex couples, who do not have this option. Even though, in the current state of development of international human rights law, it is acceptable for States to restrict marriage to opposite-sex couples, reserving certain rights to married couples where same-sex couples have no access to marriage may be seen as a form of discrimination on grounds of sexual orientation (see above, 1.3.).

4.4. The extension to same-sex partners of free movement rights recognised to opposite-sex partners

A third implication of the prohibition of discrimination on grounds of sexual orientation in the implementation of the Family Reunification Directive is that, if an EU Member State decides to grant the benefits of the provisions of EC law on the free movement of persons to the partners of a third-country national residing in another Member State (and which that other Member State treats as family members), this may not be restricted to opposite-sex partners.

---

[207] These counts, it might be recalled, include DK, IE, and the UK, despite the fact that these Member States are not taking part in the Family Reunification Directive.

[208] This is an issue which the European Court of Justice did not address in its judgment of 27 June 2006, when the Family Reunification Directive was challenged before it by the European Parliament: see Case C-540/03, Parliament v Council, [2006] ECR I-5769.

5. Freedom of assembly

5.1. The general framework

Article 11 of the European Convention on Human Rights guarantees the freedom of peaceful assembly. A few principles regarding the interpretation of this provision may be recalled. First, such freedom is not absolute. Its exercise may be regulated by the national authorities, in particular by imposing a requirement of prior notification or prior authorisation, in order to ensure that the authorities will be prepared to protect the exercise of the said right. Such requirement of prior notification should not be used as a means to exercise a control on the content of the message brought to the public: should this appear to be the case, this would constitute a misuse by the authorities of their powers and the courts should have the power to annul such a decision and, perhaps, to afford compensation to the individuals aggrieved. As long as the notification does not lead to such a misuse of powers, however, it is compatible with the requirements of Article 11 ECHR.[209] Nevertheless, an effective remedy must be available to the organisers of a demonstration who are denied the authorisation to hold it: this requires that the competent court or other independent body before which the denial of an authorisation can be challenged can adopt a decision prior to the time the demonstration is planned to take place.

The European Court of Human Rights has confirmed that one does not lose the benefit of Article 11 of the Convention simply because one engages in a protest against some legislation while violating it.[210] Thus, the objectives pursued by the exercise of the freedom of assembly may include a change in the existing legislation.[211] An association seeking to promote the rights of LGBT persons, for example, may invoke the protection of Article 11 of the Convention, even if their objective in organising a demonstrating is to protest against the content of the Criminal Code, or an existing legislative ban on same-sex marriage. Similarly, freedom of assembly cannot be denied merely because the message is considered to offend public morality. The European Court of Human Rights has recalled that 'there can be no democracy without pluralism', so that freedom of expression – which freedom of assembly constitutes one specific form of – extends 'not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or

---

209 Eur. Comm. H.R., Appl. n° 8191/78, Rassemblement jurassien et Unité jurassienne v. Switzerland, dec. of 10 October 1979, D.R., 17, p. 105.

210 Eur. Ct. H.R., Cissé v. France (Appl. n° 51346/99), judgment of 9 April 2002, para. 50 ('le fait de protester pacifiquement contre une législation vis-à-vis de laquelle quelqu'un se trouve en infraction ne constitue pas un but légitime de restriction de la liberté au sens de l'Article 11 § 2').

211 See also the Fundamental Principles on the Status of non-governmental Organisations in Europe, MM ONG (2001) 1 Rev. 3, 2 April 2002, para. 12.

as a matter of indifference, but also to those that offend, shock or disturb'.[212] The requirement of pluralism thus understood extends not only to political opinions and parties, but also to cultural identities or ideas.[213] Thus, while restriction to the right to peaceful assembly regarding its time, place and manner are acceptable, since such restrictions may be required for the authorities to guarantee public order, content-based restrictions are in principle a violation of this freedom under Article 11 ECHR.

The one exception to the rule according to which the content of the message promoted through a public demonstration does not justify the imposition of restrictions on the exercise of the freedom of peaceful assembly relates to the abusive exercise of such freedom, when it is used with the aim of obstructing the exercise of rights and freedoms of the European Convention on Human Rights. Whether or not based explicitly on Article 17 ECHR, this concerns in particular incitement to hatred, violence or discrimination, for instance on grounds of religion or sexual orientation.[214] Thus, demonstrations against LGBT people, which may be seen to incite directly to hatred or discrimination against this group – as opposed to, for instance, demonstrations in favour of the 'sanctity of marriage' or of the 'traditional family' –, may be prohibited without this leading to a violation of Article 11 ECHR.

The effective exercise of the freedom of assembly requires that authorities protect those exercising such freedom, in particular against the activities of counter-demonstrators or against the risks of disruption caused by the presence, within the demonstration, of 'agents provocateurs'. This is particularly relevant to demonstrations in favour of LGBT rights, given the hostility that, in a number of communities, LGBT still encounter: as noted by the European Court of Human Rights, the obligation of the State to protect the exercise of freedom of assembly 'is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to

---

212 Eur. Ct. H.R., Freedom and Democracy Party (Özdep) v. Turkey (Appl. n° 23885/94), judgment of 8 December 1999, para. 37; United Communist Party of Turkey v. Turkey, judgment of 30 January 1998, Reports 1998-I, p. 1, para. 43-44.

213 See Eur. Ct. HR (4th sect.), Bączkowski and Others v. Poland, judgment of 3 May 2007 (Appl. no. 1543/06), para. 62 (about the ban of a gay parade in Warsaw, in 2005).

214 For instance, in the case of Sürek and Özdemir v. Turkey (Appl. nos. 23927/94 and 24277/94), which concerned the conviction of the owner and the editor in chief of a journal which has published interviews with leading members of the PKK, the Court considered that 'While it is clear from the words used in the interviews that the message was one of intransigence and a refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred.' (judgment of 8 July 1999, § 61). Although formulated in a case concerning freedom of expression, this doctrine may be transposed in the context of the exercise of freedom of assembly under Article 11 ECHR, which constitutes a lex specialis in relation to Article 10 ECHR (Eur. Ct. H.R., Ezelin v. France judgment of 26 April 1991, Series A n° 202, para. 35; Eur. Ct. H.R., Freedom and Democracy Partu (Özdep) v. Turkey (Appl. n° 23885/94), judgment of 8 December 1999, para. 37). The lesson is that whether or not the objective pursued by the manifestants is held by the authorities to be legitimate, whether or not the meeting advocates against the official governmental policy, the freedom of assembly or demonstration is to be preserved, unless it constitutes an incitement to discrimination, hatred or violence.

victimisation'.[215] Under Article 11 ECHR, the States parties to the Convention must protect the manifestants against the attempts by counter-manifestants to disturb the assembly or demonstration. As noted by the European Court of Human Rights: 'A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to demonstrate without fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11'.[216] The duty of the public authorities in this respect, however, is by no means absolute. It should be understood as an obligation of means rather than as an obligation of result: the authorities should adopt all reasonable measures which could protect the freedom of assembly, and only where it would not be possible, within reason, to ensure that this freedom can be exercised due to the threats of a counter-demonstration, could the risks entailed justify a ban.[217]

Similarly, the organisers of an assembly must be protected from the disruption of their manifestation by 'agents provocateurs', entering an assembly the objectives of which they do not share with the sole purpose of creating disturbances which could lead to the termination of the event either by the organisers or by the authorities. However, an assembly does not lose its 'peaceful' character simply because of the potential or real presence of such provocateurs within the assembly, and such a presence, therefore, does not deprive the organisers of an assembly from the benefit of Article 11 ECHR.[218] Although it may obviously be required from the organisers that they adopt reasonable measures to ensure the maintenance of the peaceful character of the event, this obligation may not be understood to have an extent such that the simple threat of 'agents provocateurs' being present will have a chilling effect and discourage the exercise of the freedom of assembly.

The duty to protect the freedom of peaceful assembly requires from the authorities more than measures of a purely legislative nature. The measures adopted should also include the presence of sufficient police forces acting under clear directives with respect to the

---

[215] See Eur. Ct. HR (4th sect.), Bączkowski and Others v. Poland, judgment of 3 May 2007, cited above, para. 64.

[216] Eur. Ct. H.R., Plattform "Ärtze für das Leben" v. Austria judgment of 21 June 1988, para. 32.

[217] Eur. Ct. HR, Öllinger v. Austria, judgment of 29 June 2006.

[218] Eur. Comm. H.R., Appl. n° 8440/78, Christians against Racism and Fascism v. the United Kingdom, dec. of 16 July 1980, D.R., 21, p. 162.

conditions and means of an intervention, and provided with the appropriate equipment avoiding any interpretation of their presence as a provocation.

The material provided in the national contributions allow us to address two sets of questions, relating respectively to the conditions under which LGBT individuals or organisations may exercise their freedom of assembly, and to the possibility for the national authorities to ban demonstrations which, being directed against the LGBT community, may be seen as an incitement to hate, violence or discrimination.

5.2. Freedom of assembly of LGBT people or organisations demonstrating in favour of LGBT rights

In general, the freedom of peaceful assembly is respected by the EU Member States, which are all bound by Article 11 of the European Convention on Human Rights, compliance with which is supervised by the European Court of Human Rights. In certain Member States, public demonstrations are subject to prior authorisation from the authorities (BE, EL, CY, LT, LU, RO, SI, and SE). In the majority of the Member States, no prior authorisation is required, however prior notification should be given to the authorities – specifying the date and duration of the event, as well as the itinerary (marches) or the place (assemblies) – in order to allow them to adopt the necessary measures to ensure the peaceful exercise of the freedom to assemble (BG, CZ, DK, DE, FR, IT, HU, AT, PL, PT, SK, and FI).[219] In the Netherlands, in principle, neither prior authorisation nor prior notification are required under the applicable *Wet Openbare Manifestaties* (WOM) [Public Manifestations Act][220] – although municipalities are empowered to adopt byelaws requiring prior notification and in general have adopted such byelaws in order to ensure that local authorities can take the necessary measures. According to the same provisions, the authorities may not enquire about the ideas to be expressed by the planned demonstrations.

Certain problems remain, however. First, on occasion, even where the legal framework for the exercise of freedom of assembly is adequate, the authorities (particularly at the local level) may impose arbitrary or disproportionate restrictions on the organisation of events in favour of LGBT rights. The bans imposed in the town of Varna in Bulgaria, in August 2005, are one example.[221] In Romania, a LGBT march was initially banned in

---

219 The national reports on which this comparative report is based are unclear as regards EE, ES, IE, MT and the UK.

220 Staatsblad 1988, 157.

221 At the time of writing, the legal procedures following the ban are still not completed.

2005, arguing that the police would be unable to protect the safety of the participants, but later authorised it. In 2006 and 2007, the authorities seem to have had a more open attitude towards gay marches, despite certain irregularities in the process of authorising them. In Poland, a ban was imposed in Warsaw on the Equality Parade which was planned to take place on 11 June 2005, ostensibly on the basis of *Ustawa – prawo o ruchu drogowym* [Road Traffic Law][222], and after a politician had expressed distaste for the public advocacy of homosexuality. This restriction to freedom of assembly was found by the European Court of Human Rights to violate Article 11 ECHR, in the judgment it delivered on 03.05.2007 in the case of *Bączkowski and others v. Poland*.[223] In this judgment, the ECtHR also established a new standard concerning the exercise of the freedom of speech by politicians who concurrently hold administrative office. Referring to statements made by a responsible politician on his position towards gay pride marches, expressed well before the issuing of a formal decision in case of the Equality Parade, the Court stated that politicians, 'when exercising their freedom of expression… may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants, whose employment and careers depend on their approval' (para. 98). At the time, the ban imposed in Warsaw was not an isolated event in Poland. In November 2005, after LGBT groups in Poznań announced their intention to organise an Equality March, the demonstration was banned. Just like the decision in Warsaw, however, which led not only to a decision of the European Court of Human Rights, but also to a finding of unconstitutionality of the Road Traffic Law by the Constitutional Court,[224] the decision was struck down by the courts. The impact of these judgments, as well as of the subsequent judgment in the *Bączkowski* case, has been significant. Since these developments have taken place, there have been no particular problems for the LGBT community in organising assemblies. The problems which do remain relate to the effective protection afforded by the police to those participating in LGBT events from hostile reactions, or attacks, by counter-demonstrators – a distinct issue discussed below.

Vague or overbroad expressions used to describe the reasons Executive authorities may rely upon to prohibit a demonstration may lead to arbitrariness or discrimination: examples are expressions such as 'good order or public safety',[225] or 'public order and public safety', although they are commonly used.[226] Such a risk is well illustrated by the decision of the municipality of Vilnius in Lithuania to deny permission for the holding of an anti-discrimination event to be organised in May 2007 in which the Lithuanian Gay

---

222 Dziennik Ustaw [Journal of Laws] of 2005, Nr. 108, item 908, as amended.

223 Eur. Ct. HR (4th sect.), Bączkowski and others v. Poland, application No. 1543/06, judgment of 03.05.2007.

224 Judgment of the Polish Constitutional Court of 18.01.2006, No. K 21/05.

225 Cyprus/ Assemblies and Processions Law CAP. 32 (17.04.1958), Art. 5.

226 For example, France / Art. 3 of the decree law of 23 October 1935 regulating measures relative to strengthening the maintenance of public order amended by the orientation and programming law n°95-73 of 21 January 1995 relative to security.

League (LGL) was participating. Indeed, as a result of unsuccessful litigation by LGL following its subsequent attempt to organise an LGBT even in Vilnius, the Council of the Municipality of Vilnius made an amendment to *Tvarkymo ir švaros taisyklės* [Rules on Disposal and Cleanness][227] including a provision stating that the municipality can refuse to issue approval to events (including those which fall under the scope of the Law on Assemblies) which could lead to a negative reaction in society, or when there are indications, objectively verifiable, that such events could cause breaches of law. The purpose of this amendment, it would appear, is to provide a justification to the ban of LGBT events in the future. It is particularly worrying that such an amendment in effect might give rise to counter-demonstrators, opposing LGBT people, which could amount to a veto right on the exercise by the latter of their freedom of assembly, since potential counter-demonstrators could easily create a climate that would allow the authorities to invoke the argument of a 'negative reaction in society' in order to ban the event.

In Greece, the applicable regulations[228] allow for a ban to be imposed on demonstrations which threaten the public order, a notion which is understood quite broadly to include respect for '…continued and undisturbed operation of public services, public transport etc.'[229] This led the Public Prosecutor of the Supreme Court (Areios Pagos) to conclude, in his consultative Opinion No 4/1999, that these regulations were unconstitutional, since the protection of freedom of assembly under the Constitution impose stricter limits on the margin of appreciation left to the Executive. It should, however, be noted that the authorities have made reasonable use of their powers under the existing legislative provisions, so that in practice, no obstacles have been imposed to the exercise by LGBT groups of their freedom of assembly.

A second problem is that in certain cases, the authorities seem not to have ensured a sufficient protection of freedom of assembly of LGBT people or organisations. That was the case in Latvia until 2007, where organisers of gay prides in Riga had to rely on courts in order to overturn initial refusals from the authorities to ensure protection from the risk of violent counter-demonstrations, in 2005 and 2006. In Estonia, organisers of the 2007 Gay Pride complained to the Chancellor of Justice's office about the attitude of the police, which, they alleged, had been un-cooperative in the organisation of the parade. The Chancellor concluded that although the requirement of the *Põhja Politseiprefektuur* [Northern Police Prefecture] to ask parade organisers to use a private

---

227 Vilniaus savivaldybės Tarybos sprendimas dėl Tarybos 2005-01-19 Sprendimo Nr. 1-655 'Dėl Tvarkymo ir švaros taisyklių' ir dėl Tarybos 2006-07-26 Sprendimo Nr.1-1299 'Dėl Tarybos 2005-01-19 sprendimo Nr. 1-655 'Dėl Tvarkymo ir švaros taisyklių tvirtinimo' pakeitimo ir papildymo. b2007 m. lapkričio 14 d. Nr. 1-263.

228 Greece / Legislative decree 794/1971 which regulates public assemblies (Περί δημοσίων συναθροίσεων, Official Gazette, FEK A 1, 01/01/1971); and Royal decree 269/1972 which regulates the conditions under which a public assembly can be dispersed (Περί εγκρίσεως του κανονισμού διαλύσεως δημοσίων συναθροίσεων, Official Gazette, FEK A 59, 29/04/1972).

229 Supreme Administrative Court – Συμβούλιο Επικρατείας – decision 957/78.

security firm to guarantee participants' safety was not in itself illegal, the refusal of the organisers to fulfil the requirement could not be a ground for refusing to allow the parade to take place.[230] In Germany, the obligation of the authorities to protect the demonstration is limited to instances where Article 8 of the Constitution (*Grundgesetz*) is considered to be exercised, which is the case for demonstrations conveying a political message, but not for events such as 'Love Parades', which are considered merely mass parties with no political content.[231] The result is that the organisers of such parades have to cover the costs of the protection they are provided, instead of it being a duty of the authorities to ensure such protection.[232] In Hungary, the police were criticised for having provided insufficient protection to the organisers of a Gay Pride in July 2007, which was severely disrupted by the violent actions of counter-demonstrators.

While the incapacity of the police to ensure the peaceful character of the assembly is the most frequently used argument to justify a ban being imposed on demonstrations, the availability of such a justification should be narrowly construed. A preventive ban on a demonstration can only be justified in very exceptional cases of *force majeure,* i.e. cases in which it is expected that maintenance of public order, notwithstanding a substantial police presence and a substantial administrative effort, cannot be guaranteed.[233]

Finally, it may constitute a good practice for States to provide in their domestic legislation for an explicit obligation imposed on the authorities to protect the exercise of freedom of assembly,[234] and for sanctions on those who disrupt such exercise of their freedom of assembly by others.[235] The latter type of provision, however, is difficult to draft adequately and to apply in practice, since under the European Convention on Human Rights, in the presence of two groups of demonstrators conveying conflicting

---

230 Estonia/Õiguskantsleri kantselei (09.2007) 'Soovitus õiguspärasuse ja hea halduse tava järgimiseks' ['Recommendation to observe legality and good governance'], letter to politseiprefekt [Police Prefect] Raivo Kütt, p. 13.

231 Federal Constitutional Court (Bundesverfassungsgericht), decision of 12th July 2001, case no.: 1 BvQ 28/01 and 1BvQ 30/01.

232 A similar, albeit not identical, distinction is made in Sweden under the the Public Order Act (1993:1617, Ordningslagen): events which are purely entertaining in purpose, rather than those which express a specific message, are less strongly protected against restrictions.

233 For example, see in the Netherlands Maastricht Regional Court, 22.03.2001, JB 2001/104.

234 For instance, in Finland, under section 19 of the Assembly Act [kokoontumislaki (530/1999)] it is the specific duty of the police to safeguard the exercise of the freedom of assembly. In Spain, Article 3 para. 2 of the Organic Law 9/1983 stipulates that 'The authority shall protect the assemblies and demonstrations against those who intent to avoid, disturb or affect the legal exercise of this right'. See also Article 11, Hungary/ Freedom of Assembly Act (1989. évi 3. törvény) (24.01.1989); Article 22, Lithuania / Lietuvos Respublikos susirinkimų įstatymas [Law of Assemblies]. Official publication Valstybės Žinios, 1993, Nr. 69-139; Art. 26, Slovenia/Public Gatherings Act 113/05 (30.11.2005).

235 In Finland, Chapter 14, section 5 of the Penal Code imposes specific penalties for violation of political rights (applicable e.g. where a person is prevented, by means of threats or violence, from expressing his/her opinions or from participating to a public meeting), while section 6 defines as a criminal offence the prevention of an assembly. See also Article 514 para. 4 of the Spanish Penal Code, imposing sanctions against any person who 'impedes the legal exercise of the rights of assembly and demonstration, or disturbs gravely the development of an assembly or a demonstration'.

messages, the national authorities are not expected to ban one of the messages in order to allow the other message to be heard: instead, they are to create the conditions ensuring that both demonstrations can take place without either being disrupted, where this can be done without imposing on the authorities a disproportionate burden, for instance an excessive presence of police.[236]

5.3. Demonstrations against LGBT people constituting an incitement to hatred, violence or discrimination

Most EU Member States provide in their domestic legislation for the possibility of banning demonstrations which incite to hatred, violence or discrimination on grounds of sexual orientation.[237] In most States, this possibility results from the existence of a provision, contained either in legislation regulating assemblies or in the Criminal Code, prohibiting incitement to hatred, violence or discrimination. The next chapter contains a detailed analysis of such clauses.

In certain cases, reference to sexual orientation is explicit. For instance, in Spain, Article 510 of the Criminal Code provides that 'conduct likely to incite discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other motives, related to their ideology, religion or belief, family situation, the belonging of their members to a particular ethnic, racial, or national group, their sex, sexual orientation, illness or disability, will be fined with a penalty from six up to twelve months or punished with a prison sentence from one up to three years'. In Northern Ireland, Part III of the *Public Order (Northern Ireland) Order 1987*, as amended by *Criminal Justice No. 2 (Northern Ireland) Order 2004*, criminalises acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation. Such explicit references to sexual orientation may provide better guidance to the authorities, both within the Executive and in the Judiciary, about the possibility to ban homophobic demonstrations.

By contrast, general references to incitement to hatred, violence or discrimination, even when not limited to such incitement based on ethnicity, religion or nationality (which would not allow extension to incitement to hatred, violence or discrimination against LGBT people – i.e., to homophobic demonstrations) and extended to 'social groups' or to

---

[236] Eur. Ct. HR, Öllinger v. Austria, judgment of 29 June 2006.

[237] No such possibility seems to exist, however, in Estonia, and possibly too in Malta. In these States, the protection of freedom of assembly for pro-LGBT rights activists is therefore significantly weaker, since such freedom will be considered no more worthy of protection that that exercised by counter-demonstrators, including when the latter shout anti-gay hostile slogans or promote a message which incites to hatred, violence or discrimination against LGBT persons.

'a part of the population',[238] risk being interpreted restrictively, in favour of freedom of expression, even in situations where the homophobic content of the message of the demonstration is beyond doubt.

Of course, the mere existence in domestic law, particularly in criminal law, of provisions prohibiting incitement to hatred, violence or discrimination, do not ensure that authorities will effectively rely on such legislation, when necessary. In Romania, the co-called 'Normality Marches' (an initiative of the Conservative Party, in cooperation with the Romanian Orthodox Church and extreme right-wing groups) have routinely been authorised, although they have repeatedly led to promotion of slogans inciting discrimination and violence against homosexuals. The authorities have not applied legislation criminalising such acts. In Sweden too, the police have occasionally been criticised for being too generous in giving permits for demonstration that are very likely to result in crimes and/or more widely felt disturbances of public order, particularly in situations where right-wing extremists were authorised to hold demonstrations.

[238] For example, section 11:8 of the Finnish Penal Code.

6. Criminal law

6.1. The general framework

A considerable degree of convergence exists between the EU Member States regarding criminal law combating racism and xenophobia, due to developments in international human rights law, both under the United Nations system and within the Council of Europe. Thus, Article 20(2) of the International Covenant on Civil and Political Rights provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. All the EU Member States are bound by this instrument.

In addition, all the EU Member States are parties to the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4 of which imposes an obligation a) to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof'; b) to outlaw all organisations promoting such ideas and to make it a criminal act to be a member of such organisations; and c) not to permit public authorities or public institutions to promote or incite racial discrimination. Other studies have documented how the EU Member States have implemented these provisions in their national legal order.[239] At the level of the Council of Europe, the Convention on Cybercrime of 23 November 2001 and its Additional Protocol of 28 January 2003 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems as well as the General Policy Recommendation No. 7 by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe[240] also constitute key instruments in combating racism and xenophobia. The ECRI General Policy Recommendation No. 7 in particular recalls the essential minimal requirements of national legislation for combating racism and racial discrimination. It addresses not only racial discrimination, but also other legal aspects of measures to combat racism such as, for instance, the public expression of racism and incitement to racism, racist organisations and racially-motivated offences.

---

[239] See EU Network of Independent Experts on Fundamental Rights, Opinion n° 5-2005: Combating Racism and Xenophobia through the Criminal Law: The Situation in the EU Member States, 21 November 2005.

[240] European Commission against Racism and Intolerance (ECRI) – General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination, CRI (2003) 8.

This section of the report examines whether a similar degree of convergence exists as regards combating homophobia either through the criminal law or through other legal means. The case of racism or xenophobia is instructive, nevertheless, for two reasons. First, the experience of combating racism and xenophobia through the criminal law has led to a clear consensus about the compatibility of such measures with freedom of expression, as protected under Article 19 of the International Covenant on Civil and Political Rights or, at regional level, under Article 10 of the European Convention on Human Rights. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination makes a reference to the Universal Declaration on Human Rights, indicating that, in the view of the drafters of the Convention, this provision was fully compatible with the requirement of freedom of expression, stipulated under Article 19 of the Declaration, and, after the ICERD was adopted, in Article 19 of the International Covenant on Civil and Political Rights. The compatibility of the prohibition with the right to freedom of expression has also been confirmed by the Committee on the Elimination of Racial Discrimination. Referring also to Article 20(2) of the International Covenant on Civil and Political Rights, which imposes on the States parties an obligation to outlaw propaganda for war or any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, the Committee on the Elimination of Racial Discrimination notes in its General Recommendation XV, that: 'the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in Article 19 of the Universal Declaration of Human Rights and is recalled in Article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to Article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in Article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance'.[241]

Indeed, the European Court of Human Rights has considered that the States parties to the European Convention on Human Rights could fully comply with Article 10 ECHR, which guarantees freedom of expression, while implementing their obligations under Article 4 ICERD.[242] Certain States have considered it necessary when ratifying the ICERD to enter reservations on Article 4 of this instrument, which refer to the conciliation of the obligations imposed by this Article with the right to freedom of expression and

---

241 Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in: Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 4.

242 Eur. Ct. HR, Jersild v. Denmark judgment of 23 September 1994, at § 30 (the Court takes the view that 'the opinion that its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention').

association.[243] Such reservations, however, serve little purpose. Freedom of expression may be restricted by proportionate means, if the ends are legitimate and if the measures imposing such restrictions are compatible with domestic legislation, and are sufficiently accessible and clear, allowing any citizen to know which limits may be imposed in the exercise of their freedom of expression.[244]

Furthermore, freedom of expression cannot be invoked by individuals or groups whose objective is to destroy the rights and freedoms of others by exercising such freedom. This is stated in Article 30 of the Universal Declaration of Human Rights, and in Article 5(1) of the International Covenant on Civil and Political Rights. Article 17 of the European Convention on Human Rights also states that no provision in that instrument may be interpreted 'as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention'. In so far as it concerns individuals, the Court reads this provision as aimed at 'making it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... no one may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; ...'.[245] Article 17 ECHR thus creates an obstacle to any individual or a group relying on the freedoms guaranteed in the Convention in order to promote objectives which run counter

---

243 See in particular the reservations or declarations made by Austria, Belgium, Ireland and Italy when ratifying the Convention on the Elimination of All Forms or Racial Discrimination. These statements emphasise the importance attached to the fact that Article 4 of the ICERD provides that the measures laid down in subparagraphs (a), (b), and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention and which therefore consider that the obligations imposed by Article 4 CERD must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. In addition, the United Kingdom has a restrictive interpretation of its obligations under Article 4 of the ICERD, which it justifies by the need to ensure that such interpretation is compatible with its conception of freedom, of expression.

244 See Art. 19(3) of the International Covenant on Civil and Political Rights, as well as Human Rights Committee, General Comment n°11: Article 20 (1983), in: Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 133 (noting that 'these required prohibitions [which States should impose on freedom of expression, in order to combat racial discrimination] are fully compatible with the right of freedom of expression as contained in Article 19 [of the International Covenant on Civil and Political Rights], the exercise of which carries with it special duties and responsibilities. The prohibition under (…) paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. (…) For Article 20 [of the International Covenant on Civil and Political Rights, outlawing propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence] to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation'.

245 Eur. Ct. HR, Lawless v. Ireland, judgment of 1 July 1961, Series A no. 3, p. 45, § 7.

to the values of the Convention, for instance racial hatred or discrimination.[246] Thus, the Court has considered that, like any other remark directed against the values underlying the Convention, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10 and that there is 'a category [of] clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17'.[247]

A second reason why the comparison with racism and xenophobia may be useful for the discussion of a legal framework sanctioning homophobia relates to the requirement of effectiveness. Article 4 (a) of the ICERD requires that States parties penalise four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.[248] The Committee on the Elimination of All Forms of Racial Discrimination insists that 'To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response'.[249] In the examination of individual communications submitted to the Committee, it also could not accept the claim by a State party that 'the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention'[250]; indeed, this implies that the freedom to prosecute criminal offences (expediency principle, *principe d'opportunité*), while in principle acceptable, 'should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention'[251]. Indeed, this requirement may also be imposed under Article 6 of the International Convention on the Elimination of All Forms of Racial

---

246 See in particular Glimmerveen and another v. the Netherlands, Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 198, and Pierre Marais v. France, Commission decision of 24 June 1996, DR 86, p. 184; Eur. Ct. HR, Lehideux and Isorni v. France, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, paras. 47 and 53.

247 Eur. Ct. HR, Lehideux and Isorni v. France, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, para. 53.

248 Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in: Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 3.

249 Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in: Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 2.

250 Committee on the Elimination of Racial Discrimination, L.K. v. the Netherlands, communication n°4/91, para. 6.4. (insuffient investigation and prosecution of a case of alleged incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin).

251 Committee on the Elimination of Racial Discrimination, Yilmaz-Dogan v. the Netherlands, communication n° 1/1984, views of 10 August 1987; and Committee on the Elimination of Racial Discrimination, L.K. v. the Netherlands, communication n°4/91, para. 6.5.

Discrimination, guaranteeing 'effective protection and remedies' to the victims of racial discrimination.

A State will therefore be considered in violation of its obligations under this latter provision, if the investigation into alleged instances of racial discrimination (including dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, as defined in Article 4(a) of the Convention), is found to be lacking or ineffective.[252] This should also guide any attempt to identify, through a comparison between the EU Member States, the most effective means to combat homophobia through legal reform.

In attempting such a comparison, two issues are examined. The following section looks at the definition of homophobia as a criminal offence (in the form of incitement to hatred, violence or discrimination against LGBT people), or whether the EU Member States have used other instruments in order to protect LGBT from what might be called verbal assault or abuse – in particular, civil law provisions on defamation or libel, or criminal provisions subject to private prosecution. A separate section focuses on homophobic intent as an aggravating circumstance in the commission of other offences.

---

[252] See Committee on the Elimination of Racial Discrimination, Ahmad v. Denmark, communication n° 16/99 (failure by Denmark to investigate and prosecute effectively an alleged instance of racial discrimination – the author had been insulted on the grounds of his national or ethnic origin – under sec. 266b of the Criminal Code: the Committee notes that 'if the police involved in the case had not discontinued their investigations, it might have been established whether the author had indeed been insulted on racial grounds' (para. 6.2.)).

6.2. Combating homophobia through the criminal law or through other means

In 12 EU Member States (BE[253], DK[254], DE[255], EE[256], ES[257], FR[258], IE[259], LT[260], NL[261], PT[262], RO[263], SE[264]), as well as in part of the United Kingdom,[265] the criminal law contains provisions making it a criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation. In addition, as regards England and Wales, on 8 October 2007, Justice Minister Jack Straw announced the government's intention to create offences on stirring up hatred on the grounds of sexual orientation, and proposed to amend the *Criminal Justice and Immigration Bill* to extend the existing

---

253 Belgium / Article 22 of the Anti-discrimination Act (2007) (making it a crime to publicly incite to discrimination, hatred or violence against a person on the basis of one of the protected criteria, including sexual orientation, or to incite to discrimination, hatred, violence or segregation against a group, a community or its members on the same grounds).

254 Denmark / Section 266 b (1) of Straffeloven (Danish Criminal Code).

255 Germany / Article 130 of the Criminal Code.

256 Estonia / Article 151 of the Criminal Code.

257 Spain / Article 510 of the Criminal Code.

258 France / Title III of Law n°2004-1486, Arts. 20-21.

259 Ireland / Prohibition of Incitement to Hatred Act 1989 (although face-to-face abuse or 'drive-by shoutings' are not covered by the legislation unless they can be construed as likely to stir-up or incite hatred).

260 Lithuania / Article 170 of the Criminal Code, Lietuvos Respublikos Baudžiamojo kodekso patvirtinimo ir įsigaliojimo įstatymas. Baudžiamasis Kodeksas. Official publication Valstybės Žinios, 2000, Nr. 89-2741 (available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=314141 (14.02.2008)); and Art. 19 of The Visuomenės informavimo pakeitimo įstatymas [Law on the Provision of Information to the Public] (Lietuvos Respublikos Visuomenės informavimo pakeitimo įstatymas. Official publication Valstybės Žinios, 2006, Nr. 82-3254. Available in English at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=286382 (14.02.2008)).

261 Article 137c of the Dutch Penal Code outlaws defamation on grounds of (among others) hetero- or homosexual orientation; Art. 137d of the Penal Code outlaws public incitement of hatred, discrimination or violent action against persons on the grounds of sexual orientation.

262 Since the amendments introduced in 2007 to Article 240 of the Criminal Code: Portugal/Código Penal (23ª alteração) Lei n.º 59/2007 (04.09.2007), available at: http://www.dre.pt/pdf1sdip/2007/09/17000/0618106258.PDF (15.02.2008).

263 Article 317 of the Criminal Code, inserted in 2006 in order to incriminate incitement to discrimination based on all grounds of discrimination sanctioned by the Anti-discrimination Law, including sexual orientation. In addition, since 2000, the Romanian Anti-discrimination Law has integrated a provision against incitement to hatred on all grounds of discrimination, against behaviour which takes place in public and harms the dignity of an individual, and against harassment based on any ground of discrimination: see Romania / Article 19 of Ordonanță privind prevenirea și sancționarea tuturor formelor de discriminare [Government Ordinance No.137/2000 regarding the prevention and sanctioning of all forms of discrimination] (30.08.2000).

264 In Sweden, the criminal provisions on hate speech are found in the two constitutional Freedom of Press (Tryckfrihetsförordningen) and Freedom of Speech (Yttrandefrihetsgrundlagen) Acts and in the Criminal Code Chapter 16 para 8 (Brottsbalken 16:8.).

265 In Northern Ireland, Part III of the Public Order (Northern Ireland) Order 1987, after it was amended by the Criminal Justice No. 2 (Northern Ireland) Order 2004, criminalises acts intended or likely to stir up hatred or arouse fear on grounds of sexual orientation.

offences of stirring up hatred against persons on religious grounds[266] to cover hatred on the grounds of sexual orientation.[267] In Scotland, the *Sentencing of Offences Aggravated by Prejudice (Scotland) Bill* introduced by Green MES[268] Patrick Harvie, with support from the government;[269] would allow homophobic hate speech to be prosecuted as a breach of the peace aggravated by sexual orientation prejudice.

The total number of Member States where an explicit criminal offence of incitement to hatred, violence or discrimination on grounds of sexual orientation exists may therefore in the future be thirteen. This does not include the specific case of harassment in the workplace, which under the Employment Equality Directive should be treated as a form of discrimination and should be subjected to effective, proportionate and dissuasive sanctions, which may be of a criminal nature. Although hate speech, if occurring in the context of employment, may constitute 'harassment' against which LGBT persons must be protected under the said directive, this constitutes a highly specific instance which we leave aside here.

In addition to having an explicit criminal law provision on incitement to hatred or discrimination against LGBT people, certain States of this group have other, more general provisions in the criminal law which can serve a similar purpose, where the requirements for relying on specific provisions are not satisfied. In Ireland for instance, hate speech could also be dealt with under section 6 of the Criminal Justice (Public Order) Act 1994 which makes threatening abusive or insulting behaviour in a public place an offence. In the United Kingdom, the common law offence of breach of the peace, as well as a range of statutory public order and harassment offences – particularly antisocial behaviour legislation which has been introduced in England and Wales, Northern Ireland and Scotland[270] – could serve that purpose.

In 12 other Member States, by contrast, hate speech against LGBT people – i.e., incitement to hatred, violence or discrimination against LGBT people – is not explicitly defined as constituting a criminal offence (BG, CZ, EL[271], HU, IT, CY, LU, LV, AT, PL, SK, FI). It is however difficult to classify States in such watertight categories, since in most cases, generally worded offences may equally serve to protect LGBT persons from homophobic speech. In Cyprus, the Criminal Code (Cap.154) contains a number of

---

266 UK/ Public Order Act 1986 c.64 (07.11.1986), Part 3A.

267 UK/ Draft Criminal Justice and Immigration Bill, clause 126 and Schedule 26.

268 Member of Scottish Parliament.

269 See comments of Justice Secretary Kenny MacAskill, available at: http://www.equalityhumanrights.com/en/newsandcomment/Pages/HatecrimelegislationinScotland.aspx (12.02.2008).

270 See, respectively, UK/Anti-Social Behaviour Act 2003 c.38 (20.11.2003); UK/ Anti-Social Behaviour (Northern Ireland) Order 2004 (27.07.2004); and UK/Antisocial Behaviour etc. (Scotland) Act 2004 asp.8 (26.07.2004).

271 Law 927/1979 (FEK A 139, 28/06/1979) only incriminates hate speech based on racial origin, nationality and (since a modification introduced in 1984) religion.

general provisions which, while drafted with hate speech against certain ethnic groups in mind, are sufficiently general in formulation to protect LGBT people from similar forms of speech aimed at provoking hatred, violence or discrimination against them (Art. 47(b), 48(f), 51 and 51A). In the Czech Republic, the Criminal Code provision on the crime of 'incitement to national and racial hatred' (Sec. 198a) stipulates that a person who publicly incites hatred of another nation, ethnic group, race, religion, class *or another group of people* or publicly incites the restriction of their rights and freedoms shall be sentenced to a term of imprisonment of up to two years. In Finland, chapter 11, section 9 of the Penal Code provides that 'a person who spreads statements or other information among the public where a certain race, a national, ethnic or religious group *or comparable group* is threatened, defamed or insulted shall be sentenced for *incitement against a population group* to a fine or to imprisonment for at most two years' – a formulation which is generally considered to include LGBT people. In Hungary, similarly, Article 269 of the Penal Code[272] is generally interpreted to include LGBT people among the 'groups of society' against whom no speech stirring hatred may be directed – although, under the restrictive judicial interpretation given to this provision, criminal liability would be found only if 'stirring up hatred' prompts direct and immediate violent action. Luxembourg is in a similar position. In Poland, Article 212 of the Criminal Code may form the basis for prosecuting individuals whose statements discredit certain persons or groups of persons in the face of public opinion.[273] In Slovakia, Articles 359 and 421 of the Criminal Code make it a criminal offence to threaten, harm, or resort to violence against a 'group of people' (Art. 359), or to support an organisation seeking to destroy the fundamental rights and freedoms of others (Art. 421).

By contrast, in Austria (Section 283 of the Criminal Code[274]), Bulgaria (Art. 162 and 164 of the Criminal Code[275]) – although in this country, hate speech targeting LGBT people could lead to administrative sanctions imposed by the Equality Commission (PADA) –, Italy (Article 3, *Legge* [Law] 654/1975),[276] and Malta (Section 82A of the Criminal Code and sect. 6 of the Press Act[277]), existing criminal law provisions against hate speech are explicitly restricted to the protection of groups other than LGBT, making an extension of the protection of the law to LGBT difficult to envisage.

---

272 Hungary/1978. évi IV. törvény (31.12.1978).

273 This was illustrated by a case in which, after councillors, members of Prawo i Sprawiedliwość [the Law and Justice Party], compared homosexuality with paedophilia, necrophilia and zoophilia, in a debate of November 2004 concerning the Equality Parade, four lesbians files a private bill of indictment. On 04.09.2006 the parties entered into settlement in the course of the trial before the District Court in Poznań.

274 Austria / Strafgesetzbuch [Criminal Code], BGBl1974/60, last amended by BGBl I 2007/112 (28.12.2007).

275 Bulgaria/Наказателен кодекс [Criminal Code], Art. 162, para.1 and Art. 164 (2 April 1968, with numerous amendments, the latest one from 19 December 2006).

276 Italy/Legge 654/1975 (13.10.1975).

277 Chapter 248 of the Laws of Malta

In addition, apart from criminal law provisions, protection may be sought under the civil law in order to combat homophobic speech. Article 17 of the International Covenant on Civil and Political Rights provides that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, *nor to unlawful attacks on his honour and reputation*'. The Human Rights Committee considers that it follows from this provision that States must protect honour and reputation through the law, and that 'provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible'.[278] All EU Member States accordingly provide for the possibility, for the victim of defamation or libel, to seek damages in civil suits, whether independently or in combination with the prosecution for the corresponding offences.[279] In Finland for instance, a victim of hate speech may be entitled to obtain damages under the Tort Liability Act (*vahingonkorvauslaki* (412/1974, as amended e.g. by law 509/2004)]. Chapter 5, section 6 of the Act stipulates that a person is entitled to compensation for suffering where, inter alia, (i) his/her private life has been infringed by means of an act punishable under law, (ii) he/she has been discriminated against by means of an act punishable under law; or where (iii) his/her dignity has been purposefully or out of gross negligence seriously injured. Therefore compensation for suffering may be obtained where criminal acts as defined in the provisions of the Penal Code relating to hate speech – chapter 24, sections 8 and 9 and chapter 11, section 9 – or where discrimination as defined in chapter 11, section 8 or chapter 47, section 3 are at stake. A victim is entitled to damages even where the perpetrator has not in fact been charged with any of the above-mentioned offences.[280]

An intermediary category between hate speech provisions in the criminal law and the introduction of civil actions for defamation or libel, are the criminal offences subject to private prosecution – i.e., which will only be prosecuted on the basis of a complaint of the victim. In Austria, thus, the element *Beleidigung* (libel) is regulated in Section 115 of

---

278 Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) (8 April 1988), para. 11.

279 For protection of the honour and reputation of the individual, or protection from invasions of privacy, see Austria / Ehrenbeleidigung [Insult] as laid down by sect. 1330 Allgemeines Bürgerliches Gesetzbuch (Civil Code); Estonia / Riigikantselei (2001) Riigi Teataja I, 81, 487 (Võlaõigusseadus [Law of Obligations Act]); Slovakia / zákon 40/1964 (26.02.1964) (Art. 11 of the Civil Code); Spain / Organic Law 1/1982 of 5 May 1982 on Protección Civil del Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen [Civil Protection of the Right to Honour, Personal and Family Intimacy and the right to control the use of One´s Own Image]; Latvia / Civillikums (the Civil Law), Article 2352 (28.01.1937), available at: http://www.ttc.lv/index.php?skip=0&itid=likumi&id=10&tid=59&l=LV (24.02.2008); The Netherlands / Article 6:162 of the Civil Code. In criminal provisions, see Finland / Chap. 24, sections 8 (invasion of privacy) and 9 (defamation) of the Penal Code.

280 See HE 167/2003 vp, p. 54. The situation was interpreted differently before the amendment of the Tort Liability Act in 2004, see e.g. Helsinki Court of Appeals 30.6.2005, case no. 2327.

the Criminal Code[281] and is – according to Section 117 of the Criminal Code – such a *Privatanklagedelikt*[282].

6.3. Homophobic motive as an aggravating factor in the commission of criminal offences ('hate crimes')

Ten EU Member States consider homophobic intent as an aggravating factor in common crimes (BE, DK, ES, FR, NL[283], PT, RO, FI, SE, UK).[284] This includes the United Kingdom, although a distinction should be made in this State between England and Wales and Northern Ireland, on the one hand, and Scotland, on the other hand. In England and Wales, section 146 of the *Criminal Justice Act 2003* extended existing hate-crime statutory aggravations to include sexual orientation. This provision came into effect in April 2005. In Northern Ireland, Art 2 of the *Criminal Justice No. 2 (Northern Ireland) Order 2004*[285] amended the *Public Order (NI) Order 1987* to similar effect.[286] In Scotland, Green MSP Patrick Harvie has recently proposed the *Sentencing of Offences Aggravated by Prejudice (Scotland) Bill*, but at the time this report was drafted, this was still in the process of becoming law. Finland in also included in this group of States: although chapter 6, section 5 of the Penal Code does not explicitly refer to homophobia as an aggravating factor, it is clear that the LGBT people are included under the general formulation ('another population group') which appears in that clause.

Among the States of this group, a further sub-division can be made between States in which homophobic motivation is an aggravating circumstance for all offences (such as

---

281 C. Bertel, K. Schwaighofer (2008) Oesterreichisches Strafrecht: Besonderer Teil §§ 75 bis 168b StGB, Vienna New York: Springer, pp. 139-143.

282 C. Bertel, K. Schwaighofer (2008) Oesterreichisches Strafrecht: Besonderer Teil §§ 75 bis 168b StGB, Vienna New York: Springer, pp. 144-147.

283 In The Netherlands, although neither the Penal Code nor the Wetboek van Strafvordering [Code of Criminal Procedure] provide for homophobic motivation as an aggravating factor in sentencing, since December 2007 the Aanwijzing Discriminatie [Instruction on Discrimination] (2007A010) of the Public Prosecution Service do recommend that the public prosecutor raise the level of sentencing requested where the offence is committed with a discriminatory intent.

284 No information was available for HU and for PL.

285 Criminal Justice No. 2 (Northern Ireland) Order 2004, No. 1991 (N.I. 15) (28.09.2004)

286 A recent report, prepared for the Equality Commission for Northern Ireland (ECNI) and the Equality Authority (EA) in Ireland, describes Northern Ireland's homophobic hate-crime law as one of the 'notable legislative successes' that have resulted from the participatory model put in place by the statutory equality duty contained in section 75 of the Northern Ireland Act 1998. See J. Walsh, C. Conlon, B. Fitzpatrick and U. Hansson (2007) Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights under Equality (A Report prepared for the ECNI and the EA), p. 85, available at: http://www.equalityni.org (11.02.2008).

DK (Section 81 no. 6 of Straffeloven[287]), ES (Article 22(4) of the Penal Code[288]), FR (Article 132-77 of the Penal Code), RO (Article 75(1), point c, of the Criminal Code), FI (chapter 6, section 5 of the Penal Code), or SE (Ch 29 § 2 of the Criminal Code)), and those in which only a defined set of criminal offences follow this regime. Within the latter category, Portugal provides for homophobic intent as an aggravating factor in the commission of homicide, assault and severe assault (Articles 132 and 145 of the Criminal Code). In Belgium, homophobic motivation constitutes an aggravating factor for a large number of common crimes, including rape, assault, manslaughter, murder, criminal negligence, stalking, arson, defamation and slander, desecration of graves, vandalism, etc.

In 15 other States, homophobic intent is not an aggravating circumstance in the commission of criminal offences (BG, CZ, DE, EE, EL, IE, IT, CY, LT, LU, LV, MT, AT, SI, SK). However, a distinction should be made between the States in which the notion of 'hate crimes' is known, but does not extend explicitly to crimes committed with a homophobic motive (being restricted, in general, to crimes committed with a racist or xenophobic intent, or using only general formulations) (CZ, DE, LV, MT[289], AT, SK[290]), and States to which the notion of 'hate crimes' is entirely unknown.[291] In the States belonging to the first category, an extensive interpretation of the existing provisions on hate speech may, in certain cases, be envisaged, in order to cover also homophobic intent among the 'aggravating circumstances' in the commission of criminal offences, as is the case in Austria[292] and in Germany.[293] In Ireland, homophobic motivation may be dealt with at the sentencing stage of the criminal process, but statutory sentencing guidelines dealing with this do not exist and this is left to the appreciation of the courts. Luxembourg is in a similar position.

---

287 Inserted into the Criminal Code by Act No. 218 of 31 March 2004.

288 But see also, in the specific context of the Law 49/2007 of 26 December, establising the offences and sanctions regarding equal opportunities, non-discrimination and universal accessibility for disabled people, Article 16(4)(e), which aggravates the sentences when the author has been motivated by the sexual orientation of the victim (Spain / Ley 49/2007 de 26 diciembre sobre el régimen de infracciones y sanciones en materia de igualdad de oportunidades, no descriminación y accesibilidad universal de las personas con discapacidad).

289 Criminal Code, Chapter 9 of the Laws of Malta, Section 251D

290 Art. 140 of the Criminal Code.

291 In the following States, the situation is unclear: CY, EE, EL, IT, LT and SI.

292 Section 33 para. 1 of the Criminal Code.

293 In Germany, it is a general principle that the motivation of the perpetrator can already be considered in the context of sentencing in accordance with Article 46 para. 2 of the Criminal Code. However, there are considerations about introducing hate crime as a separate criminal offence.

7. Transgender issues

The situation of transgender people may be defined across two dimensions. First, transgender people should be protected from discrimination. Second, the legal rights of transsexuals must be recognised as regards the conditions imposed for the acquisition of a different gender; the official recognition of the gender acquired following gender reassignment; and their ability to marry a person of the gender opposite to their post-operative gender. In the following sections, these issues are examined, by presenting the approach adopted in EU law and in international human rights law, and by examining whether and how the domestic legislations of the EU Member States comply with that framework.

7.1. The requirement of non-discrimination

In the absence of a specific prohibition of discrimination on grounds of transgenderism, such protection can be afforded either under general equality clauses, not listing the grounds of discrimination or listing a purely exemplative (i.e., non limitative) list of grounds; or through the prohibition of discrimination on grounds of sex or sexual orientation, where clauses addressing specifically such forms of discrimination exist. In the framework of EU Law, how we approach discrimination against transgender persons may have important implications about the ability for the European Union to adopt measures against this form of discrimination. If discrimination on grounds of transgenderism is seen as a discrimination on grounds of sex or sexual orientation, the existing instruments which implement the principle of equal treatment between men and women[294] or the principle of equal treatment of persons of different sexual orientations will apply to transgender-based discrimination (Employment Equality Directive); if not, transgender people would only be protected from discrimination under the general principle of equality, in the scope of application of EU law – but they will not benefit from the more extensive protection afforded by the said legislative instruments.

In the 1996 case of *P. v. S. and Cornwall City Council*, the European Court of Justice took the view that, 'in view of its purpose and the nature of the rights it seeks to safeguard', the 1976 Directive on equal treatment between men and women in

[294] See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 26.7.2006, p. 23 (Recast Gender Directive).

employment[295] should be interpreted widely in order to afford a protection against discrimination to a person dismissed after she announced she would be undergoing a procedure, including an operation, for gender reassignment (para. 20).[296] The Court argued that discrimination on grounds of gender reassignment 'is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment' (para. 21).

This case law has been confirmed in more recent cases. In *K.B. v NHS Pensions Agency*,[297] the European Court of Justice took the view that Article 141 EC, in principle, precludes legislation, which, in breach of the European Convention on Human Rights (see below), prevents a couple one of the members of which is a transsexual from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. Such a situation is discriminatory, said the Court, since such a couple is disadvantaged by comparison with a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry and, as the case may be, have the benefit of a survivor's pension which forms part of the pay of one of them. This judgment again treats discrimination against transsexuals (in the form, here, of their inability to marry and thus to reap the corresponding benefits) as a discrimination on grounds of sex.

In a judgment it delivered on 27 April 2006,[298] the European Court of Justice considered that a transsexual worker had the right to collect her pension as a woman although she was born as a man. It read Directive 79/7[299] as applicable not only to differences in treatment between men and women in matters of social security, but also to differences in treatment resulting from a gender reassignment. This judgment represents the most recent confirmation of the view of the European Court of Justice that discrimination on grounds of gender reassignment may be treated as discrimination on grounds of sex.

Thirteen EU Member States treat discrimination on grounds of transgenderism as a form of sex discrimination (BE, DK, FR, IE, IT, LV[300], NL[301], AT[302], PL, SK[303], FI, SE, UK[304]),

---

295 Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

296 ECJ, Case C-13/94, P. v. S. and Cornwall City Council judgment of 30 April 1996, ECR [1996] I-2143.

297 ECJ, Case C-117/01, K.B. v. National Health Service Pensions Agency, Secretary of State for Health, judgment of 7 January 2004.

298 ECJ, Case C-423/04, Sarah Margaret Richards v Secretary of State for Work and Pensions, judgment of 27.4.2006.

299 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

300 Latvia/Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departaments/A42229505 SKA – 5/2008 (14.01.2008).

although this is generally a matter of practice of the anti-discrimination bodies or courts rather than an explicit stipulation of legislation.

At a minimum, this means that the EU instruments prohibiting sex discrimination in the areas of work and employment and in the access to and supply of goods and services, will be fully applicable to any discrimination on grounds of a person intending to undergo, undergoing, or having undergone, gender reassignment. However, transgenderism may not have to be reduced to this narrow understanding, linking it to 'gender reassignment' defined as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex, and includes any part of such a process'.[305] Whereas transgender people in this narrow understanding do find themselves in a specific situation due to the operation of gender reassignment – a situation which raises specific human rights issues examined in the following section –, there is no reason not to extend the protection from discrimination beyond these persons, to cover 'cross dressers, and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention and all those people who simply wish to present their gender differently'.[306] It has been recommended that protection from discrimination on grounds of 'gender identity', more generally, should encompass not only transsexuals (undergoing, intending to undergo, or having undergone a medical operation resulting in gender reassignment), but also those other categories.[307] Indeed, this is the position adopted in Finland by the Ombudsman for Equality, on the grounds that the text of the Act on Equality between Women and Men is open enough to support this interpretation and as otherwise legal protection for transgendered persons (broadly conceived) would be insufficient.[308] It is also the position of the Dutch Equal Treatment Commission, which recently issued an opinion stating that discrimination on the ground of 'transvestism' is

---

301 Leeuwarden Court of Appeal, 13.01.1995, NJ 1995 nr. 243 and, for example, ETC Opinions 1998-12 and 2000-73.

302 Austria / Erläuterungen [Explanatory Notes]/ RV 415dB XXIII. GP, available at: http://www.parlament.gv.at/PG/DE/XXIII/I/I_00415/fname_096505.pdf (08.01.2008) (explanations appended to the government bill for the implementation of Council Directive 2004/113/EC prohibiting discrimination between men and women in access to and supply of goods and services).

303 Art. 6 (3)a. Slovakia/ Antidiskriminačný Zákon 365/2004 (20.05.2004).

304 In Great Britain, the relevant provisions are contained in the Sex Discrimination Act 1975 (SDA), as amended by the Sex Discrimination (Gender Reassignment) Regulations 1999. In Northern Ireland, protection is conferred by the Sex Discrimination (NI) Order 1976 (SDO), as amended by the Sex Discrimination (Gender Reassignment) Regulations (NI) 1999.

305 As in the formulation of sect. 82 of the Sex Discrimination Act in Great Britain or in the Sex Discrimination Order in Northern Ireland.

306 S. Whittle, L. Turner and M. Al-Alami (2007) Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination (A Research Project and Report commissioned by the Equalities Review), p. 74, available at: http://www.theequalitiesreview.org.uk (12.02.2008).

307 ECNI (2007) Commission Response to OFMDFM's Consultation 'Implementing EU Equality Obligations in Northern Ireland: The Gender Goods and Services Directive', p. 5, available at: http://www.equalityni.org (12.02.2008).

308 Information from the Office of the Ombud on 11.2.2008 and 13.2.2008 (by telephone and email).

also to be regarded as a form sex discrimination.[309] It may also be the consequence of listing 'sexual identity', alongside 'sexual orientation', in the Equal Treatment Act adopted in Hungary.[310] And it corresponds to the proposal of the Commission of Inquiry set up in Sweden by the Government, which proposed in its final report SOU 2006:22 (*En sammanhållen diskrimineringslagstiftning*) that discrimination should be prohibited also on the grounds of sexual identity in order to cover all 'trans-persons', and not merely, as currently under the Equality legislation (*jämställdhetslagen* (SFS 1991:433), transsexuals.

In 11 other Member States, forming a second group, discrimination on grounds of transgenderism is treated neither as sex discrimination nor as sexual orientation discrimination, resulting not only in a situation of legal uncertainty as to the precise protection of transgender persons from discrimination, but also in a much lower level of protection of these persons (BG, CZ, EE, EL, CY, LT, LU, MT, PT, RO, SI). In these States, the legislation prohibition discrimination on grounds of sex should be interpreted in the future in accordance with the case-law of the European Court of Justice, treating transgender discrimination as an instance of sex-based discrimination. Such an interpretation may be difficult to arrive at, by contrast, in the two other Member States, forming a third group, in which discrimination on grounds of transgenderism is treated as sexual orientation discrimination (DE[311], ES[312]).

In addition, however, transgender people may be protected from discrimination as such, when they are treated differently than other persons of the same gender as the acquired gender. In Hungary, the Act on Equal Treatment[313] includes sexual identity as one of the grounds of discrimination.[314] In the UK also, where a person has a full *Gender Recognition Certificate* under the *Gender Recognition Act 2004* (GRA) it would not be lawful to discriminate other than on grounds that would apply to anyone else of his or her acquired gender.[315]

---

309 ETC 15.11.2007, Opinion 2007-201. See also Annex 1.

310 Article 8, Hungary/2003. évi CXXV. törvény/(28.12.2003).

311 See the Explanatory Memorandum to the General Law on Equal Treatment: Bundestag, publication no. 16/1780, p. 31.

312 The total is below 27 since no information was provided by the point as regards IT.

313 Hungary/2003. évi CXXV. Törvény/(28.12.2003).

314 Article 8-n), Hungary/2003. évi CXXV. Törvény/(28.12.2003.).

315 There is one exception: it is possible for an organised religion to discriminate where there are genuine religious reasons to refuse to employ a transsexual person even if the person has a Gender Recognition Certificate.

7.2. The legal status of transsexuals: gender reassignment and legal recognition of the post-operative gender

A second dimension along which the situation of transsexuals may be measured concerns their legal status, particularly as regards the conditions imposed for the acquisition of a different gender and the official recognition of the gender acquired following gender reassignment, including by changing one's forename in order to ensure that it corresponds to the newly acquired gender.

7.2.1. The availability of gender reassignment operations

The European Convention on Human Rights imposes on all States parties that they provide for the possibility, within their jurisdiction, to undergo surgery leading to full gender-reassignment; any gap in the legislation in this regard would presumably constitute an unacceptable interference with the right to respect for private life, which – considering the limited number of persons concerned by such operations – a State would not be able to justify by budgetary constraints. This seems to follow from the judgment delivered by the European Court of Human Rights on 11 September 2007 in the case of *L. v. Lithuania*.[316]

It is not entirely clear from this judgment whether the possibility for individuals to seek equivalent medical treatment abroad, for instance by relying on Article 49 EC, could constitute an acceptable alternative. This may be particularly relevant for smaller States having no medical personnel specialised on these highly delicate operations. It is reported for instance that, due to absence of fully qualified medical personnel, a Luxembourg resident would be forced to seek surgery leading to gender reassignment outside of Luxembourg, although he or she would be required first to undergo psychiatric evaluation and treatment in order to request that the surgery be paid for by the Luxembourg healthcare system.

Most EU Member States impose strict conditions on the availability of gender reassignment operations, generally including waiting periods, and psychological and medical independent expertise, but also, in certain cases, prior judicial authorisation. In

---

[316] Eur. Ct. HR (2nd sect.), L. v. Lithuania, Appl. no. 27527/03, judgment of 11 September 2007. Article 2.27 of the Lithuanian Civil Code, which determines the right to the change of the designation of sex, states that 'the conditions and the procedure for the change of designation of sex shall be prescribed by law'. However, no legislation was adopted in order to implement this provision, although the Civil Code is in force since 1.7.2001. This led the Court to find a violation of Article 8 ECHR, which guarantees the right to respect for private life.

the Czech Republic for example, the Health Care Act[317] provides that a gender reassignment operation must be approved by a commission of five persons, including two physicians not participating in the operation and one lawyer. In Denmark, the Sundhedsstyrelsen (Danish National Board of Health) handles applications for gender reassignment surgery with reference to chapter 33 in Sundhedsloven[318] and Administrative Order No. 14, 10th of January 2006 regarding sterilisation and castration, including in reference to gender reassignment. In Estonia, regulation of 07.05.1999 no. 32 by the Ministry of Social Affairs *Soovahetuse arstlike toimingute ühtsed nõuded* [Common requirements to medical acts of sex change][319] provides the basis for medical and legal acts related to gender/sex change. In Portugal, according to a resolution approved by the executive branch of the Doctors' Public Association on 19.05.1995, operations to change an individual's sex are prohibited except following a medical diagnosis confirming transsexualism or gender dysphoria.

While undoubtedly necessary, in many cases, in order to protect individuals in psychologically vulnerable situations, these obstacles to obtaining access to such medical services should be carefully scrutinised, in order to examine whether they are justified by the need to protect potential applicants or third persons, and whether they are not imposing disproportionate burden on the right to seek medical treatment for the purposes of gender reassignment. In Poland for example, sex reassignment surgery (SRS) is in practice possible only after a declaratory judgment has been delivered, since, absent such a judgment, surgeons tend to deny reassignment fearing that criminal charges would be brought against them[320] in spite of the consent of the transsexual person.[321] This results in imposing on candidates to gender reassignment a heavy burden, which may constitute a disproportionate with the right to respect for private life.

In other States, such as Bulgaria or Latvia, the availability of gender reassignment medical operations is not regulated by law, which may create a risk of abuse, and may in addition be in violation of these States' obligations under the European Convention on Human Rights. It should be emphasised that, since gender reassignment constitutes a major and irreversible medical operation, safeguards (as long as they do not result in imposing undue burdens on the availability of such medical procedures) are preferable to the existence of a legislative vacuum.

---

317 Zák. č. 20/1966 Sb., o péči o zdraví lidu (Act. No. 20/1966 Coll., Health Care Act), available at http://portal.gov.cz/wps/portal/_s.155/701?number1=20%2F1966&number2=&name=&text= (Czech only), (opened on February 19, 2008).

318 The Act on Health, No. 546, 24 June 2005.

319 Estonia/Riigikantselei (27.05.1999) Riigi Teataja L, 87, 1087.

320 Sex reassignment surgery may fall under the scope of Article 156 of the Penal Code that prohibits causing serious damage to health, as it results in total infertility.

321 Consent from the person concerned does not exclude the illegality of the act. In the legal doctrine there are voices arguing that sex reassignment surgery can be exculpated by the state by necessity, which constitutes circumstances excluding the illegality of the criminal act.

There is no uniformity between the Member States as to the coverage, by health care schemes, of the medical operation leading the gender reassignment. In Italy, once it is authorised by courts, surgery leading to gender reassignment would be fully reimbursed by the health services. In many other cases however, the health care system would be less generous, and the costs of the operation, if not reimbursed or reimbursed only partially, would represent a substantial obstacle to its availability in practice. In addition, the lack of a uniform approach as regards the provision of medical services to persons willing to undergo medical treatment with a view to gender reassignment results in a situation where patients may seek abroad services which are not available at home. Thus, there is evidence to suggest that the Irish health authorities have paid for gender reassignment surgery (which is not available in Ireland) in the United Kingdom, although at the same time, many people report being refused funding by public health authorities and their health insurance companies for treatments along the 'treatment path', including genital reassignment surgery.

7.2.2. The legal consequences of gender reassignment: recognition of the acquired gender and right to change one's forename in accordance with the acquired gender

A remarkable evolution has taken place in European human rights law on the two latter issues referred to in this section – the official recognition of the gender acquired following gender reassignment; and the ability a person having undergone gender reassignment to marry a person of the gender opposite to their post-operative gender. In a series of cases decided between 1986 and 1998, the European Court of Human Rights had initially considered that the States parties to the European Convention on Human Rights did not overstep their margin of appreciation by not according legal recognition to a transsexual's post-operative gender, due to the remaining uncertainties as to the essential nature of transsexualism and as to the legitimacy of surgical intervention in such cases, and due to the absence of a consensus between the States parties on the legal recognition to be afforded to the new gender after a surgical operation for gender reassignment.[322] Only in the case of France did the Court found Article 8 ECHR to be violated, since in that country an increasing number of official documents indicated sex (extracts of birth certificates, computerised identity cards,

[322] See Eur. Ct. HR, Rees v. the United Kingdom judgment of 17 October 1986 (Series A no. 106, pp. 18–19, § 47); Eur. Ct. HR, Cossey v. the United Kingdom judgment of 27 September 1990 (Series A no. 184, p. 17, § 41); Eur. Ct. HR, B. v. France judgment of 25 March 1992 (Series A no. 232-C); Eur. Ct. HR, X, Y and Z v. the United Kingdom judgment of 22 April 1997, Reports of Judgments and Decisions 1997-II, p. 635, § 52; Eur. Ct. HR, Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, paras. 56-61.

European Communities passports, etc.), which also appeared in social security registration numbers, and in everyday operations of economic life: the sum number of inconveniences resulting from the impossibility, in the French legal system, to ensure that the sex indicated on those documents correspond to the apparent sex, in the view of the Court, was sufficiently serious to justify a finding of violation of Article 8.[323]

This initial jurisprudence thus tolerated the refusal by the States parties to refuse a rectification of the sex registered at birth (i.e., the refusal of an official recognition of the gender reassignment), provided the inconveniences in everyday life remain limited. It also followed that, although Article 12 ECHR guarantees the right to marry to 'men and women of marriageable age',[324] this provision was not considered to be violated by the impossibility for a post-operative transsexual to marry a person of the opposite gender to the gender acquired by the transsexual. Basing itself on the idea that the right to marry guaranteed by Article 12 'refers to the traditional marriage between persons of opposite biological sex', the Court considered that such an obstacle to marriage did not impair the substance of the right to marry.[325]

However, the Court overruled this previous case-law in the case of *Christine Goodwin v. the United Kingdom*, concerning a post-operative male to female transsexual.[326] Noting 'the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender' (para. 77), the Court in addition emphasised that 'the applicant's gender re-assignment was carried out by the national health service, which […] provides, inter alia, re-assignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs'; in this context, 'it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads' (para. 78). In finding that the right to respect for private life, guaranteed under Article 8 of the Convention, had been breached – a position it has reaffirmed since[327] –, the Court seemed particularly impressed by the findings presented by the non-governmental organisation Liberty in its *amicus curiae* brief to the Court.[328] Liberty noted that 'out of thirty seven countries analysed only four (including the United Kingdom) did

---

323 Eur. Ct. HR, B. v. France judgment of 25 March 1992 (Series A no. 232-C) (distinguishing the Rees and Cossey judgments). Following the B. v. France judgment of the European Court of Human Rights, the Plenary Assembly of the Court of Cassation amended its jurisprudence relative to transsexualism. It now allows the birth certificate to be amended after a sex change in the name of privacy rights: 'the principle of the right to privacy justifies that the civil status of the transsexual person indicate the sex he or she appears to be' (11 December 1992, JCP 1993, II, 21991).

324 According to Article 12 ECHR: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

325 Eur. Ct. HR, Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, paras. 66-69.

326 Eur. Ct. HR, Christine Goodwin v. the United Kingdom, Appl. no. 28975/95, judgment of 11 July 2002.

327 Eur. Ct. HR (4th sect.), Grant v. the United Kingdom, Appl. no. 32570/03, judgment of 23 May 2006.

328 See paras. 56-58 of the judgment.

not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person. In cases where gender re-assignment was legal and publicly funded, only the United Kingdom and Ireland did not give full legal recognition to the new gender identity'. In addition, 'As regarded the eligibility of post-operative transsexuals to marry a person of sex opposite to their acquired gender, Liberty's survey indicated that 54% of Contracting States permitted such marriage (Annex 6 listed Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey and Ukraine), while 14% did not (Ireland and the United Kingdom did not permit marriage, while no legislation existed in Moldova, Poland, Romania and Russia). The legal position in the remaining 32% was unclear'.

The case of *Christine Goodwin* also re-examined the traditional position of the Court as regards the impossibility for post-operative transsexuals to marry a person of the gender opposite to that of their acquired gender – for example, for a male to female transsexual to marry a man. The Court rejected as 'artificial' the argument (which the UK government had put forward in the *Christine Goodwin* case) that 'post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex'. The reality of the case submitted to the Court, in its view, was rather that 'the applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so [and] may therefore claim that the very essence of her right to marry has been infringed' (para. 101).

As a result of the *Christine Goodwin v. the United Kingdom* judgment of 2002 and of decisions delivered by domestic courts in the UK,[329] the *Gender Recognition Act 2004* (GRA), which came into force in April 2005 and applies throughout the UK, allows an individual who is successful in applying for a full *Gender Recognition Certificate* (GRC) to obtain a new birth certificate. The Department of Trade and Industry also funded the publication of a workplace good practice guide for employers, reflecting the changes introduced by the *Gender Recognition Act 2004* and making clear the responsibilities for employers and their staff.[330] Paradoxically though, the reform brought about by the GRA has created some confusion, since the obtention of a GRC has sometimes been interpreted as a condition for changing names on documents such as a driving licence or a passport, which in fact is not the case. Instead, in the UK any person can change his/her name[331] either by having a 'Change of Name by Deed Poll' executed by a

---

329 See Bellinger v. Bellinger [2003] 2 All ER 593 (UK House of Lords).

330 The Guide is available at: http://www.womenandequalityunit.gov.uk/publications/gender_reassignment_guide05.pdf (14.02.2008).

331 See generally, Gender Trust, Information Sheet: Changing Your Name and Documents, available at: http://gendertrust.org.uk (12.02.2008).

solicitor;[332] or by completing a '*Statutory Declaration of Change of Name*'.[333] As noted in a report commissioned for the Equalities Review, there is a need to provide clear information about how a change of name can be effectuated, in order to overcome this confusion, based on a misinterpretation of the GRA.

Official recognition of a new gender

In general, as a result of the case-law described above, the EU Member States allow for the official recognition of the new gender acquired after a gender reassignment operation, and they may also allow for such recognition in the absence of any medical procedure; and they allow the transgender person to marry a person of a sex opposite to the gender he/she has acquired.

There are exceptions, however. In Ireland, there is no provision for transsexual people to be officially recognised in the gender in which they identify. As a consequence transsexual people do not have a right to marry in their reassigned gender or to change their birth certificate or to enjoy any right legally confined to the gender with which they identify. As was confirmed by the High Court in the case of *Linda Foy v. An tArd-Chlaraitheoir (Registrar General) and others (No. 2)* (judgment of 19 October 2007), the legislation governing Birth Certificates in Ireland is incompatible with the European Convention on Human Rights, made applicable in Ireland by the European Convention on Human Rights Act 2003. The Court issued a Declaration of Incompatibility of the law as set out in s. 60(8) of the Civil Registration Act, 2004, and the Taoiseach (Prime Minister) is accordingly required to lay an Order before each House of Parliament. It may appear that Luxembourg, too, is in violation of the ECHR in this regard, since there are no legal provisions specifically addressing the issue of gender reassignment to be applied by the Luxembourg Civil Status and Population Administration (*Etat civil et population du Luxembourg*). A similar lack of legal certainty exists in Latvia, resulting in a situation where the Registry Office (in charge of maintaining the Birth Register) refuses to take the decision on change of entry on gender in the Birth Register itself, but instead asks the Ministry of Health to issue its conclusion with regard to any particular case, with the risks of arbitrariness and lack of uniformity this entails – a situation condemned by the administrative courts, which recently ordered the Registry Office to amend the Birth Register in cases of gender reassignment, without invoking the lack of a clear legal mandate to do so as a pretext for refusing to do so.[334] In Malta also, courts have had to

---

[332] UK/ Enrolment of Deeds (Change of Name) Regulations 1994 (01.04.1994).

[333] UK/Statutory Declarations Act 1835 c.62 (09.09.1835). Such a declaration states the name by which an individual wishes to be known, and is witnessed by a solicitor, justice's clerk at a magistrate's court or other authorised officer of the court. It is sent with a copy of the individual's birth certificate and a doctor's or psychiatrist's letter to allow the individual's name to be changed on statutory documents.

[334] Administratīvā rajona tiesa [Administrative District Court], case No. A42229505 (judgment of 6.02.2006), Administratīvā apgabaltiesa [Administrative Regional Court], No. AA43-0446-07/14

intervene to compensate for the failure of the legislator to allow for the official recognition of a new gender acquired following treatment.[335] It is unclear whether this is sufficient to guarantee the legal certainty which could be required in such cases.

The situation in the other EU Member States, whose legal systems are in full conformity with the requirements of the European Convention on Human Rights, can be described as follows. In four Member States, there is no requirement to undergo hormonal treatment or surgery of any kind in order to obtain an official recognition of gender reassignment (ES[336], HU, FI[337], UK). In this group of States, gender reassignment is possible simply be bringing evidence of gender dysphoria before the competent authority (such as a doctor or clinical psychologist in Spain; experts from the Ministry of Health in Hungary, who weigh the evidence submitted by the applicant; the Gender Reassignment Panel in the UK). In other Member States, by contrast, the official recognition of a new gender is possible only following a medically supervised process of gender reassignment (BE[338], BG, DE, EE, NL[339]),[340] sometimes requiring, as a separate specific condition, that the person concerned is no longer capable to beget children in accordance with his/her former sex (BE, DE, NL), and sometimes requiring surgery and not merely hormonal treatment (IT[341], PL). In Germany for instance, the law of 10th September 1980 on the changing of given names and the determination of sexual

(judgment of 11.04.2007), Augstākās tiesas Senāta Administratīvo lietu departaments [Department of Administrative Cases of the Senate of the Supreme Court], case No. A42229505 SKA-5/2008 (judgment of 14.01.2008).

335 Malta/First Hall of the Civil Court/689/1999, Francis sive Mandy Zammit vs. AG and Director of Public Registry (24.09.2001)

336 Spain / Law 3/2007 of 15 March on Rectificación registral de la mención relativa al sexo de las personas [the Rectification of the mentions of the Gender in Registries]. The legislation makes it possible to obtain the official recognition of a gender reassignment without having to undergo a medical operation to that effect: see in the case-law the judgments of 15 May 2007 by the Provincial Court of Cádiz (Sentencia 121/2007 de la Audiencia Provincial de Cádiz, de 15 de mayo), and the judgment delivered on 17 September 2007 by the Supreme Court (civil chamber, plen.) (Sentencia del Tribunal Supremo núm. 929/2007 de 17 septiembre, Sala de lo Civil, Sección Pleno).

337 Finland / Act on the Recognition of the Sex of a Transsexual Person [laki transseksuaalin sukupuolen vahvistamisesta (563/2002)] (in force on 1.1.2002).

338 In Belgium, this is clear under the Act of 10 May 2007 concerning transsexualism, inserting articles 62bis-62ter in the Civil Code: see K. Uytterhoeven, G. De Cuypere, P. Senaeve and T. Wuyts (2007) De wet aangaande de rechtspositie van transseksuelen, Leuven: K.U.Leuven, Instituut voor Familierecht en Jeugdrecht.

339 Through a judgment in April 2007 the Court of Appeal of 's-Hertogenbosch ruled that the applicant's physical change of sex was not yet sufficiently complete for a change of sex to be granted in his birth certificate within the meaning of Article 1:28 of the Civil Code. The court based its decision upon the finding that hormonal treatments had only started in September 2006 and surgery was yet to take place: see 's-Hertogenbosch Court of Appeal, 22.05.2005, LJN: BA542.

340 The procedure is not described in detail in the national reports relating to FR, RO, and SK.

341 This regime is defined in the Legge [Law] 164/1982 of 14.04.1982, Norme in materia di rettificazione di attribuzione di sesso [Rules concerning rectification of sexual attribution] (Italy/Legge 164/1982 (14.04.1982)). In principle, the recognition of the gender reassignment by judicial decision depends on prior gender reassignment surgery, which the courts have to authorise beforehand. See however, for one isolated case where a judge ordered a sex reassignment without any operation, as the transsexual concerned was very ill and probably near to death: Italy / Tribunale di Roma (18.10.1997).

identity in special cases[342] provides that for the determination of whether a person belongs to the other gender/sex (Articles 8-12 of the Law on Transsexuals), the transsexuals must be unmarried and have undergone a sex-change operation making them incapable of reproduction (Article 8 para. 1 of the Law on Transsexuals). In this judicial process the competent magistrates' court must also, in accordance with Article 9 para. 3 of the Law on Transsexuals, obtain two expert opinions before making its decision.

Under the European Convention on Human Rights, a) a transsexual person has the right to have his/her new gender identity recognised, and b) marriage with a person of the gender opposite to the gender acquired by the transsexual should be available. However, it is generally considered that these rules do not imply that full recognition of the gender reassignment should be possible for a person who is married, since such recognition would result in a marriage existing between two persons of the same-sex. Thus, in the United Kingdom, a transgender person who is married cannot receive a full GRC because, in the UK, marriage is not permitted between two members of the same-sex.[343] A transgender person who is married will be issued with an interim GRC (IGRC). This enables them to obtain a full GRC via a simplified procedure if they annul[344] their marriage or their spouse dies. This was also the situation in Belgium prior to the opening up of marriage to same-sex couples by the Law of 13 February 2003. It is currently the situation in Poland, which requires that a married person divorce prior to its new gender being officially recognised.

In other States, conversely, gender reassignment leads to the marriage being dissolved, since two people of the same gender are not allowed to stay married (BG[345]). Hungary for instance is moving towards this solution: while the current Code of Family Law[346] does not recognise sex change as a reason of terminating marriage,[347] the new Civil Code that is currently under preparation explicitly mentions this as a reason of terminating marriages,[348] and this rule would apply to registered partnerships as well.[349] It may be asked, however, whether this restriction to undergoing gender assignment, whether medically or legally – i.e., the requirement not to be married –, should not be

---

342 BGBl I, p. 1654.

343 This was held not to be in breach of the ECHR in the case of Parry v UK (2006) (App No.42971/05).

344 In Scotland, the grant of an IGRC provides a ground for divorce rather than making the marriage voidable; in the rest of the UK, an IGRC is a ground for marriage being voidable.

345 Art.99, para. 2 of the Family Code.

346 Hungary/1952. évi IV. törvény/(06.06.1952). Hereinafter referred to in the body text as the Code of Family Law.

347 According to Article 17-1 (Hungary/1952. évi IV. törvény/(06.06.1952), Code of Family Law a marriage terminates if: a) either of the spouses dies or b) a court terminates it.

348 Article 3: 21 of the draft of the new Civil Code, (hereinafter referred to as the Draft). Available at: http://irm.gov.hu/download/ptk-normaszoveg-tervezet_20071029.pdf/ptk-normaszoveg-tervezet_20071029.pdf, (13.02.2008).

349 Article 3: 101 of the Draft. The issue of registered partnerships is dealt with in item 7.1 of this study.

questioned, since it obliges the individual to have to choose between either remaining married or undergoing a change which will reconcile his/her biological and social sex with his/her psychological sex: in Sweden, a government appointed Commission submitted a report in March 2007 (SOU 2007:16, *Ändrad könstillhörighet- förslag till ny lag*) proposing that the current requirement of being unmarried or divorced as a prerequisite for authorisation for change of sex shall be omitted.

Finally, it may be noted that, while the ECHR does require that individuals having undergone a gender reassignment have the possibility of having their acquired gender officially recognised, it is not required that they also have the possibility not to be assigned to either sex. After an individual who felt inter- or asexual, neither male nor female, requested that his sex be crossed out in his birth certificate, the Dutch Supreme Court dismissed this claim in 2007, ruling that it falls within the margin of appreciation of national states under Article 8 of the ECHR to require that a person's sex in his/her birth certificate is either male or female and not gender-neutral.[350] This area may have to be revisited in the future, however. Scientific studies have shown that in Germany for instance, there are around 150 children born each year who can be classified as intersexual, and that the total number of people affected by severe variance in sex development is around 8,000-10,000.[351] This is a significant number. But the German legal system, no more than the others, has been able to accommodate this reality: so far the courts have refused to change the registered sex of an intersexual in the birth register to 'hermaphrodite'. It has been argued[352] that the right to legal recognition of a third gender on the basis of the right of self-determination in accordance with Article 2 para. 1 of the Basic Law, in conjunction with Article 1 para. 1 of the Basic Law (free development of personality), would justify the recognition of intersexuals, just like it has been with regard to transsexuals.[353] At yet however, this could not be achieved, partly because two fundamental institutions of law – marriage and military service – require the categorisation of people into two genders; additionally, even the Basic Law, in its Article 3 para. 2, 1st sentence, assumes the differentiation of people as males and females.[354]

Change of forename

One specific manifestation of gender identity is in the choice of the forename, where that name indicates the (male or female) gender of the person. In a minority of Member

---

350 Supreme Court, 30.03.2007, LJN AZ5686.
351 Bundestag, publication no. 16/4786, p. 3.
352 See Tolmein (2002), Zeitschrift für das gesamte Familienrecht, pp. 957 ff.
353 Federal Constitutional Court BVerfGE 49, 286.
354 Germany/Arbeitsgericht/722 UR III 302/00 (13th September 2001); Neue Juristische Wochenschrift (NJW) – Rechtssprechungsreport (2001), p. 1586; District Court (Landgericht) München I/16 T 1944/02 (30th June 2003); Zeitschrift für das gesamte Familienrecht (2004), p. 269; Neue Juristische Wochenschrift (NJW) – Rechtssprechungsreport (2003), p. 1590.

States, it is relatively easy to change forenames, including by adoption of a name identified to the other gender than one's gender or origin, without this being made conditional upon a medically supervised operation of gender reassignment (BE, DE, IE, SI, UK). Among these States are Ireland, where, although there is no legislation regarding names and changes of names for transgendered persons, nor is there any prohibition in practice on a person adopting a new first name or surname by deed poll and using this on passports, driving licences, medical records, tax and social security documents. In most Member States, by contrast, changing names (acquiring a name indicative of another gender than the gender at birth) is a procedure available only in exceptional circumstances, generally conditional upon medical testimony that the gender reassignment has taken place (BG, CZ[355], EE[356], EL, CY, AT[357], PT, SK[358], SE), or upon an official recognition or gender reassignment, whether or not following a medical procedure (FI). Various intermediate positions exist. In Belgium, a two-tracks procedure exists: whereas, in principle, any individual may request a change of name without having to offer a particular justification (and this request may be granted by the Minister of Justice as a matter of discretion), transgendered individuals have (under the Act of 10 May 2007 concerning transsexualism which introduces a separate procedure) a right to register the name change, which may only be refused where the new name will cause confusion or cause harm to the applicant or to a third party. In Denmark, the Administrative Order on Names (No. 438 of 11 May 2007) states in section 13 that a person who has not had a gender reassignment operation, but who has been evaluated as transsexual by the Sexological Clinic at the National Hospital of Denmark, can obtain a name change: thus, while gender reassignment is not a condition for obtaining a change of the first name, the individual nevertheless must provide evidence that he/she has a valid reason to request such a change. In Germany, the 1980 law on transsexuals allows a change of forename even without a prior medical operation resulting in gender reassignment, following the seminal decision of the Federal Constitutional Court of 1978.[359] However, prior to authorising this change, the courts must consult two experts who give their opinions on whether, in accordance with the findings of the medical sciences, the applicant's feeling of belonging will likely not change (Article 4 para. 3 of the Law on Transsexuals).

---

355 Czech Republic / Zák. č. 301/2000 Sb., o matrikách, jménu a příjmení (Act. No. 301/2000 Coll., Act on Registry Office), available at http://portal.gov.cz/wps/portal/_s.155/701?number1=301%2F2000&number2=&name=&text (Czech only) (opened on 19.2.2008).

356 See § 15 of Nimeseadus [Names Act]: Estonia / Riigikantselei (2005) Riigi Teataja I, 1, 1.

357 In 1996, the Ministry of the Interior (MoI) issued an Erlass (internal order), the so-called Transsexuellen-Erlass [Transsexual Order], to the effect of clarifying the conditions under which a name change could be authorised: BMI Zahl: 36.250/66-IV/4/9 (27.11.1996). One of these conditions was that the person making the request should not be married. In 2006, the Constitutional Court ruled that there is no legally valid reason to restrict the correction of incorrect data in public registers to unmarried persons: Austria/Verfassungsgerichtshof/B947/05 (21.06.2006).

358 Art. 7. Slovakia / zákon 300/1993 (Act on Name and Surname) (24.09.1993).

359 Federal Constitutional Court, BVerfGE, 286.

In Latvia, a peculiar characteristic of the system is that according to administrative practice, following a gender reassignment, the previous forename is simply transformed into the other gender, by changing its ending, as according to Latvian grammar endings of names differs depending on gender. In many cases however, the name created in such way sounds unusual for the acquired gender. Although in theory, the person can later apply for change of name according to the Law on the Change of a Given Name, Surname and Ethnicity Record,[360] a change in gender is not mentioned among the reasons stipulated in the law for the change of the given name or surname. In addition, the interim situation – where a person is being assigned a name which he or she has not chosen and which differs from his or her original name given at birth – may be considered in violation of the requirements of the International Covenant on Civil and Political Rights[361] and of the European Convention on Human Rights.

[360] Latvia/Likums Par vārda, uzvārda un tautības ieraksta maiņu [Law on the Change of a Given Name, Surname and Ethnicity Record] (15.06.1994), available at: http://www.likumi.lv/doc.php?id=57418&mode=KDOC (25.02.2008).

[361] See Human Rights Committee, Coeriel and Aurik v. The Netherlands, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994) (final views of 31 October 1994), para. 10.2. ('…if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of Article 17 [ICCPR, guaranteeing the right to respect for private and family life]').

8. Other relevant Issues

In the national contributions that form the basis for this comparative report, a number of issues not discussed under the previous chapters were addressed. These were mostly related to family law, and in particular, to the status of same-sex relationships under national legislation or the ability for same-sex couples to adopt jointly. The two following issues deserve closer attention, because of their closer links to the competences of the EU and to the possibility of developing an effective anti-discrimination policy at EU level.

8.1. The collection of data relating to discrimination on grounds of sexual orientation or gender identity

It is striking to see how few statistical data could be found by national FRALEX experts, in order to evaluate the effectiveness or impact of the legislations commented upon in this report. This could, in part, be due to the fact that sexual orientation is still an emerging issue, which had been largely ignored in public discussion and public policies until the beginning of this decade – which may explain that data collection in this field is only in its infancy. The sociological analysis that forms the second part of this report will examine in detail the contributing factors to this apparent lack of data, which can also, in part, be attributable to misunderstandings about the restrictions imposed under personal data protection legislation, to the processing of data related to sexual orientation.

There is anecdotal evidence to suggest that the fears about abuses being committed in the collection and processing of data relating to sexual orientation are not ill-founded. In Bulgaria for instance, the prison system collects information regarding the sexual orientation of prisoners, and any such information is fed into the risk assessment of the detainee. The Bulgarian Helsinki Committee (human rights NGO) reported a case at the Sliven prison concerning of a female prisoner of bisexual orientation, in which conclusions about her sexual orientation – wrongly determined to be homosexual, were included in the 'Accommodation', 'Family Relations', 'Lifestyle and Contacts', 'Emotional Status' and 'Mindset and Behaviour' sections. These sections also stated that prior to her imprisonment, the individual was cohabiting with another female (whose name was explicitly stated) with whom she had an intimate relationship; also, that the prisoner had a 'masculine behavioural pattern' and 'masculine appearance'. The prisoner herself was never questioned about her sexual orientation. The information and details contained in her risk assessment as an offender was accessible to any third party legally entitled to access prisoner records – the courts, prosecutor's office, etc. – for the purposes of

determining the rights ensuing from a prisoner's behaviour during the term of imprisonment.

It is thus necessary to protect the personal data relating to sexual orientation, which are particularly sensitive given the risks of misuse of such data. It should however be recalled that both the main piece of EU legislation regarding personal data protection – the 1995 Personal Data Directive[362]– and the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[363] which all EU member states are party to, are only concerned with 'personal data', namely 'any information relating to an identified or identifiable individual.'[364] But no personal data are involved where information is collected on an anonymous basis or once the information collected is made anonymous in order to be used in statistics, since such data cannot be traced to any specific person. Similarly, while the European Court of Human Rights has made clear that Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, is applicable to instances of processing of personal data,[365] this does not extend beyond the situations where information is identified to one particular individual, or where it can be traced back to one individual without unreasonable efforts.

In addition, even in circumstances where the legal requirements of the 1981 Council of Europe Convention pertaining to the automatic processing of personal data and, more specifically, of sensitive data (including data relating to the sexual orientation of individuals), would be applicable, these rules merely restrict the circumstances in which sensitive data can be processed: they do not impose an absolute prohibition on the processing of such data.[366] Combating discriminatory behaviour would appear as a

---

362 Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31.

363 C.E.T.S., No. 108.

364 Article 2 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981).

365 See e.g. Eur. Ct. HR, Leander v. Sweden, 26 March 1987, S A 116, p. 22, § 48; Eur. Ct. HR (GC), Rotaru v. Romania (Appl. n°28341/95), Judgement of 4 May 2000, §§ 43-45. But see, for the limits of this protection, Eur. Ct. HR, Zdanoka v. Latvia (Appl. n°58278/00), partial inadmissibility decision of 6 March 2003.

366 In its resolution on Non-discrimination and equal opportunities for all - A framework strategy adopted on 8 May 2006 (2005/2191(INI), EP doc. A6-0189/2006 (rapp. T. Zdanoka)), the European Parliament called for a clarification of the requirements of data protection legislation on this issue, and asked in particular the Member States to 'develop their statistics tools with a view to ensuring that data relating to employment, housing, education and income are available for each of the categories of individual which are likely to suffer discrimination based on one of the criteria listed in Article 13 of the EC Treaty' (para. 20). Following a suggestion of the EU Network of independent experts on fundamental rights (see EU Network of Independent Experts on Fundamental Rights, Thematic Comment n°3: the rights of minorities in the Union (April 2005), available at: http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm), the European Parliament called for the Working Party established under Article 29 of Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data to deliver an opinion on the question of how the use of statistical data

legitimate public interest for the pursuance of which such treatment could be allowed, subject to adequate safeguards. In addition, given that the data which would have to be collected in the framework of anti-discrimination policies are used to constitute statistics, the principles enumerated in the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe on the protection of personal data collected and processed for statistical purposes[367] also should be taken into account. This Recommendation provides in particular that the data collected and processed shall be made anonymous as soon as they are no longer necessary in an identifiable form.[368] It also states that where personal data have been collected and processed for statistical purposes, they shall serve only those purposes, and shall not be used to take a decision in respect of the data subject, nor to supplement or correct files containing personal data which are processed for non-statistical purposes.[369] In addition, in order for the processing of personal data for statistical purposes to remain proportionate, the principle of finality should be strictly observed: only those personal data shall be collected and processed which are necessary for the statistical purposes to be achieved.[370] These are important safeguards, but they are safeguards, again, which do not impose insuperable obstacles to an improved monitoring of the practices of law enforcement authorities in order to identify patterns of discrimination.

At the same time, it is clear that surveys, anonymous questionnaires, or even statistics about complaints filed with the authorities or with NGOs, would provide a very unreliable picture of the extent of discrimination on grounds of sexual orientation in the EU. The reason is the reluctance of individuals to identify themselves as LGBT persons, an identity which they may in general conceal, and which only puts them at a risk of being discriminated against once they divulge it or once it is uncovered.[371] For example, in a survey conducted in Slovenia in 2002,[372] it appeared that of the 251 participants (87 of them women, and 164 men), 60 per cent hide their sexual orientation at least from one of the parents (46 per cent hide from both parents, 14 per cent from one parent, mostly the father), while 60 per cent of the respondents hide their sexual orientation from other relatives; fifty per cent would not reveal their sexual orientation to public; and 52 per cent of the respondents conceal their sexual orientation in their working environment.

---

for the purposes of combating discrimination could be reconciled with the requirements of data protection legislation.

367 Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies.

368 Para 3.3.

369 Para 4.1.

370 Para 4.7.

371 With the exception of discrimination on grounds of assumed sexual orientation or on grounds of association with LGBT persons.

372 M.Šípošová, P. Jójart, A. Daučíková (2002) Správa o diskriminácii lesbických žien, gejov, bisexuálov a bisexuálok na Slovensku, Bratislava: Q archív.

Such numbers merely confirm the obvious, viz., that due to social hostility, LGBT individuals do not reveal their sexual orientation and prefer remain invisible to the majority of the population. This might also explain why very few victims of discrimination on the grounds of sexual orientation have claimed their rights in court. LGBT individuals often prefer to stay invisible and away from unwanted publicity.

Apart from awareness-rising events of a promotional nature and information campaigns, public bodies, particularly the police and equality bodies, could develop ways to encourage LGBT individuals to complain when they are subject to discrimination. The authorities themselves could also take initiatives to collect better data about the extent of discrimination on grounds of sexual orientation, in order to develop appropriate policies on that basis and to improve awareness of the issue.

8.2. Access to reproductive health services

A further challenge in the promotion of the rights of LGBT persons in the EU concerns access to reproductive health services. In Denmark, an amendment to *Lov om kunstig befrugtning i forbindelse med lægelig behandling, diagnostik og forskning m.v.*[373] was adopted in 2006. This amendment relates to the availability of treatment in regional hospitals; assessment of parental unfitness; relaxation of the rules regarding egg donation; and extension of the storage of frozen human eggs. An amendment was adopted in the course of parliamentary debate allowing single and lesbian women the same access to artificial insemination as women in heterosexual relationships. Accordingly, women would have the same access to artificial insemination regardless of their marital status and sexual orientation.

The Act entered into force on 1 January 2007.[374] Similarly, in Spain, Law 14/2006 of 26 May on techniques of assisted human reproduction recognises the right of any woman to have access to such techniques, 'regardless of her marital status and sexual orientation' (Art. 6(1)).

It may be asked whether, considering the free provision of medical services in the EU, such inclusionary approach to defining the conditions for having access to such reproductive health services should not be promoted at the level of the EU.

---

[373] Act 1997 No. 460; Act on Artificial Insemination in connection with medical treatment, diagnosis, research, etc. (extent of treatment in regional hospitals; assessment of parental unfitness; relaxation of the rules regarding egg donation; and extension of the storage of frozen human eggs).

[374] Act no. 535 of 8 June 2006 amending Lov om kunstig befrugtning.

It is noteworthy in this regard that in 2005, the Romanian Constitutional Court concluded that the draft law on reproductive health and medically assisted reproduction[375] was discriminatory, since it excluded individuals who were not in an established relationship from accessing medical reproductive services and reproductive assistance.[376]

[375] Romania/ Proiect de lege privind sănătatea reproducerii şi reproducerea umană asistată medical, L334/2004, available at: http://80.97.216.132/senat.proiect.asp?cod=9290&pos=0.

[376] Romania/ DECIZIE nr.418 din 18 iulie 2005 asupra sesizării de neconstituţionalitate a Legii privind sănătatea reproducerii şi reproducerea umană asistată medical, published in Romania/ Monitorul Oficial nr.664/26 iulie 2005, point 5. See case in Annex 1.

9. Good practice

Four sets of good practices are highlighted. Two of these are means to overcome the underreporting of discrimination on grounds of sexual orientation, or the lack of reliable statistical data on this subject, as illustrated by the paucity of such data in the national contributions. A third set of good practices concern the proactive policies public authorities could take in order to promote the visibility of homosexuality and various gender identities, in order to create a climate where LGBT persons will have nothing to fear from being open about their identity. Finally, one good practice relates to the need to protect transgendered persons from investigations into their past, particularly into their past professional experiences in the context of job applications.

9.1. Establishing specialised units within the public administration

A number of surveys demonstrate the resilience of homophobia in the EU. Proactive policies are therefore required from the public authorities, in order to create awareness and to establish a climate of tolerance which could encourage LGBT persons to publicise their sexual orientation or gender identity without fear of intolerance or harassment.

One approach consists in establishing units in public administrations which would be specialised on LGBT rights and could gain the trust of those concerned, and contribute at the same time at rising awareness. As mentioned when referring to the establishment of equality bodies with a competence to address discrimination on grounds of sexual orientation, the setting up, either within such bodies (such has HomO in Sweden, or the establishment and resourcing of an Advisory Group on LGB issues within the Equality Authority in Ireland), or within public administration or law enforcement agencies, of units specialising of sexual orientation issues, could significantly contribute to encouraging the victims of such discrimination to bring forward complaints or file claims. It also contributes to the development of a specific expertise on these issues, in administrations which otherwise might be unable to acquire a sufficient awareness in that respect.

Examples abound of good practices in this direction from which inspiration may be sought. In Belgium, there is a person in the office of the Commissioner-General for the Refugees and the Stateless Persons – the administration competent for the processing of asylum claims – who is exclusively occupied with applications for asylum or subsidiary protection, based on sex (and transsexualism) or sexual orientation. Another good practice in this regard is provided by the Garda Siochana in Ireland. 25 Garda Liaison

Officers have been appointed to act as a point of contact for LGB people reporting homophobia, hate speech or homophobic violence.[377] In the 2006 LGBT Hate Crime Report, 70 per cent of respondents stated that they were aware of these Liaison Officers.[378] The Gay and Lesbian Equality Network (GLEN) has worked with the Garda to develop a LGBT Community Safety Strategy for the Dublin Metropolitan Region launched by the Minister for Justice, Equality and Law Reform in June 2006 which includes, inter alia, a drop-in service at an LGBT community centre.[379] In the Netherlands, in response to the lack of willingness among homosexuals to report homophobic offences, the police established the *Roze in blauw* [Pink in Blue] network, of which about 70 lesbian, gay and bisexual (LGB) police officers are members. The network represents the interests of LGB people within and outside the police. Victims of homophobic offences can call a specific telephone number to report violence against LGB people. If so desired the police communication rooms bring the victim into contact with a member of the Pink in Blue network to report the offence.[380] Many police forces in the UK have LGBT or minority liaison officers in every borough or police district. These officers have been specially trained to support victims of homophobic and transphobic incidents. They may also have an additional responsibility to engage with individuals and groups who support victims.[381]

In Italy, initiatives adopted by various local administrations are now being scaled up through the adoption, by some municipalities and regions, of the so-called *Carta d'intenti per la costituzione della Rete nazionale delle pubbliche amministrazioni per il superamento delle discriminazioni basate sull'orientamento sessuale e sull'identità di genere* [Charter of intent on the constitution of a national network of public administrations for overcoming discrimination on grounds of sexual orientation and gender identity] which aims to create a national public administration network to improve and promote the civil rights of LGBT people.[382]

Alternatively, or in combination with the establishment of specialised units, the problem of underreporting of homophobic of criminal offences or discriminatory behaviour could be overcome by allowing the victims to go through a third party. In the United Kingdom, in order to address the problem that victims of homophobic and transphobic crimes may be unwilling to approach the police, a system has been set up which allows for reporting to a named third party, typically an LGBT organisation. The service is available in

---

377 Informal liaison and support has been in existence at Pearse St. Garda Station in Dublin since 1996.

378 2006 LGBT Hate Crime Report: Stop Hate Crimes in Ireland Campaign, available at http://johnny.fruitdesign.ie/upload/hatecrimereport.pdf at p.35

379 It is expected that this will be expanded to a national level.

380 www.art1.nl; http://www.politie-amsterdam-amstelland.nl/frameset/get.cfm?id=586; M. van San and J. de Boom (2006), Geweld tegen homoseksuelen, Rotterdam RISBO Contact Research BV, p. 24.

381 See, e.g., http://www.met.police.uk/contacts/LGBT.htm (11.02.2008).

382 See http://www.primapagina.regione.toscana.it/identitasessuale-lgbt (13.02.2008).

various parts of the UK, including Greater London and Northern Ireland, and is advertised to the public.[383]

9.2. Measuring the extent of discrimination on grounds of sexual orientation

In order to develop awareness of the issue of sexual orientation discrimination and to create a climate of tolerance, it may also be possible for the authorities themselves to take initiatives to collect better data about the extent of discrimnation on grounds of sexual orientation. For instance, the Minister of Justice in Belgium has issued a circular letter on the registration of all homophobic crimes and offences, prescribing a uniform way for the registration of such crimes, which expressly takes account of their homophobic nature. The Danish Ministry of Justice took a similar initiative in 2007, establishing a new reporting system for decisions in criminal cases where the crime has been committed on account of, inter alia, the victim's sexual orientation. In the Netherlands, in order to get a better overview of the level of homophobic aggression in the Netherlands, the police and the National Expertise Centre for Diversity (LECD) of the Public Prosecution Service developed a system to improve the registration of offences and crimes with a discriminatory aspect. Moreover, the Public Prosecution Service introduced a new information management system that provides for the option to specify the grounds of discrimination involved in an offence or crime.[384] Such initiatives should enable to gain a better understanding of the extent of discrimination on grounds of sexual orientation, and to more reliable statistical information on the level of homophobia.

9.3. Creating awareness by proactive policies

But the public authorities may also have to move beyond improving their internal modes of organisation. In November 2007 the Dutch government issued a policy paper on 'homosexual emancipation policy' (*homo emancipatiebeleid*) for the period 2008-2011.[385] The main purpose of this policy is the advancement of social acceptance of LGBT people in the Netherlands. In the policy paper the government announced that it has five

---

383 For Greater London, the police work with Galop, an LGBT community safety charity: details available at: http://www.galop.org.uk (11.02.2008).

384 Parliamentary Documents of the Dutch Lower House of General-States, 2007-2008, nr. 130 (herdruk), pp. 279-280.

385 Emancipatienota 'Gewoon homo zijn', Parliamentary Papers II 2007-2008, 27017, no.3. The first version of this policy paper dates back to 1988: Overheidsbeleid en homoseksualiteit. Beleidsbrief van het ministerie van wvc, Kamerstuk 19504 nr. 11. Rijswijk: Sdu.

goals for the aforementioned period: (a) to ensure that homosexuality can be a topic of discussion in all population groups; (b) to tackle the problem of violence and harassment against LGBT people; (c) to stimulate the setting up of civil society organisations, at both local and national level; (d) to contribute to an LGBT-friendly environment in schools, in the workplace and in sport; and (d) to fulfil an active role in the international and European field.

One important target of promotional campaigns is in education. In the Netherlands, one of the goals of the policy paper on 'homosexual emancipation policy' is to contribute to an LGBT-friendly environment in schools. Although it is part of the mandate of the Education Inspectorate to ask for a school policy for LGBT students and staff, schools are not legally obliged to pursue a security policy ('veiligheidsbeleid') specifically focused on LGBT people.[386] However, the General Teachers' Union, calls for specific policy on homosexuality in secondary schools.[387]

In addition, the organisations, *COC Nederland* and *Art.1*, have developed teaching materials aimed at making homosexuality a subject for discussion in secondary education. These teaching packs were warmly welcomed by local government. For instance, in January 2008 a pilot with the teaching pack '*Spreek je uit!*' ['Speak out!'] started in The Hague and, in the province of Limburg, the campaign '*Vrolijke Scholen*' was launched, which aims to inform schools about how to be more gay-friendly.[388] Similar examples of initiatives in education can be identified in a number of EU Member States.

Such initiatives are often controversial. At the beginning of 2006 the Polish version of *Compass*, the guide for teachers on methods of educating young people about human rights, published by the Council of Europe, was withdrawn from circulation in Poland by the Ministry of Education, and the director of the National In-Service Teacher Training Centre (NTTC), was dismissed for publishing the guide. The grounds for dismissal were the content of the chapter on homosexuality contrary to the general programme of education, as well as the charge that the publication promoted homosexuality in schools.[389] The Commissioner for Human Rights of the Council of Europe subsequently also had to express his concerns about the draft amendments to *Ustawa o systemie oświaty* [Law on the Education System][390], which carried a view of homosexuality as an unnatural tendency of people who require special care and are subject to a 'deviation',

---

386 Equal Treatment Commission 27.01.2006, CGB oordeel 2006-13.

387 www.gayandschool.nl and the website of the Dutch General Union of Educational Personnel www.aob.nl, last accessed 31.01.2008.

388 www.art1.nl, last accessed 30.01.2008 and www.coc.nl, last accessed 30.01.2008.

389 For considerations on the litigation initiated by Mirosław Sielatycki against the Minister of National Education, see Chapter 1.

390 Poland/Ustawa z dnia 7 września 1991 r. o systemie oświaty, unified text – Dziennik Ustaw [Journal of Laws] of 2004, No. 256, item 2572, as amended.

and which prohibited the promotion of homosexuality in schools.[391] While these draft amendments never passed, that they could even be proposed illustrate how much still needs to be done to ensure that homosexuality will cease being a stigma, and will simply be one way of living one's sexuality among many others, in a society respectful of diversity.

9.4. Protecting the privacy of transgendered individuals in the context of job applications

One of the problems transgendered people may face is that, even after their gender reassignment has been officially recognised, information may have to be collected about their past, particularly in the context of applications for employment. In the United Kingdom, the Criminal Records Bureau (CRB) provides access to criminal record information in order to help employers in the public, private and voluntary sectors to identify job applicants who may be unsuitable for certain work, especially positions that involve contact with children or other vulnerable members of society.[392] To perform this role, the CRB has to be aware of any previous names and/or gender of job applicants. However, the CRB has created a separate application procedure which allows transgender applicants to exclude previous names from the disclosure application form. Applicants are still required to send details of their previous identity in a separate letter directly to the Sensitive Casework Manager within the CRB. The CRB then checks the data sources held against both current and previous names. This procedure avoids the need for disclosure of former name or gender history to the employer at the application stage, whilst allowing the CRB to carry out the requisite checks against any previously-held identities.

---

391 Memorandum to the Polish Government, Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, 20.06.2007, CommDH(2007) 13.

392 See http://www.crb.gov.uk (11.02.2008). For Scotland, see the Scottish Criminal Records Office, available at: http://disclosurescotland.gov.uk (11.02.2008).

10. Conclusions

10.1. The Employment Equality Directive

> Charter of Fundamental Rights (Article 21)
>
> *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

This report shows that in 18 EU Member States (BE, BG, CZ, DE, ES, IE, HU, LV, LT, LU, NL, AT, RO, SI, SK, FI, SE, UK), the implementation of the Employment Equality Directive has gone beyond minimum standards as regards discrimination on the grounds of sexual orientation; in these countries protection against discrimination on this ground not only provided in work and employment, but also in some or all of the areas covered by the Racial Equality Directive: social protection (social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public, including housing. In nine EU Member States (DK, EE, EL, FR, IT, CY, MT, PL, PT) the Employment Equality Directive has been implemented as regards sexual orientation discrimination in matters related to work and employment. Thus, in the majority of EU Member States, legislation was put in place which provides for protection from discrimination on the grounds of sexual orientation in areas beyond work and employment.

In 18 Member States (BE, BG, DE, EL, FR, IE, CY, LV, LT, LU, HU, NL, AT, RO, SI, SK, SE, UK) there is an *equality body competent to deal with discrimination on the grounds of sexual orientation*. While nine other Member States (CZ, DK, EE, ES, IT, MT, PL, PT, FI) do not have in place at the time of writing an equality body competent to address discrimination on grounds of sexual orientation, four of these States (DK, EE, IT, PT) are moving in the direction of creating one single equality body for all discrimination grounds including sexual orientation. Only one State has set up a body specifically tasked with discrimination on grounds of sexual orientation: Sweden.

10.2. The Free Movement Directive

> Charter of Fundamental Rights (Article 45)
>
> *1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.*
>
> *2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.*

In order to comply with the requirements of fundamental rights as defined in Article 6(2) of the EU Treaty, the implementation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive) should ensure that 'spouses' or 'partners' of citizens of the Union having exercised their free movement rights are recognised as such, even when they are same-sex spouses or partners.

Three situations need to be distinguished:

(1) When a same-sex *married partner* of a citizen of the Union wishes to join his or her partner in another EU Member State: Concerning a same-sex married partner of a citizen of the Union (whose marriage with another person of the same sex is valid under the laws of BE, ES, NL) seeking to join him or her in another EU Member State, 11 Member States (EE, EL, IE, IT, LV, LT, MT, PL, PT, SI, and SK) appear to reject the recognition of same-sex marriage concluded abroad, and might refuse to consider as 'spouses', for the purposes of family reunification, the same-sex married partner of a citizen of the Union. In contrast, 12 other Member States (BE, CZ, DK, DE, ES, FR, LU, NL, RO, FI, SE, UK) would recognise such marriage. In 4 Member States (BG, CY, HU, AT), the situation is unclear. However, any refusal to recognize same sex marriage validly concluded abroad for the purposes of freedom of movement constitutes direct discrimination on grounds of sexual orientation, in violation of Article 26 of the International Covenant on Civil and Political Rights and of the general principle of equality, as reiterated in Article 21 of the Charter of Fundamental Rights. This results in a situation in which the freedom of movement of LGBT is restricted, and not uniformly recognised throughout the Union. It also is the source, in many cases, of legal uncertainty: in the vast majority of Member States, the legislation relating to freedom of entry and residence of 'spouses' of citizens of the Union does not clearly address the situation when these 'spouses' are of the same sex as the Union citizen, and there is no case-law to guide those wishing to exercise their free movement rights.

(2) When a same-sex *registered partner* of a citizen of the Union wishes to join him or her in another EU Member State: Ten Member States (BE, CZ, DK, ES, HU, NL RO, SE, FI, UK) currently recognise registered partnerships concluded abroad as giving rise to family reunification rights. Seventeen Member States (BG, DE, EE, EL, FR, IE, IT, CY, LV, LT, LU, MT, AT, PL, PT, SK, SI) are not under such an obligation, whether this is because they have no such institution in their domestic law, or because the form of partnership they allow for is not equivalent to marriage.

(3) When a same-sex *de facto partner* of a citizen of the Union (without registered partnership or same-sex marriage, but with either a common household or a durable relationship, duly attested) wishes to join him or her in another EU Member State: In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence of a de facto partnership, either of a common household or of a 'durable relationship' may be attested. While this may be explained by the need not to artificially restrict such means – i.e., by the need to allow for such proof to be provided by all available means –, the risk is that the criteria relied upon by the administration may be arbitrarily applied or difficult to meet in practice. This could lead to discrimination against same-sex partners, which have been cohabiting together or are engaged in a durable relationship.

10.3. The Qualification Directive

> Charter of Fundamental Rights (Article 18)
>
> *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.*

Regarding Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (the 'Qualification Directive') spouses of refugees or individuals benefiting from subsidiary protection would include same-sex spouses in ten EU Member States (BE, CZ, DK, DE, ES, LU, NL, AT, FI, UK); the situation is more doubtful in seven other Member States (EE, FR, IT, PL, PT, RO, SE), where the definition of 'spouse' in this context still has to be tested before courts. In ten Member States (BG, EL, IE, CY, LV, LT, HU, MT, SI, SK), by contrast, same-sex spouses would probably not be allowed to join their spouse granted international protection; this should be considered a direct discrimination on grounds of sexual orientation.

Nine EU Member States (BE, CZ, DK, DE, ES, LU, NL, FI, UK) allow the same-sex partner to join the person to whom international protection is granted, although the conditions may vary between these jurisdictions as to the precise conditions for establishing the existence of a 'durable relationship'. The situation is doubtful in four other Member States (BG, FR, PT, SE). In the 14 remaining States, same-sex partners are not granted a right to residence (BG, EE, EL, IE, IT, CY, LV, LT, HU, MR, AT, PL, RO, SI). In 12 of these States (BG, EE, EL, IE, IT, CY, LV, HU, MR, AT, PL, RO) neither opposite-sex nor same-sex partnerships give rise to a right of the partner to reunite with the sponsor granted a form of international protection. In at least two of the States of this group (LT, SI), a difference in treatment is established between opposite-sex partners living in a durable relationship, on the one hand, and same-sex partners living in such relationship, on the other hand, with only the former being granted a right to reunite: this constitutes direct discrimination on grounds of sexual orientation and cannot be justified.

10.4. The Family Reunification Directive

> Charter of Fundamental Rights (Article 7)
>
> *Everyone has the right to respect for his or her private and family life, home and communications.*

A similar problem arises under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ('Family Reunification Directive'). This directive ensures that the spouse will benefit from family reunification (Art. 4/1/a).

A first implication is that the same-sex spouse of the sponsor should be granted the same rights as would be granted to an opposite-sex spouse. It would appear however that, in at least 13 Member States (EE, EL, FR, IE, IT, LT, LV, HU, MT, PL, PT, SI, SK), the notion of spouse would probably not extend to same-sex spouses, even where the marriage has been validly concluded in a foreign jurisdiction: this constitutes direct discrimination on grounds of sexual orientation and cannot be justified.

A second implication is that if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners, this should benefit all such partners, and not only opposite-sex partners. At the time of writing, 12 Member States have decided to extend the right to family reunification to unmarried partners. Four States of this group restrict the possibility to registered partnerships (CZ, DE, CY, LU). Eight other States of this group allow for family reunification on the basis of any durable relationship, even not authenticated by official registration (BE, BG, DK, FR, NL, FI, SE, UK). Fifteen Member States, forming a second

group, have chosen not to provide for the extension of family reunification rights to unmarried partners (EE, EL, IE, IT, CY, LT, LV, HU, MT, AT, PL, PT, RO, SI, SK).

10.5. Combating homophobia through the criminal law

> Charter of Fundamental Rights (Article 1)
>
> *Human dignity is inviolable. It must be respected and protected.*

The examination of whether hate speech of a homophobic nature is made a criminal offence in the EU Member States, and of whether the homophobic intent is considered an aggravating circumstance for sentencing purposes in the criminal laws of the Member States, revealed similar degrees of inconsistency.

In 12 EU Member States (BE, DK, DE, EE, ES, FR, IE, LT, NL, PT, RO, SE), the criminal law contains provisions making it a criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation. In the UK, there are plans to create offences involving stirring up hatred on the grounds of sexual orientation. The remaining states do not have such explicit provisions, however generally worded provisions may serve to protect LGBT persons from homophobic speech. The absence of explicit provisions might lead to legal uncertainty in the absence of guidance or authoritative jurisprudence. In BG, IT, MT, and AT existing criminal law provisions against hate speech are explicitly restricted to the protection of groups other than LGBT, making an extension of the protection of the law to LGBT difficult to envisage.

Ten EU Member States make the homophobic intent an aggravating factor in the commission of common crimes (BE, DK, ES, FR, NL, PT, RO, FI, SE, UK with the exception of Scotland). In 15 other Sates, homophobic intent is not an aggravating circumstance in the commission of criminal offences (BG, CZ, DE, EE, EL, IE, IT, CY, LT, LU, LV, MT, AT, SI, SK).

10.6. The protection of transgender persons

Charter of Fundamental Rights (Article 21)

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Transgendered people should be protected from discrimination in the European Union. The European Court of Justice considers that the instruments implementing the principle of equal treatment between men and women should be interpreted in order to afford a protection against discrimination on grounds of transgender.

Thirteen EU Member States treat discrimination on grounds of transgender as a form of sex discrimination (BE, DK, FR, IE, IT, LV, NL, AT, PL, FI, SE, SK, UK), and even in these States, this is generally a matter of practice of the anti-discrimination bodies or courts rather than an explicit stipulation of legislation. In 2 Member States (DE, EE) discrimination on grounds of transgender is treated as sexual orientation discrimination. In 11 other Member States (BG, CZ, EE, EL, CY, LT, LU, MT, PT, RO, SI) discrimination on grounds of transgender is treated neither as sex discrimination nor as sexual orientation, resulting in a situation of legal uncertainty. In Hungary, the Act on Equal Treatment includes sexual identity as one of the grounds of discrimination.

The European Convention on Human Rights guarantees the legal recognition of the new gender acquired followed a gender reassignment medical operation; in addition it recognises the right of the transgendered person to marry a person of the gender opposite to that of the acquired gender. Although four EU Member States (IE, LV, LU, MT) still seem not to comply fully with this requirement, the situation in the other Member States is generally satisfactory. But the approaches vary. Whereas in a few Member States, there is no requirement to undergo hormonal treatment or surgery of any kind in order to obtain an official recognition of gender reassignment, in other Member States, the official recognition of a new gender is possible only following a medically supervised process of gender reassignment sometimes requiring, as a separate specific condition, that the person concerned is no longer capable to beget children in accordance with his/her former sex, and sometimes requiring surgery and not merely hormonal treatment. In certain Member States the official recognition of gender reassignment requires that the person concerned is not married or that the marriage be dissolved. This obliges the individual to have to choose between either remaining married or undergoing a change which will reconcile his/her biological and social sex with his/her psychological sex: it has therefore been proposed that the requirement of being unmarried or divorced as a

prerequisite for authorisation for sex change should be abandoned. Finally, the ability to change one's forename in order to manifest the gender reassignment is recognised under different procedures. In most Member States, changing names (acquiring a name indicative of another gender than the gender at birth) is a procedure available only in exceptional circumstances, generally conditional upon medical testimony that the gender reassignment has taken place, or upon an official recognition or gender reassignment, whether or not following a medical procedure.

10.7. The lack of statistics and data for the development of anti-discrimination policies

> Charter of Fundamental Rights (Article 8)
>
> *Everyone has the right to the protection of personal data concerning him or her.*

The paucity of relevant data across the EU, which could inform about discrimination on grounds of sexual orientation is striking. This could be due, in part, to the fact that sexual orientation is still an emerging issue, largely ignored in public debate and public policies until the beginning of this decade; in part, it is attributable to misunderstandings about the requirements of data protection legislation, particularly as embodied in the EU Data Protection Directive 95/46/EC and in the domestic laws implementing this directive. Art 8 of this directive defines personal data concerning sex life as sensitive data. This provision is the basis of legal uncertainty concerning the lawfulness of the collection of statistics informing about discrimination on the grounds of sexual orientation.

11. Opinions

According to Art 4/1/d of Council Regulation 168/2007, the European Union Agency for Fundamental Rights is entrusted with the task to formulate opinions for the European Union institutions and the Member States in order to fulfil its objective, which is to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States, when implementing Community law, with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate course of action within their respective spheres of competence to fully respect fundamental rights.

11.1. Equal Right to Equal Treatment

18 EU Member States have gone beyond minimal prescriptions as regards sexual orientation in implementing the Employment Equality Directive by providing protection against discrimination for LGBTs not only in employment, but also in other or even all of the areas covered by the Racial Equality Directive. In 18 Member States there is an equality body competent to deal with discrimination on the grounds of sexual orientation. This is important to note in view also of the equality of grounds implicit in the European Union's Charter of Fundamental Rights, which in Article 21 prohibits discrimination equally on all grounds.

The majority of Member States have thus already disregarded any artificial "hierarchy" of discrimination grounds. The competent European Union institutions should therefore consider developing the necessary legislative provisions to ensure that all grounds of discrimination mentioned in Article 13 of the EC Treaty benefit from the same high level of protection ensuring that all can enjoy equal rights to equal treatment. This can be achieved through one horizontal directive for all discrimination grounds covered by Art 13 of the EC Treaty with the same extended scope and institutional guarantees (requirement for an equality body) following the model of the Racial Equality Directive.

11.2. Same sex couples are not always treated equally with opposite sex couples

Rights and advantages reserved for married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership in the absence of a possibility to marry, or when, in the absence of a registered partnership, the de facto relationship presents a sufficient degree of permanency in order to ensure

equal treatment of LGBT persons. International human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognised if they had access to marriage; or that, failing such official recognition, the de facto durable relationships they enter into leads to extending to them such advantages. Indeed, where differences in treatment between married couples and unmarried couples have been recognised as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate choice not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows a contrario that advantages recognised to married couples should be extended to unmarried same-sex couples either when, in the absence of such an institution, the de facto relationship presents a sufficient degree of permanency: any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

This is also relevant for rights and benefits provided for spouses and partners under the EU's Free Movement Directive, the Family Reunification Directive and the Qualification Directive. The treatment of same sex couples in conformity with international human rights law needs to be ensured and clarified for all these directives.

11.3. Approximation of criminal law combating homophobia

Following the model of the proposed framework decision on racism and xenophobia (COM (2001) 664), , which was sent to the European Parliament for reconsultation after reaching political agreement in Council (Doc Nr 11522/2007 from 19 July 2007), the European Commission should consider proposing similar EU legislation to cover homophobia. This EU legislation needs to cover homophobic hate speech and homophobic hate crime and approximate criminal legislation in the Member States applicable to these phenomena. Homophobic hate speech and hate crime are phenomena which may result in serious obstacles to the possibility for individuals to exercise their free movement rights and other rights in a non-discriminatory manner. These phenomena need to be combated across the European Union ensuring minimum standards of effective criminal legislation.

11.4. Transgender persons are also victims of discrimination

Transgender persons are also victims of discrimination and homophobia. They should therefore be equally protected from discrimination. According to the European Court of Justice the legal instruments for equal treatment of men and women should be interpreted so as to afford protection also against transgender discrimination. This report has documented legal uncertainty in the Member States and different approaches. Clarifying the protection of transgender persons is therefore essential. In addition, the notion of 'sex' or 'gender' should be interpreted more broadly, in order to cover also 'gender identity' – i.e., beyond transgender people as such, cross dressers and transvestites, people who live permanently in the gender 'opposite' to that on their birth certificate without any medical intervention, and all those who wish to present their gender differently. Both these clarifications should be explicitly included in any relevant future EU anti-discrimination legislation, including a possible horizontal anti-discrimination directive.

Member States should consider to introduce/improve legislation and practice in order to fully ensure the full legal recognition of the new gender including change of forename, social security number and other possible gender indicators.

11.5. Lack of statistics regarding discrimination on grounds of sexual orientation

The lack of statistical data is partly attributable to misunderstandings concerning the requirements of EU data protection legislation. In this respect it would be advisable to request from the Working Party established under Article 29 of this directive to deliver an opinion concerning the compatibility of the directive with the processing of sensitive personal data for statistical purposes, particularly in the context of anti-discrimination policies. Such an opinion would reduce legal uncertainty and promote anti-discrimination policy by making the collection of solid and comprehensive statistics regarding all forms of discrimination, including discrimination on the grounds of sexual orientation, possible.

ANNEX

Fundamental Rights Agency Legal Experts Group (FRALEX)

Country	Name	Position/Institution
Belgium	Paul Lemmens	Professor / Institute for Human Rights – University of Leuven
Bulgaria	Slavka Kukova	Researcher / Bulgarian Helsinki Committee
Czech Republic	Pavel Sturma	Professor / Charles University - Prague
Denmark	Birgitte Kofod Olsen	Deputy Director / The Danish Institute for Human Rights
Germany	Heiner Bielefeldt	Director / The German Institute for Human Rights
Greece	Petros Stangos	Professor / Aristotle University of Thessaloniki
Estonia	Merle Haruoja	Chairman of the Board / Estonian Institute for Human Rights
Spain	Teresa Freixes Sanjuan	Professor / Autonomous University of Barcelona
France	Florence Benoit-Rohmer	Professor / Robert Schumann University - Strasbourg
Ireland	Donncha O'Connell	Dean of Law / National University of Ireland - Galway
Italy	Marta Cartabia	Professor / University of Bicocca- Milan
Cyprus	Nicos Trimikliniotis	Assistant Professor & Director / Centre for the study of Migration, Inter-ethnic & Labour Relations at University of Nicosia
Latvia	Ilvija Pûce	Lawyer / Latvian Centre for Human Rights
Lithuania	Edita Ziobiene	Director / Lithuanian Centre for Human Rights
Luxembourg	Francois Moyse	Attorney / Di Stefano, Sedlo & Moyse
Hungary	Lilla Farkas	Attorney/ President of the Equal Treatment Advisory Board
Malta	Ian Refalo	Professor / Organisation for the Promotion of Human Rights
Netherlands	Rick Lawson	Professor / University of Leiden
Austria	Manfred Nowak	Co-Director / Ludwig Boltzmann Institute of Human Rights
Poland	Zbigniew Holda	Professor/ Jagiellonian University- Cracow
Portugal	Jose A. Guimaraes de Sousa Pinheiro	Professor / University of Lisbon
Romania	Romanita Elena Iordache	Vice-President / ACCEPT
Slovak Republic	Wolfgang Benedek	Professor / University of Graz

Country	Name	Position/Institution
Slovenia	Arne-Marjan Mavcic	Head of Analysis and International Cooperation Department - Constitutional Court of Slovenia
Finland	Martin Scheinin	Professor / Institute for Human Rights, Åbo Akademi University
Sweden	Maja K. Eriksson	Professor / University of Uppsala
UK	David Harris	Co-Director / Human Rights Law Centre – University of Nottingham
EU / International	Olivier De Schutter	Professor of Human Rights at the Catholic University of Louvain

European Union Agency for Fundamental Rights

Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States

Part I – Legal Analysis

2008 – 160 pp – 21 x 29.7 cm

ISBN-13: 978-92-9192-266-6
DOI: 10.2811/9312
TK-30-08-001-EN-Z

A great deal of information on European Union Agency for Fundamental Rights is available on the Internet.
It can be accessed through the FRA website (http://fra.europa.eu).

European Year of Intercultural Dialogue 2008

TK-30-08-001-EN-Z

FRA - European Union Agency for Fundamental Rights
A-1060 Wien, Rahlgasse 3
Tel.: +43 1 580 30 - 0
Fax: +43 1 580 30 - 693
E-Mail: information@fra.europa.eu
http://fra.europa.eu

ISBN 978-92-9192-266-6