

DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION - THE EUROPEAN VIEW

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Is the legal framework adequate and effective to prohibit discrimination on grounds of sexual orientation?

Does the law in the area of discrimination on grounds of sexual orientation lag behind other anti-discriminatory law? And can this gap be bridged?

1. Non-Discrimination, Sexual Orientation and EC Law

The principle of non-discrimination constitutes a general principle of EC law and only recently was expressly mentioned in legislation, with the insertion of Article 13 EC into the Amsterdam Treaty. Prior to this, the principle of non-discrimination was mainly used in the internal market area relating to free movement articles, discriminatory taxation and agriculture. However, over the years the concept has been applied more generally to cover those situations where persons were treated unjustly and in an arbitrary fashion.

In fact the Advocates General recognised, prior to the insertion of Article 13 EC, that the general principles of Community law imposed a requirement on the EC institutions and the Member States not to discriminate in areas of Community law on arbitrary grounds such as sexual orientation. However in *Grant*¹, one of its more conservative judgements, the ECJ examined travel benefits for the same-sex partners of employees and it decided that discrimination on grounds of sex in EC law did not cover discrimination on grounds of sexual orientation as this would extend the scope of the Treaty beyond Community competence.

*D v Council*² followed on the same cautious lines, although in this case there was no confusion as to Community competence since the case related to the regulation of Community employees. This case concerned the EU's refusal to pay a staff household allowance (which would have been payable to a married employee) to a homosexual employee who was in a "civil partnership" registered under Swedish law. The court

¹ Case C-249/96 *Grant v South-West Trains*, [1998] ECR I-621

² Case C-125/99P *D v Council*, [2001] ECR I-4319

concluded that although there had not been any discrimination on grounds of sexual orientation, it did not deny that there could be a possibility of the existence of an EC law prohibiting discrimination on grounds of sexual orientation. The court held that “*as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner*”.

In spite of these rulings it remains arguable that there exists a general principle of non-discrimination on the basis of sexual orientation, race and other arbitrary grounds. Furthermore the recent EU Charter of Fundamental Rights declares that “*Any discrimination based on any ground such as...sexual orientation shall be prohibited*”. In addition, within the employment and social affairs area there is the recent equality Directive 2000/78 establishing a general framework for equal treatment in employment and occupation that prohibits discrimination in employment based on grounds which include sexual orientation.

2. The Main Differences Between the Two Equality Directives

It is useful to compare the two main EC Equality Directives, which are *Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* and *Directive 2000/78 establishing a general framework for equal treatment in employment and occupation*. This exercise is of relevance in order to examine the varying levels of protection between the different rights, the width or otherwise of the scope of the legislation in question and the types of actions needed to implement the said legislation.

Article 3 of the *Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*³ lays down the scope of this Directive. This scope is wide and not limited to equal treatment in employment and occupation issues only, but it also includes issues referring to social protection and social benefits, such as education, social advantages and access to and supply of goods and services.

On the other hand, *Directive 2000/78 establishing a general framework for equal treatment in employment and occupation*⁴ has as its scope issues related to employment only: conditions of access to employment, access to all types of vocational guidance or training, employment and working conditions and membership of, and involvement in, organisations of workers or employers. This list would seem broad enough to encompass such grey areas as compulsory military service and voluntary work. In order to emphasise this, Paragraph 13 of the Preamble and Article 3(3) of the same Directive, expressly excludes social security or social protection schemes from application in the context of employment and occupation. Education and access to and supply of goods and services, which are covered in *Directive 2000/43*, are also excluded. Any consequence of this provision on the legislation of Member States will remain to be seen.

³ Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [OJ 2000, L180/22]

⁴ Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [OJ 2000, L303/16]

Directive 2000/78 covers the more controversial forms of discrimination based on *religion or belief, disability, age and sexual orientation*, and hence it follows that its scope would be narrower. Although it is understandable that the scope is narrow due to the differing attitudes in the Member States in certain controversial areas, a question that arises is whether it is justified to have a lesser degree of protection against discrimination based on religion, disability, age and sexual orientation. It shall be shown at a later stage that even within this Directive there exist varying levels of protection against discrimination between these so-called controversial grounds.

Furthermore *Directive 2000/43*, in Article 13, imposes an obligation on the Member States to set up a body or bodies for the promotion of equal treatment on grounds of racial or ethnic origin. The same Article obliges the Member States to ensure that the competences of these bodies include a number of tasks, such as reporting and assistance to victims. The corresponding obligation to set up a body to promote equal treatment in employment and occupation to combat discrimination on grounds of religion, disability, age and sexual orientation is not found in *Directive 2000/78*. Therefore, the two Directives differ not only in their scope but also in the obligations imposed on the Member States. The requirement to create a body vests the Member States with an obligation for positive action in the field of racial or ethnic discrimination, whereas the absence of such a requirement requires a more passive role for the authorities of the Member States.

Sexual Orientation Discrimination Under Directive 2000/78

Primarily, when one examines the provisions in the *2000/78 Directive*, discrimination on the grounds of sexual orientation is the only form of discrimination that is not dealt with individually. This results in that its individual scope and meaning remains wholly undefined, and hence leaves the implementing Member States to act in uncharted waters. The preamble to the Directive, for example makes reference to gender issues (paragraphs 2, 3), old age (paragraphs 6, 8, 25), race and ethnic origin (paragraph 10), disability (paragraphs 16, 17, 18, 19, 20, 21, 27) and religion (paragraphs 24). The only indirect reference to sexual orientation is in paragraph 22 of the Directive's Preamble, which states "*This Directive is without prejudice to national laws on marital status and the benefits dependent thereon*". Over and above the fact that there is no explicit reference to sexual orientation, there is an indirect leeway for Member States to avoid granting equal treatment to non-conventional families, which often involve cohabiting homosexual couples.

In addition, within the operative part of *Directive 2000/78* Articles 4, 5 and 6 refer specifically to issues of religion or belief, disability and age respectively and these Articles outline the limits of the protection afforded, such as the differential treatment in employment when ethos is based on religion or belief, special rights of accommodation for disabled persons and justifications of different treatment on grounds of age. Here, again, there is an evident omission of any reference to issues relating to sexual orientation. This increases the difficulty of defining the issues relating to discrimination on grounds of sexual orientation and of creating a harmonised minimum protection throughout the European Union. Therefore, Member States may provide that a difference of treatment, which would otherwise be prohibited, shall not constitute discrimination where '*by reason of the nature of the particular occupational activities concerned or of the context in which they are*

carried out, a characteristic related to one of the forbidden grounds constitutes a ‘*genuine and determining occupational requirement*’⁵. However, it is very difficult to imagine certain jobs where a particular sexual orientation is needed.

The question arises as to whether in reality there is actually discrimination between the anti-discrimination grounds themselves, whether the protection against discrimination based on sexual orientation is a less 'important' right. Contrary to this assertion, the European Council has declared that ‘*[t]he different forms of discrimination cannot be ranked: all are equally intolerable*’⁶; however needless to say such declarations should be put into practice and not merely written on paper.

3. Discrimination on the Grounds of Sexual Orientation

This paper studies the protection against discrimination based on sexual orientation in employment, and hence will focus on this. It is useful at this stage to attempt a definition of what sexual orientation consists of. The term has not been defined in *Directive 2000/78*, and sexual orientation may be seen both as an attraction or preference, and as a conduct or behaviour, which refers to the choice of the sex of the partner in the emotional-erotic sphere. This situation leaves the definition of this terminology in the hands of the individual Member States, which could obviously result in discrepancies and different degrees of protection afforded throughout the Union. The Commission, on its Equal website,⁷ defines the ambit of discrimination on grounds of sexual orientation as covering persons who fall into the gay, bisexual and lesbian category. However, a wider view is taken by Sweden’s Office of the Ombudsman against Discrimination on Grounds of Sexual Orientation⁸. They define sexual orientation as a collective term used to refer to the fact that everyone has a sexual orientation, whether this is gay, lesbian, bisexual or heterosexual. However, for the purposes of this paper the meaning given to ‘sexual orientation’ will be the meaning used by the European Commission, unless otherwise expressly stated, that is gay, bisexual and lesbian.

Another important distinction when it comes to defining the scope of sexual orientation is that between cohabitation for same-sex couples and sexual orientation. The difference is of importance when it comes to identifying the focus group and legislating on the issues that could arise from the two different groups. Should one identify the persons concerned with regards to their sexual practices (for example same-sex cohabitation or otherwise) or with regards to their sexual identities (for example gay, lesbian, bi-sexual or heterosexual)?

What is meant by discrimination on grounds of sexual orientation? Discrimination on these grounds would consist of situations when a person is subjected to different treatment on grounds of being gay, lesbian or bisexual, on grounds of having engaged in same-sex conduct or being in a same-sex relationship, or on grounds of coming out as gay, lesbian or bisexual. There would be discrimination on the grounds of sexual orientation even if the

⁵ Article 4, Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [OJ 2000, L303/16]

⁶ Council Directive 2000/750 of 27th November 2000 establishing a Community action programme to combat discrimination (2001-2006) [OJ 2000 L303/23]

⁷ http://europa.eu.int/comm/employment_social/equal/policy-briefs/etg0-visibility-vision_en.cfm

⁸ <http://www.homo.se>

aggrieved person does not actually identify as gay, lesbian or bisexual, but was perceived as such by the persons who discriminated or was treated differently because he or she associates with homosexual persons.⁹

The prohibition of sexual orientation discrimination also means that the same-sex partner of an employee must be treated in the same way as the different-sex partner in a heterosexual relationship is or would be. This holds true as long as the same-sex partner is compared with the different-sex partner who is not married to the employee.

Direct sexual orientation discrimination finds its source in a treatment that places on gay, lesbian and sexual persons burdens that are not placed on heterosexual persons. These burdens, in the case employment discrimination, are often the result of bias, stereotype and prejudice associated with homosexuality. On the other hand, indirect discrimination occurs when the criterion used to take decisions is apparently neutral (e.g. being married), but it puts at a particular disadvantage persons who have a particular sexual orientation (e.g. gays and lesbians) because for them it is more difficult to meet the condition requested (in many European countries a person cannot marry another person who is of the same sex).

Few Member States have truly understood the changes in perspective involved in the consideration of indirect discrimination. More than just extending the conventional use of legal sanctions to discriminatory acts, indirect discrimination requires the examination of all the apparently neutral procedures and practices, and, above all, the active promotion of equality.¹⁰ Whilst actions fighting against direct discrimination require invisibilisation of personal characteristics in order to ensure impartiality, indirect discrimination, on the other hand requires making the invisible visible. This is problematic in the area of sexual orientation discrimination due to the fact that a person's sexual orientation, as for example a person's religious beliefs, is an invisible trait and is generally treated by that individual as private and personal¹¹. For this reason, any reporting or direct questioning for statistics on the part of the authorities, for reasons of policy making and action programmes with regards to sexual orientation discrimination, may be found to be incompatible with privacy issues and hence this makes development in this field even more difficult.

Unlike direct discrimination, indirect discrimination may be justified by a legitimate aim or policy. This would include the prohibitions emanating from the laws on marriage, adoption and benefits relating to same-sex couples and families. Certain forms of direct discrimination may also be justified on policy grounds, as dubious as they may seem, such as the discriminatory access standards towards homosexuals in the United States Armed Forces. This practice is being eroded slowly across Europe, for example the ban on gays in the British Armed Forces was lifted in 2000 and the Royal Navy has become the first section of the British armed forces to join a scheme protecting gay rights. It has signed

⁹ The European Group of Experts on Combating Sexual Orientation Discrimination, *Combating sexual orientation discrimination in employment: Legislation in Fifteen EU Member States*, November 2004

¹⁰ European Commission, *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, the United Kingdom and the Netherlands.*, DG Employment and Social Affairs, August 2004

¹¹ Sexual orientation is not an immediately *visible* characteristic and in order to be perceived by observers, such must be expressed via distinctive and identifiable signs: codified clothing, attitudes, expressions, and even quite simply a public expression (coming out)

equal rights Diversity Champions Programme to promote fair treatment of lesbian, gay and bisexual recruits. Same-sex couples with a registered civil partnership will also be able to apply for married quarters, in all British armed forces, from autumn 2005.¹²

4. The Existence of Supporting Measures with Regard to Sexual Orientation

The *2000/78 Directive* relating to equal treatment in employment and occupation is a general framework Directive and consequently it is rather skeleton-like and would require independent action on the part of the Member States to fill in any gaps or include any additional obligations. The question one must pose is whether there exist other forms of legislation or guidelines in support of this Directive that fulfil the role of fleshing out the rights for equal treatment and the obligations on the Member States with regards to sexual orientation discrimination.

As mentioned above, the *2000/78 Directive* is a framework Directive which requires additional legislation at Member State level, and also, in my opinion, at Community level. There are various EU programmes and institutions that support the two Directives on equality, such as the Centre on Racism and Xenophobia, a variety of structures relating to gender discrimination and social measures for target groups (old age and disability). Besides these actions there are a number of guidelines and Directives, at a Community level, that regulate discrimination on grounds of age, disability and religion. However, yet again, both the specific programmes and the legislation are missing with regards to discrimination on grounds of sexual orientation, although one can take part in other EU programmes with a view to promoting non-discrimination on sexual orientation. What follows is a brief overview of the legislative and other supporting measures or initiatives undertaken by some Member States in the area of non-discrimination and with an emphasis on sexual orientation discrimination.

4.1 Legislative Provisions

Generally, in most of the old Member States, the legislation prohibiting sexual orientation discrimination in employment covers homosexual, heterosexual and bisexual persons. This does not only cover a person's sexual preference, but it also covers discrimination on grounds of a person's sexual behaviour or on grounds of a person's *coming out*. This encourages the persons involved to be more open about their sexual orientation and on the other hand, also giving them the right to keep their sexual preferences private.

In certain Member States, such as Italy¹³ and Spain¹⁴, there is uncertainty whether their anti-discrimination laws cover direct discrimination between same-sex and different-sex (cohabiting) partners, although the Directive expressly prohibits that form of discrimination. In other Member States, a problem arises with regard to the prohibition of indirect discrimination against same-sex partners; in employment the main concern is the most common form of indirect discrimination, that is the discrimination against unmarried

¹² BBC News, Royal Navy to promote gay rights, UK Edition, 21st February 2005

¹³ Legislative Decree no 216 of 9 July 2003, Implementation of the Directive 2000/78/EC on equal treatment in employment and occupation.

¹⁴ Law 62/2003 Fiscal, Administrative and Social measures.

employees and their partners. In Ireland¹⁵, for example, a specific exception in the implementing legislation seeks to prevent the national Courts from assessing whether such discrimination is indeed justified. It remains to be seen whether such indirect discrimination would be considered objectively justified in day-to-day cases, one of the justifications being the aim not to prejudice national laws on marital status, as laid down in paragraph 22 of The Preamble *Directive 78/2000*¹⁶.

In Maltese legislation, the non-discrimination areas are protected within the Equal Treatment Regulations (LN 452.95) and the Employment and Industrial Relations Act (Chapter 452). The latter makes reference exclusively to the issue of gender equality, whereas the former incorporates the two Equality Directives relating to racial and ethnic origin and equal treatment in employment. This Regulation also makes no reference to the inclusion or the exclusion of social security rights, social protection and the right to social advantages in relation to equal treatment as laid down in *Directive 2000/43*.

The transposition of anti-discrimination provisions on sexual orientation has proved controversial in several of the new Member States, not excluding Malta. The fact that the Directive is a Framework law has caused a significant variation of implementation amongst the Member States, with some states implementing a specific act dealing with sexual orientation discrimination and other states merely transposing the framework EC Directive. An example of supporting legislation on equality in relation to sexual orientation is the United Kingdom's Employment Equality (Sexual Orientation) Regulations 2003¹⁷, which lays down the definition of sexual orientation and the various scenarios in which discrimination is prohibited. The United Kingdom's Regulation defines sexual orientation as meaning sexual orientation towards persons of the same sex, persons of the opposite sex and persons of the same sex and of the opposite sex. The discrimination could consist of direct discrimination, indirect discrimination, discrimination by way of victimisation and harassment.

For the practical relevance of the prohibition of harassment, in any national legislation, much will depend on the attitude of employers, co-workers and national courts towards common forms of anti-homosexual behaviour (such as verbal abuse, forced disclosure of a person's sexual orientation and homophobic environments).

Another example of specific legislation relating to sexual orientation is the Swedish Act on a Ban against Discrimination in Working Life on grounds of Sexual Orientation¹⁸ which was promulgated in 1999 and covers homosexual, bisexual or heterosexual orientation. This Act prohibits direct discrimination, indirect discrimination and harassment which are connected with sexual orientation and it also provides legal redress and the setting up of a

¹⁵ The Social Welfare Act 2004 and the Equality Act 2004, that amend the Employment Equality Act 1998 and the Equal Status Act 2000.

¹⁶ Paragraph 22, "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon".

¹⁷ Statutory Instrument 2003 No. 1661, The Employment Equality (Sexual Orientation) Regulations 2003. For explanation of text see the site: http://www.dti.gov.uk/er/equality/so_rb_longexplan.pdf

¹⁸ Act (1999:133) on a Ban against Discrimination in Working Life on grounds of Sexual Orientation, Including amendments: up to and including SFS 2003:310.

¹⁹ Draft of a European Anti-Discrimination Provisions' Transformation Act, ADG, 15 Dec. 2004, available at: <http://dip.bundestag.de/btd/15/045/1504538.pdf>

specific Ombudsman Office. Although this Act does not include socio-economic rights besides those that apply to salary and employment conditions, it has been shown above that these rights are catered for adequately in other measures within the Swedish legal system and hence there was no need for them in this Act relating to employment.

There is no such corresponding legislation in Germany, although a draft version of general application and covering all grounds of discrimination is up for approval in the first half of 2005¹⁹. However, the German Courts have already served as a tool for the granting of compensation for discrimination on the grounds of sexual identity.²⁰ In fact, a number of Member States have failed to implement *Directive 2000/78* within the stipulated time. Recently the European Commission announced that it will refer five Member States to the European Court of Justice for failing to transpose the Employment Equality Directive. The Commission therefore, decided to take the final step of the infringement procedure and to refer Germany, Luxembourg, Greece, Austria and Finland to the European Court of Justice.²¹

4.2 Other Supporting Measures

A number of Member States have set up a body for the promotion of equal treatment, under *Directive 2000/43*, and have included within the scope of this body *Directive 2000/78* and hence there would exist one unified body that would examine and promote equal treatment against discrimination on all the grounds covered under both Directives. These countries have chosen to entrust the enforcement of the prohibition of sexual orientation discrimination in employment to these specialised bodies. This is the case with the Netherlands's Commissie Gelijke Behandeling (Equal Treatment Commission), Austria's Equal Treatment Commission and Ireland's Equality Authority and Equality Tribunal. These specialised bodies cover all grounds of discrimination under the two Directives, including sexual orientation.

Sweden is the only Member State that established a specific body to deal with, sexual orientation discrimination and this is the Office of the Ombudsman against Discrimination on Grounds of Sexual Orientation.

In Malta, we have a number of Commissions set up to promote equality, but as yet none in relation to sexual orientation and none set up under these two EC Directives. The obligation to set up the bodies referred to in *Directive 2000/43* (Equal treatment irrespective of racial or ethnic origin) is not laid down in the Maltese Equal Treatment Regulations (LN 452.95) although it should have been implemented, and hence the legislature is even further away from introducing a body that would supervise one of the most controversial of the non-discrimination rights. This is also the case in the United Kingdom, where there exists the Commission for Racial Equality and the Disability Rights Commission and no special agency for sexual orientation issues. The proposed Commission for Equality and Human

²⁰ Stork F, Comments on the Draft of the New German Private Law Anti-Discrimination Act: Implementing Directives 2000/43/EC & 2004/113/EC in German Private Law, GLJ Vol.6 No.2-1 Feb 05

²¹ Commission takes Member States to the European Court of Justice for failing to implement EU anti-discrimination rules, IP/04/1512, 20/12/2004

Rights, which will have enforcement powers in relation to sexual orientation, will not begin operating until late 2006 at the earliest.

The existence of these bodies allows for specific non-judicial procedures for the enforcement of the obligation of non-discrimination on grounds of sexual orientation. Judicial procedures, in particular civil procedures are available in most of the Member States. Penal judicial procedures are available in most of the Member States, except in Austria, Denmark, Portugal and the United Kingdom.

5. Social Rights and Partner Benefits

The exclusion of a direct tackling of discrimination based on sexual orientation within the Directive is most probably due to the controversy within the Member States on issues relating to rights of homosexuals to marriage, cohabitation benefits and adoption, and any implications that employment benefits may have on such rights. Although the paper focuses on equal treatment in employment it is, in my opinion, impossible not to touch on other socio-economic issues that effect the individual's every day life. This is even more important in the area of homosexual rights where the negation of rights occurs in most cases within the social policy sphere.

The rights given to homosexual couples in each Member State vary to a great extent. On one side of the spectrum there is the Netherlands that in 2001 introduced marriage between same-sex partners and the introduction in 2003 of legislative amendments in Sweden that give the same rights to same-sex and opposite-sex couples with respect to all forms of adoption and legal custody of children (this also occurred in Denmark, Iceland and the Netherlands). Spain has recently moved in this direction. On the other side we have countries, such as Malta, which - although they have implemented the Directive in national law - do not have any other legislation that recognises the other familial and socio-economic rights for homosexuals that go beyond employment. This is common in predominantly religious countries, such as Malta, Cyprus and Poland, where "homophobic" statements by church leaders are common and where the church holds considerable political power²².

The exclusion of social benefits and rights from *Directive 2000/78* leads to the question of whether it is "wise" to separate employment rights from social security rights, social protection and the right to social advantages. This question is more pertinent when it is seen that *Directive 2000/43* (Equal treatment irrespective of racial or ethnic origin) does not separate them and includes both employment and social rights. In other words, equal treatment on grounds of disability, religion, age and all the more so sexual orientation, can only be afforded protection in the ambit of employment, and not in other areas which are closely linked, such as the social aspect of day to day life of minorities. This of course, does not impede Member States from introducing or maintaining provisions which are more favourable to protect the principle of equal treatment, as laid down in Article 8 of *Directive 2000/78*. Nonetheless, as stated previously, this is totally at the discretion of the individual Member States, and in the area of sexual orientation discrimination the level of equal

²² International Lesbian and Gay Association (ILGA), *Meeting the Challenge of Accession - Surveys on sexual orientation discrimination in Countries joining the European Union*, Policy Paper 2004

treatment legislation and the creation of supervisory bodies is most likely to differ enormously.

Examples in the Field of Employment

Through the elimination of discrimination on the basis of sexual orientation in employment benefits, the Union and in turn its Member States will counteract two negative aspects that this form of discrimination causes.²³ First and foremost, the disapproval of same-sex relationships by employers is challenged, as employers are actively prevented from applying their own personal understanding of anti-homosexual societal norms. Secondly, it must be recognised that the effect of non-recognition of partners can be quite substantial in monetary terms and thus the granting of “partner benefits” effectively puts an end to those in same-sex relationships receiving less reward for their work compared to different-sex partners in unmarried relationships²⁴.

Those benefits which employers provide to unmarried different-sex partners and which are denied to same-sex partners are termed 'discriminatory partner benefits'. Abolishing this direct form of discrimination would signify a radical change of the prevailing culture of the Member States' employers. The European Court of Justice recognised this form of discrimination between unmarried same-sex and different-sex couples back in 1998.²⁵ The prohibition of discriminatory partner benefits was also acknowledged by the European Court of Human Rights in *Karner*²⁶. The Court held that differences based on sexual orientation require serious reasons by way of justification and any such measure must be shown to be appropriate and also that in that particular instance discrimination was necessary in order to achieve the desired aim. In Denmark, Finland, Italy, the Netherlands, Portugal and Sweden the term 'employment conditions' is explicitly referred to in the respective national anti-discrimination legislation, and such encompasses partner benefits and pecuniary payments.

The existing types of discrimination within the employment and partner benefit field can be many. This discrimination may stem from legislation, although examples of directly discriminatory laws are close to non-existent. The only discriminatory legislation that came to light²⁷ concerns the Irish Parental Leave Act 1998, which laid down that this form of paid leave could only be claimed by an employee in respect of his/her spouse or “a person with whom the employee is living as husband or wife”. This form of discrimination does not exist in Maltese Law due to the fact that the law, for example in the Social Security Act [Chapter 318] or in Urgent Family Leave [S.L. 452.88], makes no reference to cohabitating couples irrespective of whether they are different-sex or same-sex couples. The majority of social security rights and employment rights, such as urgent family leave, belong to “immediate family” meaning the *husband, wife and married or unmarried children*, as well

²³ Bell M., Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union, Wintemute R., & Andenaes M., (eds.) *Legal Recognition of Same-Sex Couples. A Study of National, European and International Law*, Hart Publishing, 2001

²⁴ This section refers to same-sex unmarried couples vis-à-vis opposite sex unmarried couples, due to paragraph 22 of *Directive 78/2000* on marital status.

²⁵ Case C-249/96 *Grant v South-West Trains*, [1998] ECR I-621

²⁶ *Karner v Austria*, 24th July 2003, No. 400016/98

²⁷ The European Group of Experts on Combating Sexual Orientation Discrimination, *Combating sexual orientation discrimination in employment: Legislation in Fifteen EU Member States*, November 2004

as *family relations up to the first degree*, and persons having legal custody of a child. In addition, certain rights found within the Maltese social security body of legislation are frequently based on the notion that the male is the prime bread-winner and head of the household. However, this form of gender discrimination is not the subject of this paper but arguably although there is no direct discrimination based on “sexual orientation”, in order to offer a level playing field Maltese law needs to be reformed to cater for cohabitating couples of whatever sex.

Another interesting example of discrimination occurs in the Netherlands, between different-sex and same-sex *married* partners. The Roman Catholic Church in the Netherlands denies survivors’ pensions to same-sex widows/widowers in the pension scheme for pastoral workers and it is uncertain as of yet whether this discrimination may be permitted under the exceptions of religious employers. This form of discrimination between same-sex and different-sex married couples is relatively unexplored since the Netherlands is one of the few Member States that actually allows same-sex marriages.

Case law in this area is scarce, most likely due to the specific nature of the claim, and whilst the law may protect against discrimination, the moral values in society inside and outside the workplace still have considerable influence. Legal commentary is also scarce; however several commentators consider that in the light of the prohibition on sexual orientation discrimination in employment law, same-sex partners should enjoy the same rights as opposite-sex partners as far as benefits are based on cohabitating without being married.²⁸

6. Considerations

The field of sexual orientation discrimination is, as mentioned above, relatively unexplored and underdeveloped. This could be due to a number of reasons. Firstly, the examination of issues of discrimination in employment on the basis of sexual orientation is difficult due to the fact that in a substantial number of Member States sexual orientation issues, in particular discrimination, receive little attention. Therefore, awareness of the main issues and information relating to the possible remedies at law are minimal.

Secondly, sexual orientation discrimination, in particular with regard to partner benefits, remains somewhat of a taboo in most Member States. Due to the social stigma surrounding homo- or bi- sexual orientation many employees are reluctant to reveal their sexual orientation to claim a benefit or to seek clarification on points of law where such could extend to same-sex partners.

And finally it can be said that whereas in other anti-discrimination areas such as gender and race, a lot has been done, in the area of sexual orientation not much has been done to monitor, prevent and educate on issues relating to sexual orientation discrimination. Although there may be no express legislative provisions that directly discriminate within the system of a Member State, the lack of supporting bodies and measures help in retaining the status quo for homosexual and bisexual couples and prohibiting the much-needed advances in this area. In fact, the anti-discrimination action taken at Community level demonstrates

²⁸ Daubler W. Kittner M. & Klebe T. (Eds.), Betriebsverfassungsgesetz (BetrVG)-Kommentar, 8. Auflage, Frankfurt am Main 2002

that there is not one general undifferentiated equality principle, but instead shows a clear hierarchy within the anti-discrimination grounds²⁹ listed in the Treaty and also in *Directive 78/2000*, with sexual orientation ranking as one of the non-priority grounds for action at Union level.

²⁹ Waddington L. & Bell M., *More Equality than Others: Distinguishing European Union Equality Directives*, [2001] CMLRev 587