

Proposal from ILGA-Europe

Council Directive implementing the principle of equal treatment between persons
irrespective of sexual orientation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 13(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the European Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States, and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community law.

(2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which all Member States are signatories, *as well as the United Nations Convention on the Rights of Persons with Disabilities to which the European Community is a signatory.*

(3) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life, freedom of religion and freedom of association.

(4) Equality is a fundamental principle of the European Union. Article 21 of the Charter of Fundamental Rights of the European Union prohibits any discrimination on grounds of sexual orientation.

(5) Directive 2000/78/EC¹ forbids discrimination on grounds of sexual orientation in employment and occupation.

(6) Discrimination based on sexual orientation, including harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of all persons into economic and social life.

(7) Legislation should prohibit discrimination based on sexual orientation in a range of areas outside the labour market, including access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.

(8) Given the existence of Directive 2000/78/EC, this Directive should not apply in the fields of employment and occupation. This is without prejudice to Article 14.

(9) Discrimination on grounds of sexual orientation includes discrimination based on assumptions about a person's sexual orientation or because of association with persons of a particular sexual orientation.

(10) It is important to protect all natural persons against discrimination on grounds of sexual orientation. Member States shall also provide protection for legal persons where they suffer discrimination on grounds of the sexual orientation of their members.

(11) Differences in treatment may be accepted *in narrow circumstances* if they are justified by a legitimate aim. A legitimate aim *must be consistent with the goal of achieving full equality in practice*. A legitimate aim includes the protection of victims of sexual orientation discrimination (*for example*, in the provision of health services or residential accommodation limited to persons of a particular sexual orientation). Any limitation should nevertheless be appropriate and necessary.

(12) In order to ensure full equality in practice, measures may be maintained or adopted which are intended to prevent or compensate for disadvantages suffered by persons of a particular sexual orientation, and such measures may permit organisations of persons of a particular sexual orientation where their main object is the promotion of the special needs of those persons.

(13) Persons who have been subject to discrimination based on sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should also be empowered to engage in proceedings, including on behalf or in support of any victim.

¹ [2000] OJ L303/16.

(14) In cases of urgency, the rights conferred by this Directive should be enforceable through pre-emptive judicial procedures. This shall be in accordance with national procedural rules, but could include injunctions.

(15) Effective legal procedures must be available to deal with situations of multiple discrimination, that is, where discrimination on grounds of sexual orientation is combined with one or more of the other grounds listed in Article 13 EC. In particular, national legal procedures shall ensure that a complainant can raise all aspects of a multiple discrimination claim in a single legal procedure.

(16) The rules on the burden of proof should be adapted when there is a prima facie case of discrimination *or victimisation*. For the principle of equal treatment to be applied effectively, the burden of proof should shift back to the defendant when evidence of such discrimination *or victimisation* is brought.

(17) Protection against discrimination based on sexual orientation should itself be strengthened by the existence of a body or bodies in each Member State with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims. The body or bodies may be the same as those with responsibility at national level for the defence of human rights or the safeguarding of individuals' rights, or the implementation of the principle of equal treatment.

(18) Compliance with the provisions of this Directive would be strengthened if Member States temporarily exclude public or private entities who fail to comply with national provisions implementing this Directive from access to public funds or grants.

(19) Equal treatment of persons irrespective of sexual orientation cannot be confined to legislative measures. Instead, the European Union and the Member States should promote the raising of public awareness of sexual orientation and the changing of public attitudes. Dialogue with the social partners and non-governmental organisations is an essential element in this process.

(20) Since the objectives of this Directive, namely to ensure a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(21) In accordance with paragraph 34 of the interinstitutional agreement on better law-making,² Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public,

² [2003] OJ C 321/1.

CHAPTER I: GENERAL PROVISIONS

Article 1: Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on grounds of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2: Definitions

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on sexual orientation.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably, on grounds of sexual orientation, than another is, has been or would be treated in a comparable situation;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to sexual orientation takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

4. An instruction to discriminate against persons on grounds of sexual orientation shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3: Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sexual orientation.

Article 4: Mainstreaming

1. Member States and EU institutions and agencies shall actively promote the objective of equality between persons irrespective of sexual orientation when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

2. Member States shall require public bodies to combat sexual orientation discrimination and to promote equality between persons irrespective of sexual orientation.

3. *Member States shall encourage all service-providers to take steps to prevent discrimination and harassment.*

4. When implementing this Directive, Member States shall actively take into account the principle of gender mainstreaming, as well as combating discrimination which occurs on more than one ground combined with sexual orientation.

Article 5: Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) social protection, including social security and healthcare;
- (b) social advantages;
- (c) education;
- (d) access to and supply of goods and services which are available to the public, including housing.

2. Without prejudice to Article 14, this Directive shall not apply to matters of employment and occupation insofar as these matters are covered by Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.³

Article 6: Justified differences in treatment

This Directive shall not preclude differences in treatment, if the provision of goods and services exclusively or primarily for persons of a particular sexual orientation is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. *A legitimate aim must be consistent with the goal of achieving full equality in practice.*

Article 7: Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between persons irrespective of sexual orientation than those laid down in this Directive.

³ [2000] OJ L303/16.

2. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II: REMEDIES AND ENFORCEMENT

Article 8: Defence of Rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive. Such engagement includes acting on behalf or in support of the complainant, with his or her approval.

3. Member States shall introduce into their national legal systems such measures as are necessary to secure timely and effective application of the principle of equal treatment by recourse to pre-emptive judicial procedures where urgency is required.

4. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

5. *Member States shall ensure that a single legal procedure is available where discrimination on grounds of sexual orientation is combined with discrimination on one or more of the other grounds listed in Article 13 EC.*

Article 9: Remedies

1. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination on grounds of sexual orientation, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit.

2. Candidates for public contract award procedures relating to works, services and supplies, and private and public entities wishing to enter into contractual relations with State, regional or local administrations, or other bodies governed by public law, shall be required to present to the contracting authorities evidence of steps taken to comply with this Directive and, with regard to sexual orientation, Directive 2000/78/EC.

3. Public or private entities held, by a judicial procedure, to be in breach of the national provisions adopted pursuant to this Directive or, with regard to sexual orientation, pursuant to Directive 2000/78/EC, may be deemed ineligible for grants awarded by the Member States or the EU institutions in the framework of the EU Structural Funds for a period of three years following the final judgment.

Article 10: Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 8(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

6. *Paragraph 1 shall also apply to complaints of victimisation.*

Article 11: Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12: Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 13: Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall *establish and maintain a regular* dialogue with relevant stakeholders which have a legitimate interest in contributing to the fight against discrimination on grounds of sexual

orientation in the areas covered by this Directive. Such dialogue should include engagement with the social partners and relevant non-governmental organisations.

CHAPTER III: BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 14: Bodies for the promotion of equal treatment

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 8(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Fundamental Rights Agency;

(e) maintaining a regular dialogue with individuals affected by sexual orientation discrimination and relevant non-governmental organisations.

3. For the purposes of this Article, references to 'discrimination' shall be taken to include unlawful discrimination within the scope of this Directive and unlawful discrimination on grounds of sexual orientation within the scope of Directive 2000/78/EC.

CHAPTER IV: FINAL PROVISIONS

Article 15: Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules

governing profit making or non- profit making associations, are or may be declared null and void or are amended.

Article 16: Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, within four years of the publication of this Directive and every five years thereafter.

2. The Commission shall draw up and publish within five years of the publication of this Directive a report on its application in the Member States. The Commission's report shall take into account, as appropriate, the views of bodies for the promotion of equal treatment, the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive. In this regard, special attention shall be paid to the application of Article 6 in the Member States.

Article 17: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of the publication of this Directive. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such publication of reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 18: Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 19: Addressees

This Directive is addressed to the Member States.

EXPLAINING THE PROPOSED DIRECTIVE

Introduction

Sexual orientation discrimination in employment is already prohibited under Directive 2000/78 (the Employment Equality Directive).⁴ Discrimination is not, however, confined to the labour market. It occurs across many areas of life, from homophobic bullying in schools to unequal treatment in access to rented accommodation. This proposal aims to provide a model for how the European Union can complement the Employment Equality Directive with further legislation to prohibit discrimination in areas beyond the labour market. This proposal focuses exclusively on sexual orientation discrimination, but its objectives could be equally achieved within a broader instrument covering discrimination on other grounds, such as sex, racial or ethnic origin, religion or belief, disability and age. Indeed, a comprehensive anti-discrimination Directive would be a more effective way of addressing multiple discrimination and ensuring that all grounds of discrimination are treated equally.

In drafting this model Directive, the existing EU legislation was taken as a starting point. In addition to the Employment Equality Directive, important sources are the Racial Equality Directive,⁵ the Gender Goods and Services Directive⁶ and the Recast Gender Employment Directive.⁷ Draft Directives have also been produced by the European Disability Forum⁸ and AGE (the European Older People's Platform)⁹ and these have been a valuable source of inspiration. Finally, it should be clarified that discrimination on grounds of gender identity is treated as an aspect of gender equality law by the European Union. This is expressly acknowledged in Recital 3 of the Recast Gender Employment Directive. Therefore, this proposal concerns only sexual orientation discrimination.

The Preamble

EU legislation always begins with a preamble. This sets out, in a series of 'recitals', the reasons behind the adoption of the legislation. It also provides further explanation on the meaning of the substantive articles within the legislation. Although it is not legally-binding, the preamble is regularly referred to by the Court of Justice as a guide to interpreting the contents of the Directive. Therefore, it is important to read the preamble together with the articles of the Directive.

Explanation of the Articles

Article 1

⁴ [2000] OJ L303/16.

⁵ [2000] OJ L 180/22.

⁶ [2004] OJ L 373/37.

⁷ [2006] OJ L 204/23.

⁸ <http://www.edf-feph.org/Papers/nondisc/EDF%20Disability%20Directive.pdf>

⁹ See further: <http://www.age-platform.org/>

This sets out the central purpose of the Directive, which is to prohibit sexual orientation discrimination.

Article 2

This Article provides the definition of discrimination. Four types of discrimination are identified and this is consistent with other EU anti-discrimination legislation.

Direct discrimination is where a person is treated less favourably on grounds of sexual orientation. For example, if a company refuses to rent an apartment to an unmarried same-sex couple, but would rent an apartment to an unmarried opposite-sex couple, then this is less favourable treatment on grounds of sexual orientation.

Indirect discrimination is where a rule or a practice applies equally to all persons, but it has the effect of putting persons of a particular sexual orientation at a particular disadvantage. A common example is where services are limited to married couples only (e.g. discounted fees for healthclub membership) and national law does not allow same-sex couples to marry.¹⁰ Such practices have the effect of putting lesbians and gays at a particular disadvantage because they cannot marry their partners. Indirect discrimination can, however, be justified if the measure pursues a legitimate aim and it is an appropriate and necessary way of meeting that aim. This is a matter ultimately for courts to determine on a case-by-case basis.

Harassment is often revealed in empirical studies to be one of the most common forms of discrimination that lesbian, gay and bisexual (LGB) people face. For example, if a lesbian regularly encountered derogatory comments from her doctor, this could be unlawful harassment. The definition is similar to that found in other EU legislation, however, our proposal clarifies that the victim need only show that either her dignity has been violated or that an intimidating, etc environment has been created.

Instructions to discriminate covers circumstances where a third party directs another person to commit unlawful discrimination. For example, if a landlord told a housing agency acting on his behalf not to rent his properties to same-sex couples, this would be an instruction to discriminate.

Article 3

Sexual orientation discrimination has existed for many years and its effects cannot be completely overcome by simply refraining from any future discrimination. Instead, the goal of equality requires specific measures (positive action) to be taken in order to remedy past and present disadvantages linked to sexual orientation. This Article makes it clear that such actions are not unlawful discrimination. For example, a local authority might provide free use of its premises in order to facilitate an organisation working with LGB youth. Alternatively, a public health authority might provide services targeted

¹⁰ Within the EU, same-sex marriage is currently permitted in the Netherlands, Belgium and Spain.

exclusively at gay men or lesbians. This may reflect evidence that gay men and lesbians have not been adequately catered for within mainstream healthcare services. Recital 12¹¹ clarifies that positive action can include the creation of organisations of persons of a particular sexual orientation where their main object is the promotion of the special needs of those persons (e.g. an association of LGB Muslims).

Article 4

The experience in the European Union with gender equality legislation demonstrates that prohibiting discrimination is not a sufficient step to achieving full equality in practice. This is in part because of the need to address the legacy of discrimination from the past and discrimination that continues today. In recent years, it has been increasingly recognised that active measures are needed to promote equality rather than simply relying on individuals to bring complaints under anti-discrimination legislation.¹²

This Article identifies *four* measures that can be taken to promote equality between all persons irrespective of sexual orientation. First, it obliges Member States and the EU institutions and agencies to promote equality when designing and implementing laws and policies in areas covered by the Directive. For example, education policy would have to consider the needs of LGB school pupils. Secondly, public bodies should be placed under a duty to promote equality. Some states, such as the UK and Finland, have developed detailed rules on how public bodies should promote equality. This Directive does not aim to provide an overly-prescriptive formula for how each state should approach this task. Nevertheless, it places a general obligation on Member States to ensure that public bodies are taking active measures to promote equality. *Thirdly, the Directive requires Member States to encourage service-providers to prevent discrimination and harassment. This is equivalent to the duty which applies in relation to employers in Article 2(5) of Directive 76/207.*¹³ Finally, this Article obliges Member States to take into account multiple discrimination when implementing this Directive. Consideration should be given to persons who face discrimination on more than one ground, for instance, a combination of gender and sexual orientation.

Article 5

This Article identifies the areas to which the Directive applies. The list is based on that found in the Racial Equality Directive. The Directive only applies to goods and services ‘which are available to the public’. This recognises the fundamental right to private and family life, as well as issues relating to freedom of association or freedom of religion (see recital 3). For example, a person who decides to rent a room within his own apartment (i.e. where he is living) might not be regarded as providing a ‘public’ service. Therefore, a gay man could advertise only for gay flatmates. In contrast, a gay landlord would

¹¹ An equivalent provision can be found in Recital 17 of the Racial Equality Directive.

¹² Commission, ‘Non-discrimination and equal opportunities for all – a framework strategy’ COM (2005) 224, 2.

¹³ As amended by Dir 2002/73 [2002] OJ L269/15.

discriminate if he only rented his properties to other gay men (i.e. properties where he was not also living).

Article 6

Prohibiting discrimination in the provision of goods and services must be balanced with other objectives and interests. On the one hand, there is a large sector of businesses and services focused on LGB persons, such as bars, clubs, hotels, bookshops, travel agencies, etc. On the other hand, there are some service-providers who, for reasons relating to religious beliefs, do not wish to offer their services to LGB persons. Prohibiting discrimination implies a restriction on the freedom of service-providers in both situations. Gay clubs will not have an unrestricted right to refuse entry to persons who are not (or who do not appear to be) LGB. Similarly, religious organisations that provide services in the public domain (e.g. managing schools or residential care facilities) will not have an untrammelled prerogative to deny their services to LGB persons.

Nevertheless, there are some scenarios where providing a service exclusively or primarily for persons of a particular sexual orientation could be justified. For example, a church that provides marriage services could be justified in refusing its services to same-sex couples. This would most likely fall within the scope of the church's freedom of religion (recital 3).

It is difficult to strike the correct balance between the flexible accommodation of diversity in service provision, whilst avoiding an excessively wide scope for justifying discrimination. Article 6 provides a mechanism for courts to undertake this tricky balancing exercise.¹⁴ *The scope of this exception should be narrow and any legitimate aims pursued under this exception must be compatible with the goal of achieving full equality in practice. For instance, a leisure centre that excluded same-sex couples from its cheap family entry tickets could not argue that financial constraints were a legitimate aim.* Recital 11 provides further examples of when sexual orientation-specific services could be justified. In some cases, the rationale will be similar to that available under Article 3 on positive action. Article 16(2) provides for a review of the application of this Article five years after the Directive is published.

Article 7

This is a standard provision in anti-discrimination Directives. It aims to guarantee that Member States do not use the implementation process as an opportunity to reduce the existing level of protection in national law.

Article 8

This Article requires Member States to provide a judicial or administrative process through which individuals can enforce their rights under the Directive. Paragraph 2 recognises the important role for NGOs in enforcing anti-discrimination legislation.

¹⁴ It is based on Article 4(5) of the Gender Goods and Services Directive.

Whereas the existing anti-discrimination Directives restrict this role to acting on behalf or in support of individual litigants, the text proposed would also permit NGOs to bring actions in their own name (i.e. even in the absence of a named individual victim). For example, if a hotel publicly stated ‘no same-sex couples accepted’, then an NGO with a legitimate interest (e.g. a LGB rights organisation) should be entitled to challenge such discriminatory practices. If it is necessary to wait for an actual couple to be refused a hotel reservation, this would undermine the effectiveness of the Directive.

Paragraph 3 is inspired by a similar proposal in the draft Directive prepared by AGE. This recognises that in some cases compensation after discrimination has occurred will not be an adequate remedy. Consider the situation of a local authority that allows organisations to rent a field for holding festivals. If an application to rent this field in order to celebrate Gay Pride is denied, financial compensation months or years after the Gay Pride event will not be an adequate remedy. In such a case, there should be provision for pre-emptive judicial remedies, such as injunctions (see recital 14).

Specific procedural difficulties can arise in cases of multiple discrimination. In some states, there are separate judicial or non-judicial adjudicatory bodies for different grounds of discrimination (eg separate forums for claims of sex or race discrimination). In order to avoid a situation where the individual has to ‘split’ their claim, paragraph 5 requires Member States to provide procedures which allow a victim of multiple discrimination to present all aspects of their case in a single legal procedure.

Article 9

Paragraph 1 is based on the standard text on penalties found within the Recast Gender Employment Directive. Unlike the Employment Equality Directive, this specifies that there must not be any automatic upper limit on financial compensation for unlawful acts of discrimination.

Paragraphs 2 and 3 are inspired by similar proposals from the European Disability Forum. They seek to introduce a scheme of contract compliance, which has been used more widely in the USA. The basic rationale behind these provisions is the need to go beyond enforcement only by litigation. Instead, there is a need to provide incentives for service-providers to take active measures to promote equality. Moreover, when choosing how to allocate public finances, it is wholly appropriate to ensure that funds are not being awarded to service-providers who engage in unlawful discrimination. Where acts of unlawful discrimination have been definitively established by national courts, then such service-providers should be disqualified from access to EU Structural Funds for a temporary period.

Article 10

This is a standard provision found in other EU anti-discrimination legislation. It recognises the difficulties individual claimants face in proving *why* they were treated in a less favourable manner. A woman might suspect that the reason she was refused

membership of a sports club was because she is a lesbian, but often the relevant evidence lies in the hands of the respondent. This Article provides that where a complainant establishes a prima facie case of discrimination, then the burden of proof shifts to the respondent (recital 15). It is not a reversal of the burden of proof. It will not be enough for a person say that she has been discriminated against; before the burden of proof shifts to the respondent, she must establish facts from which it may be presumed that discrimination has taken place.

Paragraph 6 addresses an ambiguity in the existing Directives regarding whether the shift in the burden of proof applies where the case concerns victimisation.

Article 11

Individual victims of discrimination are often reluctant to complain because of the potential retaliatory acts that the discriminator might take. This Article prohibits any victimisation linked to proceedings to enforce the principle of equal treatment.

Article 12

The Directive will only be effective if individuals are aware of their rights. This Article obliges Member States to take steps to draw people's attention to the national provisions implementing the Directive (see also recital 18).

Article 13

Another vital element when putting the Directive into practice is dialogue between Member States and all interested parties, especially the social partners and appropriate NGOs. This Article obliges Member States to encourage such dialogue.

Article 14

The Racial Equality Directive and the Gender Equality Directives oblige Member States to establish a body or bodies for the promotion of equal treatment. In contrast, this duty was not included in the Employment Equality Directive. Many states have already chosen to create a body with responsibility for issues of sexual orientation discrimination: for example, Austria, Belgium, Cyprus, Estonia, France, Germany, Hungary, Ireland, Lithuania, the Netherlands, Slovenia and Sweden.¹⁵ With the exception of Sweden where there is a specific Ombudsman against discrimination on grounds of sexual orientation,¹⁶ sexual orientation has been included within a broader mandate for other equality issues. As mentioned earlier, a strategy based purely on individual litigation is unlikely to be effective, especially in relation to sexual orientation. Levels of litigation on sexual orientation discrimination remain very low, even in countries like the Netherlands or

¹⁵ See further, M Bell, I Chopin and F Palmer, 'Developing anti-discrimination law in Europe – the 25 EU Member States compared' (European Commission, 2007):

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07compan_en.pdf

¹⁶ <http://www.homo.se>

Ireland where this form of discrimination has been unlawful for some years. Issues of confidentiality can be one reason why LGB persons are reluctant to take legal action. Therefore it is essential to have an agency charged with assisting victims, as well as other competences to promote equality apart from individual complaints.

The text proposed draws on that found in the Recast Gender Equality Directive. One addition is to require the equality body to maintain a regular dialogue with persons affected by sexual orientation and relevant NGOs. This is important to ensure that sexual orientation issues do not become ‘invisible’ within a broader equality mandate.

Articles 15-19: Final Provisions

These are standard articles found in other anti-discrimination Directives. The Employment Equality Directive gave Member States a period of three years in order to complete implementation into national law of its provisions. In most Member States, the process of implementation did not begin in earnest until the final year for implementation. Indeed, for a significant number of states, implementation only occurred after the deadline and remains incomplete. In the light of this experience, it is proposed to allow two years for implementation, with states reporting after four years on how the Directive has been applied. Within one year of receiving these reports (i.e. five years after the Directive’s publication), the Commission should report on its application and whether there is a need for revision of its provisions. In this report, special attention should be devoted to the exception provided in Article 6.