

Impacts of the EC-Employment-Directive

Experiences from implementation in member states

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The major impact of the Employment Directive (2000/78/EC) certainly lies in the fact that it explicitly proscribes prohibition on the ground of sexual orientation throughout the territory of the European Union.

The importance of such a prohibition is invaluable. We have to remember that in 2000, the year when the Directive was adopted, only half of the member states had anti-discrimination legislation covering sexual orientation discrimination. In many member states legal discrimination was widespread, in four of them even in the criminal law; those four states sent people to jail just because they had the "wrong" sexual orientation. Even today three of the EU-member-states are still doing this.

So the value of the Directive cannot be underestimated in that it makes it clear that sexual orientation discrimination is unacceptable throughout Europe and that this explicit ban of discrimination has to be incorporated into the legislation of all member states. This, in my view, is the most important impact of the Directive.

And the prohibition of discrimination is not merely symbolic. The Directive obliges member states to introduce not just laws against sexual orientation discrimination; it obliges them to introduce *effective* regulations. Sexual orientation discrimination must not only be prevented and sanctioned theoretically on the books but practically in every-day real life:

1. Not only direct (blatant) discrimination has to be covered, also *indirect discrimination* must be outlawed; discrimination which is effected by apparently neutral provisions or regulations which despite their neutralness put lesbians, gays and bisexuals at a particular disadvantage.

2. *Burden of proof* for victims has to be reduced. Once a complainant establishes facts from which it may reasonably be presumed that there was discrimination the respondent has to prove that no distinction occurred or that disadvantageous treatment was justified.

3. NGOs must have *legal standing* in all proceedings concerning discrimination. Organizations of the lesbian and gay movement must have the opportunity to engage in such proceedings before courts or other bodies both, in support of a victim and also on behalf of a victim.

4. *Sanctions* for discrimination must not be symbolic but have to be effective, proportionate and dissuasive.

It is now for the member states to implement this effective system; and so far some problematic areas (“hot issues”) can already be detected where governments attempt to water down the protection.

1. *Burden of proof*: some states do not implement the shift of burden of proof what is in clear and blatant violation of the Directive. Other more intelligent governments establish a shift in burden of proof and claim to have implemented the Directive while covering the fact that they did not fully so; for instance by not requiring a respondent to prove that discrimination did not occur (or that it was justified) but letting it suffice that the respondent him/herself establishes facts from which it may be presumed that there was no discrimination (or that it was justified) to let the burden of proof fully shift back to the victim.

2. *Legal standing*: member states attempt not to establish legal standing for NGOs at all or, more often, to foresee only acting in support of a victim, but not on behalf of it (“collective action”)

3. *Sanctions*: some states do not establish effective, proportionate and dissuasive sanctions. In some cases the only sanction even is compensation of a maximum of EUR 500,--.

4. *Exceptions*: exceptions turn out as a rather hot issue in some states; exceptions for religious organizations are granted too generously or exceptions are even granted in areas where the Directive does not allow for exceptions (as in corrective institutions).

5. *Married couples*: one of biggest battlegrounds will be privileges granted to married partners. Where marriage is not available for same-sex partners, disadvantageous treatment of unmarried couples via married couples leads to indirect discrimination on the basis of sexual orientation, since same-sex partners always do fall into the disadvantaged group and never can access the privileged group. You might point to recital 22 of the Directive which says that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon. Recitals however are not binding, and the content of recital 22 has not been taken over into the operative (binding) part of the Directive (as is the case with other recitals: see rec. 12/Art.3.2, rec. 13/Art. 3.3, rec. 14/Art. 6.2, rec. 19/Art. 3.4, rec. 23/Art. 4, rec. 28/Art. 8, rec. 29/Art. 9, rec. 31/Art. 10). So recital 22 can just serve as an (non-binding) opinion of the Council that privileges dependent on marriage regularly are objectively justified by a legitimate aim and appropriate and necessary for the achievement of that aim (Art. 2.2.b.i.). Courts and other bodies called to enforce anti-discrimination provisions will have to determine if this really is the case in the circumstances of each case. National legislation which (different than the Directive) attaches binding force to recital 22 by, for instance, taking it over into the operative parts of a national statute, therefore would violate the Directive in that it bars national courts and other enforcement bodies from making such an assessment on a case-to-case basis.

It will be the task of civil society in the member states (social partners and NGOs) to take over the role of watch-dogs in the legislative process and in litigation before the courts and other enforcement bodies to ensure effective implementation of the Directive.

And on the European level there will be one major task in the future: to overcome the hierarchy of discriminated groups.

Different levels of protection for different groups of victims seems to be at odds with the fundamental principle which forms the basis of all anti-discriminatory measures: that all humans beings are born free and equal in dignity and rights.