



Preliminary Assessment of the Proposed Directive By ILGA-Europe

The European Region of the International Lesbian and Gay Association (ILGA-Europe) warmly welcomed the European Commission's proposal of a single horizontal anti-discrimination Directive, covering the grounds of age, disability, religion/belief and sexual orientation. This decision is an essential step towards putting an end to the hierarchy of rights between the different grounds of discrimination in the EU.

General comments:

This new directive is crucial because it provides for real protection where there is clear evidence of discrimination happening, including in housing, access to goods and services, access to health and education. It builds on the foundation of the existing protection against discrimination on grounds of racial and ethnic origin.

The proposed Directive includes within its scope and legal concepts important protections already found in European law for other grounds of discrimination. It is essential that the extension of this protection to all grounds is brought into law in order to move further in ending the hierarchy that exists in legal protections between grounds of discrimination.

Key strengths of the proposed directive:

The directive introduces significant advances to the EU anti-discrimination legal framework by leveling up the protection for four grounds - Age, Disability, Religion and Sexual Orientation – and by covering the same scope as in the Race Equality Directive (2000/43/EC).

Therefore, it is extremely important to ensure that the following provisions remain in the Directive:

- Article 1 which ensures that the **scope of the directive covers the four grounds:** Age, Disability, Religion and Sexual Orientation
- Article 2, which ensures that the **definitions of discrimination are consistent with the current frameworks**, with the welcome addition of the explicit recognition of denial of reasonable accommodation as a form of discrimination
- Article 3 (2) on the **material scope of the directive**, which specifically includes social protection (including social security and healthcare), social advantages,

access to and supply of goods and other services which are available to the public (including housing) and education.

Given the extensive evidence of discrimination that exists in all these areas based on the four grounds, it is crucial to ensure that the directive adopted covers this broad material scope. It is particularly important to ensure that education will remain in the **material scope of the proposed anti-discrimination directive (article 3(1))**.

Evidence of the need for protection against discrimination in education

A 2006 Europe-wide survey showed that 53% of young people in Europe have experienced homophobic bullying in school¹. This form of harassment considerably affects the access to school of young people, whether they are lesbian, gay, bisexual, transgender or perceived to be.

An extensive body of research has demonstrated that homophobic bullying, like other forms of bullying, have a negative impact on school achievement and on mental well-being, and can lead to early school leaving and mental health problems, including depression and suicide.

Tackling the issue of harassment and discrimination in schools is clearly a matter of concern for the EU as it is intricately linked to some key EU objectives in terms of employment, social cohesion, social inclusion and the promotion of mental health.

- Article 12 that will introduces a duty to **create an equal treatment body for all grounds**, and preamble 28 which stipulates that these equal treatment body will operate in line with the UN Paris Principles

Improvements to be made:

ILGA-Europe is committed to supporting and improving the Commission's legislative proposal by ensuring that it is consistent with international obligations.

In general, it is essential that the **objective of equal treatment is the rule rather than the exception**. Therefore, exceptions clauses restraining equal treatment must be strictly limited and subject to a strict standard of justification that can be tested before the courts. In particular, we will be calling for amendments on the following provisions of the proposed text:

Material scope and exceptions related to education

Education is crucial to equality for all groups. This is why the principle of equality in access to education should not be unduly limited by blanket exceptions to the principle of equal treatment (Article 3 (3) and (4))

There is a concern that blanket exclusions go further than is necessary to comply with the principle of subsidiarity, leading, for some children, to the complete denial of the right to education. We do not deny that this is an area in which the member states retain

¹ There were 754 respondents to the questionnaires; 93% of the responses came from youth from within the EU. In Takacs, J., Social Exclusion of LGBT youth in Europe, ILGA-Europe and IGLYO publication, 2006. www.ilga-europe.org/europe/publications/non_periodical/

a significant competence. However, this does not go as far as preventing the EU to legislate against discrimination in education, as evidenced by the inclusion of precisely this prohibition in the Race Equality Directive. These exceptions are also of concerns for each of the other grounds, i.e. disability (especially the exemption related to special needs education), religion and belief (cf. access to educational institutions based on religion or belief), and age (protection against discrimination for young people in education in general).

Exceptions around marital and family status, and reproductive rights

Exceptions around marital and family status and reproductive rights should not be added in the text as provisions of the Directive. Such exceptions create ambiguity and lead to a lack of clarity. Moreover, such provisions could be interpreted in a way that would lead to the continuation of less favourable treatment for people on the basis of their sexual orientation.

ILGA-Europe recognises that member states are entitled to decide on the form of recognition they wish to give to same-sex couples and agrees that the aim of this directive is not to change national laws related to marital status, family status and reproductive rights. However, national competence in this sphere does not, and should not preclude states from taking legal measures to address acts of discrimination in access to a service or to a social benefit.

We consider that it is essential to consider carefully how (lack of) recognition of rights to same-sex couples impact on the rights of LGBT people to be protected from discrimination in a significant manner. Any exemption related to marital and family status should be considered in the light of the fact that it is often by virtue of being with a partner of the same sex that people are discriminated in accessing goods and services, in access to social benefits and social protection (e.g. discrimination encountered when same-sex couples are booking a room together, when a partner is not considered as next of kin in relation to health care or accessing benefits to care for a partner, when a same-sex couple wants to get a mortgage to buy a house).

There is no precedent for including exceptions related to family status, marital status and reproductive rights in the provisions of EU directives, as such exceptions are not found in the provisions of the Employment Framework Directive (2000/78). An exception around marital status was included in the preamble of the Employment Framework Directive (Recital 22) and was recognised as a clear limitation of the Directive by legal experts. In a resolution adopted in May 2008, the European Parliament also acknowledged that “exceptions linked to marital status in Directive 2000/78/EC has limited the protection against discrimination on the ground of sexual orientation offered by that Directive”²

Moreover, ILGA-Europe considers that article 3(2) of the proposed directive needs to be carefully examined in light of recent European Court of Justice jurisprudence and legal reports of the Fundamental Rights Agency.

² Progress made in equal-opportunities and non-discrimination in the EU (transposition of Directives 2000/43/EC and 2000/78/EC) P6_TA-PROV(2008)0212, 20 May 2008.

In the ruling on the case *Maruko v. Versorgungsanstalt der deutschen Bühnen* (April 2008), the European Court of Justice has recognised that the **competence of states in relation to marital status does not allow for states to disregard the principle of non-discrimination**. It concluded that:

“Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination.” (par. 59)

In addition the **Court recognized that differences in status between same-sex and opposite-sex couples can constitute discrimination**. In the case *Maruko v. Versorgungsanstalt der deutschen Bühnen* (April 2008), the ECJ held that “refusal to grant the survivor’s pension to life partners constitutes direct discrimination on grounds of sexual orientation” in cases where same-sex couples are in comparable legal situation to opposite-sex couples.³ The Court held that there is no justification for difference between marriage and other forms of union where these exist.

This argumentation is complemented in a recent legal analysis⁴ published by the EU Fundamental Rights Agency which interprets the Employment Framework Directive in light of international human rights law. The FRA analysis concludes 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.”⁵

In other words, **according to international human rights law, in States where same-sex couples cannot marry, they should be allowed to benefit the same material protection as that recognized to married couples**. Member States have the exclusive competence to decide on the form and definition of civil status, but they must ensure equality of treatment between lesbian, gay and bisexual persons and heterosexual persons.

Finally, the inclusion of reproductive rights in this provision is of concern. Access to reproductive health services falls within the material of the directive as services. However, the impact of the provision is likely to be that individuals would not be able to challenge refusal to access reproductive services such as IVF because of their sexual orientation and their marital status.

3 In the same case, the Advocate General Damaso gave an opinion in which he held that the non recognition of same sex partnerships constituted an indirect discrimination on the grounds of sexual orientation (*Affaire C-267/06 Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Advocate general opinion of the 6th September 2007.)

4 Fundamental Rights Agency, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, June 2008. http://fra.europa.eu/fra/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf

5 See Legal Analysis (p.29) http://fra.europa.eu/fra/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf

Other comments

- **Multiple discrimination** should be addressed if it does not require the reopening of the “Race equality directive” or the “Framework Employment Directive”
- We also call for a commitment to level up the **gender equality legislation** at the latest by 2010 to ensure the same legal protection for all grounds of discrimination.

To discuss any aspect of this position further, please contact Patricia Prendiville, Executive Director (patricia@ilga-europe.org) or Evelyne Paradis, Senior Policy Officer (evelyne@ilga-europe.org).