

After Amsterdam:

Sexual Orientation

and the
European
Union

Supported by the
European Commission



and the Austrian
Federal Government



A Guide



This guide is published by

ILGA-EUROPE,

the European Region of the
International Lesbian and Gay Association

rue du Marché-au-charbon/Kolenmarkt 81
B-1000 Brussels

Phone/fax: +32-2-502.24.71
E-mail: ieboard@egroups.com
<http://www.steff.suite.dk/ilgaeur.htm>

ILGA-Europe enjoys consultative status with the Council of Europe
and is a member of the Platform of European Social NGOs

Project co-ordinator:

Kurt Krickler

Design:

Friedl Nussbaumer

The publisher can provide upon request a version of this guide on diskette.

This report is also available in French, German and Spanish and can be found
in all four languages at ILGA-Europe's web-site.

© Authors/ILGA-Europe, Brussels 1999

Readers are encouraged to copy and disseminate this document
widely provided that appropriate reference is made to the source.

Printed in Austria by
Melzer Druck Ges.m.b.H., Vienna

After Amsterdam:

Sexual
Orientation
and the
European
Union

A Guide

September 1999



TABLE OF CONTENTS

PREFACE	6
Chapter 1: THE ROAD TO AMSTERDAM	8
1. Before Amsterdam	8
A. Social policy	8
B. Fundamental rights, discrimination and citizenship	10
C. The Intergovernmental Conference	11
2. The Treaty – towards a social Europe?	12
A. Discrimination and fundamental rights	12
B. The Social Chapter	13
C. Employment	13
D. Subsidiarity	14
Chapter 2: THE TREATY OF AMSTERDAM	15
Introduction	15
1. Article 13 EC	16
A. A new opportunity for equal rights	16
B. Limitations of the Article	17
C. What types of action may be taken under the new article?	19
2. Other relevant changes in the field of human rights	21
A. Article 6 EU	21
B. Article 7 EU	22
C. Article 49 EU	22
3. The future protection of fundamental rights in the EU: a charter of fundamental rights?	23
Chapter 3: EQUAL RIGHTS AND EU POLICIES	26
Introduction	26
Common v. separate anti-discrimination law	27
1. Discrimination in employment	28
A. Harassment	30
B. Recognition of same-sex partners	31
C. Exceptions to the discrimination law	32
2. Discrimination outside employment	33
A. Access to goods and services	34
B. Education	35
C. Healthcare	36
D. Housing	36
EU anti-discrimination law and sexual orientation – a summary	37

Chapter 4: TOWARDS EQUALITY IN THE FREEDOM OF MOVEMENT OF PERSONS	40
Introduction	40
1. EU Citizens: Workers	42
A. The legal situation of same-sex partners	42
B. Proposed changes to the law	44
2. Third-country nationals	46
Chapter 5: LOBBYING THE EUROPEAN UNION IN PRACTICE: PUBLIC ACCESS TO DOCUMENTS	50
Some useful addresses	54
Chapter 6: AFTER AMSTERDAM	57
1. What has happened so far	58
A. Article 13	58
B. Fundamental rights	60
C. Other developments	61
2. ILGA-Europe's campaign work	62
A. Activities to date	62
B. Future activities	63
RECOMMENDATIONS	64
Appendix: MORE INFORMATIONS ABOUT THE EU	68

PREFACE

The Treaty of Amsterdam, which came into force on 1 May 1999, marks a significant milestone for lesbians and gay men in the European Union.

The changes introduced by the Treaty include a new clause, Article 13, which covers discrimination on the grounds of sexual orientation, together with sex, racial or ethnic origin, religion, belief, disability and age. This is the first time that any express reference to discrimination on grounds other than sex or nationality has appeared in the Treaties. It follows extensive campaigning by non-governmental organisations, including ILGA-Europe.

Article 13 ends any doubt about whether the Community has the legal competence to adopt legislation and policies to address discrimination on the grounds listed within it. The debate is now about what action can and should be taken. But what does Article 13 mean? What are the implications of the new Treaty? What opportunities does it offer for concrete action on discrimination?

ILGA-Europe has produced this guide as a contribution to that debate and to promoting wider participation in it. The guide focuses on the implications of the Amsterdam Treaty in relation to sexual orientation discrimination. It is not possible within the scope of this guide to provide a detailed examination of the implications of the Treaty in relation to the other grounds of discrimination listed in Article 13, although they are all of direct relevance to lesbians and gay men.

ACKNOWLEDGEMENTS

The ILGA-Europe Executive Board gratefully acknowledges the contributions which made this guide possible:

This guide was produced as part of a project supported by the European Commission (DG X) under the Information Programme for European Citizens (P.R.I.N.C.E.) – “Building Europe Together”, the Austrian Federal Chancellery, the Austrian Federal Ministry for Labour, Health and Social Affairs and the Austrian Federal Minister for Women’s Affairs and Consumer Protection. Besides the publication of this guide in English, French, German and Spanish, the project includes a seminar “The Treaty of Amsterdam – New Opportunities for Protection from Sexual Orientation Discrimination Under Article 13” taking place in Vienna, 2-3 October 1999, to which participants from all 15 Member States and eleven candidate countries have been invited.

Financial support, especially for the seminar, was also received from ILGA-Europe’s project partners:

- *Homosexuelle Initiative (HOSI) Wien*, Austria’s First Lesbian and Gay Association
- *Pan-Fonden*, Denmark

- *Landsforeningen for bøsser og lesbiske (LBL)*, the Danish National Association for Gays and Lesbians
- *ÉGALITÉ – Equality for Gays and Lesbians in the European Institutions*
- *Seksuaalinen Tasavertaisuus (SETA)*, the Finnish Association for Sexual Equality
- *Lesben- und Schwulenverband in Deutschland (LSVD)*, the Lesbian and Gay Association of Germany
- *Fundación Triángulo por la Igualdad Social de Gais y Lesbianas*, Triangle Foundation for Social Equality of Gays & Lesbians, Spain
- *Riksförbundet för sexuell likaberrättigande (RFSL)*, the Swedish Federation for Lesbian and Gay Rights
- *Stonewall*, United Kingdom
- *UNISON*, the public sector trade union in the United Kingdom.

We would like to thank Sejal Parmar, Mark Bell, Kees Waaldijk and Madeleine de Leeuw for contributing specific chapters to this guide, and Jackie Lewis, Alberto Volpato and Kurt Krickler for writing the other chapters and editing the original English version of this guide. We also want to express our gratitude to Pierre Noël, César Lestón and Kurt Krickler for translating the guide into French, Spanish and German, and to Friedl Nussbaumer for doing the layout, and finally again to Kurt Krickler for supervising the production process and proof-reading all four versions.

USING THIS GUIDE

The guide contains a number of chapters. Chapter 1 provides information on the background to the Amsterdam Treaty and introduces some of the key changes it makes. Chapter 2 explores the scope and limitations of the anti-discrimination clause, Article 13, and the other new provisions relating more generally to human rights, while Chapters 3 and 4 examine the potential for measures to address sexual orientation discrimination in various EU policy areas.

Other chapters provide information on obtaining documents to assist in lobbying, outline developments since Amsterdam, and set out ILGA-Europe's recommendations for action under the current Treaty framework. As preparations for the next Treaty revision negotiations are already being made, the guide also includes proposals for further changes to promote equality and human rights.

The Amsterdam Treaty has changed the numbering of articles in the Treaty on the European Community and the Treaty on European Union. The guide uses the new numbering as contained in the consolidated versions of the Treaties.

Some background information on the EU and its institutions is provided in an appendix which also contains useful addresses for further queries.

The Executive Board of ILGA-Europe

Brussels, September 1999

Chapter 1:

The Road to Amsterdam

by Jackie Lewis

Europe will be a Europe for all, or it will be nothing at all.¹

This chapter will introduce the Amsterdam Treaty, while following chapters look at the details of its provisions and explore the possibilities for action in different areas of Community activity to address discrimination. In order to provide a context for the changes agreed in Amsterdam and the subsequent analysis, this chapter first provides background information on the historical development of the social dimension and the growing debates around issues of discrimination and fundamental rights.

BEFORE AMSTERDAM

A. SOCIAL POLICY

The 1958 Treaty of Rome contained only a few scattered provisions on social policy, including on the European Social Fund. However, Community social policy only began to seriously emerge with the adoption of the 1974 Social Action Programme, focussed mainly on measures in the field of labour law. Even then, implementation of the programme was very slow, with many proposals blocked due to the requirement for unanimous agreement in the Council.

The development of social policy was given a new impetus in the mid-1980s by moves towards establishing the single internal market, in which there would be freedom of movement of workers, services, goods and capital. By this time, the membership of the Community had grown to 12, and there were considerable pressures for the Community to concern itself with the social impact of the single market programme. The 1986 Single European Act contained a specific reference to the social dimension and stated that one of the aims of the Community was to improve the economic and social situation by extending common policies and pursuing new objectives.

An attempt to set down guiding principles on the social areas referred to in the Act eventually found expression in the “Community Charter for the Fundamental Social Rights of Workers”, formally endorsed in 1989 by all the Member States except the UK. The preamble to the Charter states “Whereas, in order to ensure equal treatment, it is important to combat every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and belief, and whereas, in a spirit of solidarity, it is important to combat social exclusion (...).” Although the Charter had no legal base, it was a significant step in the recognition of work related social issues and it also includes references to social protection for young people, older people, disabled people and the unemployed. The Charter provided the basis for the Commission’s second Social Action Programme.

The pressures for increasing the role of the Community in the social sphere continued into the negotiations leading up to the Maastricht Treaty on European Union, which laid down a specific procedure and timetable for Economic and Monetary Union (EMU) and a single currency. The EU was given the objective of promoting economic and social progress that is balanced and sustainable. The Treaty strengthened provisions on economic and social cohesion, and gave the Community a new but limited role in education and public health.

However, proposals for the Community to be given greater powers in the field of social policy were opposed by the UK. The remaining Member States (11 at the time, subsequently 14) adopted the Protocol and Agreement on Social Policy, which was attached to the Maastricht Treaty. This allowed the 14 to take further steps to develop a Community social policy, and adopt Community legislation in a much broader area, binding on all Member States except UK. It also gave a formal legislative and consultative role in social policy areas to the social partners, with the possibility for agreements concluded between them at Community level to be adopted by the Council as legislation.

With the continuing process of increasing economic integration, there has been a growing recognition of the need for more common policies in social and economic fields. There has also been a growing acceptance that divergence of national approaches and standards in the broader social field create barriers to trade in the single market. Continuing high levels of unemployment, and the growth of poverty and social exclusion, have contributed to an increased recognition that the EU should address socio-economic problems with programmes of its own. In addition, non-governmental organisations (NGOs) active in the areas of social and human rights have become increasingly active in lobbying for action at the European level. In September 1995, a number of these organisations formed the Platform of European Social NGOs with the overall aim of establishing a continuing civil dialogue between the NGO sector and the institutions of the EU on social policy issues.

The Social Action Programme 1995-1997 announced the setting up of a committee of experts, the *Comité des Sages*, to examine what might become of the 1989 Community Charter in connection with the forthcoming review of the Treaties. The Committee presented its report, "For a Europe of Civic and Social Rights", in March 1996. This strongly advocated the construction of a "social Europe", with an interrelated social and economic agenda, and stressed the need to strengthen the sense of democracy and citizenship in the Union by treating social and civil rights as indivisible. The report proposed that the first step should be the inclusion in the Treaties of a minimum core of rights, including a ban on any form of discrimination, followed by a process of wide-ranging consultation to complete the full list of civil, social, and political rights. The report's recommendations were strongly supported at the 1st European Social Policy Forum, organised by the Commission, in June 1996, and at follow-up conferences in the Member States.

B. FUNDAMENTAL RIGHTS, DISCRIMINATION AND CITIZENSHIP

The first Community treaty to contain an explicit reference to fundamental rights was the Single European Act, adopted in 1986. When the Community was founded, it was not perceived that there was a fundamental rights aspect to the primarily economic objectives and activities of the Community. The founding member states had, together with others, established the separate framework of the Council of Europe and the protection of human rights was seen as being guaranteed by the European Convention on the Protection of Fundamental Rights and Freedoms, adopted in 1950, and the European Court of Human Rights.

Over the years, the principles of fundamental human rights have increasingly been recognised as forming an integral part of Community law. Initially, fundamental human rights gained recognition through the judgments of the European Court of Justice (ECJ), which held in several cases that they were part of the general principles of law which it is the Court's duty to apply.

The European Parliament has played a significant role in pushing issues of discrimination and human rights onto the political agenda. It has adopted comprehensive resolutions highlighting the effect and extent of various forms of discrimination, including sexual orientation, and demanded action to combat it. Although some important steps have been taken, the absence of a specific legal base in the Treaties has been a significant obstacle to the adoption of substantive measures.

Recently, there has been growing acceptance that measures taken to implement the internal market, such as freedom of movement, could not achieve their objective without addressing disparities in the level of protection against any form of discrimination. This was reflected in the Commission's White Paper on Social Policy in 1994, which stated that the Union must act to provide a guarantee for people against the fear of discrimination if it is to make a reality of free movement.

These issues have become interlinked with debates about citizenship. The Maastricht Treaty established EU citizenship, with every national of an EU Member State becoming a citizen of the Union. This was of greater symbolic than real significance, as Union citizens would only have the limited civil and political rights defined in the Treaty. These included the right to live and work anywhere in the EU, and the right to vote and stand as candidates in European Parliament and local elections (both subject to certain limitations). There have been growing demands for a broader concept of citizenship, and for guaranteed rights for all the people of the EU, not just those who are nationals of its member states.

C. THE INTERGOVERNMENTAL CONFERENCE

There were a number of reasons for convening an Intergovernmental Conference (IGC) in 1996. The Maastricht Treaty had built in requirements to hold reviews of certain specified areas by the end of 1996. There were also pressing practical reasons for a review of the workings of the EU and its institutions, particularly in the context of the forthcoming enlargement of the Union.

In addition, there were strong political pressures for a review of the Treaties. The Maastricht Treaty had failed to carry popular support among the peoples of the EU it created. It was recognised by the governments of the Member States that there was a need to address the decline in public support for European integration, and to respond to the widespread concerns about its direction and impact, which were repeatedly reflected in opinion polls.

There were, therefore, considerable political pressures to strengthen the social dimension and to bring Europe closer to its citizens. In May 1995, the Parliament adopted a resolution calling for the forthcoming IGC to adopt “a treaty for the citizens of the Union”, which provided more rights for EU citizens and improved protection of the fundamental rights of all EU residents. There were political demands from a variety of sources for the construction of a “social Europe” through revisions to the Treaty to expand social provisions, strengthen Community policies in areas such as employment and the environment, prohibit discrimination and embody fundamental civil and social rights.

Before the IGC was opened, a “Reflection Group”, composed of representatives from each Member State, the Commission and the Parliament, was given the task of identifying the key issues and preparing the groundwork. Its report suggested that the results of the IGC must lead to progress towards three main objectives: making the EU more relevant to its citizens; enabling it to work better and preparing it for enlargement; and giving it a greater capacity for external action. The report included a recommendation for a new general clause on discrimination.

2. THE TREATY – TOWARDS A SOCIAL EUROPE?

The IGC opened in March 1996 and concluded with the adoption of the Treaty of Amsterdam at the European Council Meeting in Amsterdam in June 1997.

A. DISCRIMINATION AND FUNDAMENTAL RIGHTS

The introduction of the new clause on discrimination – Article 13 – which covers sexual orientation, is clearly of particular significance. Although there had been general agreement on the need for a clause on discrimination, there was considerable debate during the IGC about what form this should take and what grounds of discrimination should be explicitly mentioned. The inclusion of sexual orientation in the final version of Article 13 can be seen as being a result, at least in part, of increasingly effective campaigning by lesbian and gay organisations and growing alliances between organisations working for equality and human rights. The meaning and limitations of Article 13, and its potential effects in particular areas of Community policy are examined in subsequent chapters.

The promotion of equality and the elimination of discrimination between women and men has become one of the aims of the Treaty, and is no longer confined to employment-related matters but is to be integrated into all Community policies.

The revised article on nationality discrimination, Article 12, reiterates the prohibition on discrimination on the basis of nationality and empowers the Council to adopt, on the basis of qualified majority vote, rules designed to prohibit such discrimination.

The Amsterdam Treaty made a number of changes that assert more strongly the EU's commitment to fundamental rights, but did not introduce new specific rights as had been called for by the Comité des Sages report. The preamble to the EU Treaty has been amended to state the EU's intention to respect the rights set out in the Council of Europe's European Social Charter of 1961, and the 1989 Community Charter. Changes to Article 6 of the EU Treaty, which state more clearly the principles on which the EU is founded, are examined in Chapter 2, together with the changes relating to violations of human rights by Member States and to requirements on applicant states.

B. THE SOCIAL CHAPTER

A single framework for social policy has been re-established through the incorporation of the Maastricht Agreement on Social Policy into the EC Treaty. The objectives of the social chapter, as defined in Article 136, are:

the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

The Council can also, under Article 137(2), adopt measures aimed at combating social exclusion. It will be important for lesbian and gay organisations to lobby at national and EU level to ensure that sexual orientation discrimination is addressed within programmes to combat social exclusion.

It should also be noted that the Amsterdam Treaty strengthens the role of the European level social partners – the European Trade Union Confederation (ETUC) for the trade unions, UNICE and CEEP for the employers – in developing social legislation. The Commission must now consult the social partners before it makes proposals in the social policy field. The provision for agreements reached between the social partners to lead to Community legislation has now been incorporated into the Treaty. It is therefore vital that the principle of equality and the combating of all forms of discrimination is fully addressed within the social dialogue. The close co-operation which is developing between the ETUC and the Platform of European Social NGOs will be particularly significant in this respect. ILGA-Europe is a member of the Platform.

C. EMPLOYMENT

With around 18 million people unemployed in the European Union, there was extensive pressure from governments and from trade unions for employment to be added to the agenda for the IGC. The Amsterdam Treaty has created an entirely new title on employment. While the main responsibility for employment policy remains with the Member States, they are now required to regard promoting employment as a matter of common concern, and to co-ordinate their employment policies.

Each year, the Council will adopt Employment Guidelines which Member States have to incorporate into national action plans on employment. Governments should consult with social partners and NGOs at national level on these plans. Lesbian and gay organisations will need to ensure that national plans address the particular issues affecting lesbians and gay men in the area of employment.

D. SUBSIDIARITY

There are only a few areas (e. g., monetary union) where the Community has exclusive competence. In many areas, competences are shared between the Community and the Member States.

The principle of subsidiarity is based on the idea that, where competences are shared, it is the Member States that should act wherever possible. The Community should only act where the objectives of the proposed action can be better achieved by the Community “by reason of the scale or effects of the proposed action” and the member states cannot achieve them by acting alone.

Although the Treaty article on subsidiarity (Article 5 EC) has not been changed, the Member States adopted a Protocol on the Application of the Principles of Subsidiarity and Proportionality which is binding and part of the Treaty. The principle of proportionality is that action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

The protocol requires the Commission to “consult widely before proposing legislation and, wherever appropriate, publish consultation documents”. It seems feasible to argue that consulting “widely” on proposals on discrimination, for example, should include consultation with non-governmental organisations representative of the people who will be directly affected by those proposals.

Jackie Lewis

is co-chair of ILGA-Europe’s executive board

¹ European Commission (1996): “For A Europe of Civic and Social Rights. Report of the Comité des Sages”. Luxembourg: Office for Official Publications of the European Communities (OOPEC).

Chapter 2:

The Treaty of Amsterdam

by Sejal Parmar

INTRODUCTION

The Treaty of Amsterdam, which revised the Treaties on which the EU is founded, was the outcome of the negotiations of the Intergovernmental Conference (IGC) that took place from March 1996 to June 1997. It came into effect on the 1st of May 1999 after all fifteen Member States had ratified the Treaty into their own legal orders. One of the most notable successes of the Treaty of Amsterdam was a revitalised interest in fundamental rights.

The negotiations during the IGC were undoubtedly influenced strongly by the accumulation of pressure from a number of sources urging clearer and stronger EU powers in the domain of fundamental rights. A non-discrimination article was always on the agenda mainly because of a series of reports and recommendations initiated by the various EU institutions, especially the European Parliament. Not to be underestimated also is the overwhelming pressure put on the institutions by the range of non-governmental organisations that vigorously campaigned for the entrenchment of a non-discrimination provision.

The objective of this chapter is to outline the principle legislative provisions introduced by the amendments of the Treaty of Amsterdam that improve the legal situation of lesbians and gay men. Although the new provisions have their limits, there has at least been a marked shift in acknowledging the need for equal treatment. By focusing on the potential advantages and limitations of the new Article 13 EC on non-discrimination, this chapter will assess the extent to which this provision facilitates the protection of the rights of gay men and lesbians. The progress made in the human rights field more generally will also be examined.

1. ARTICLE 13 EC

In February 1998, the Court of Justice of the European Communities held that EU law did not prohibit employment discrimination on the basis of sexual orientation in *Grant v. South West Trains*.¹ The case, which attracted much media attention, dealt a blow for gay and lesbian rights under EU law. There was a glimmer of hope, however, at the end of the Court's ruling indicating that in future a similar case might be decided differently as a result of measures taken under the new Article 13 of the Treaty establishing the European Community. This article allows the possibility of upholding the principle of equal treatment in a wider range of scenarios and includes, within the protected grounds, the first explicit mention of sexual orientation in any international treaty.

A. A NEW OPPORTUNITY FOR EQUAL RIGHTS

Article 13 EC states:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The basic significance of Article 13 is that it is the first time on which grounds for discrimination, besides sex and nationality, have been referred to in the Treaty.

Article 13 is to be found within that part of the EC Treaty that is entitled "Principles" underlying its **foundational importance** to the full scope of EC law. At the same time, Article 13 allows for the concept of equal treatment in a very wide range of areas.

It may be argued that the use of the word "combat" in the article may reflect a more **pro-active** vision of guaranteeing the human right to non-discrimination, that looks further than the securing of equality on formal and legal levels only. This is also recognition that certain discriminatory practices may be difficult to isolate and then fit into a definition of discrimination that is constrained by the type of discriminatory act.

At the very least there is the **recognition that discrimination on the ground of sexual orientation exists, combined with an implication that such discrimination may be a grounds for EU action**. Another certainty is that Article 13 allows action beyond the field of employment, to areas such as education and healthcare, which shall be discussed in Chapter 3.

B. LIMITATIONS OF THE ARTICLE

(i) Not a free-standing equality clause

Article 13 is not a free-standing equality principle that entails a positive obligation to act on the part of the legislator, but a **general principle of law that invites the EU to enact legislation if it so chooses**.

As a consequence, Article 13 has **no direct effect**, which means that it cannot be relied upon in the courts of Member States in the same way as Article 12 EC² forbidding nationality discrimination, and Article 141 EC³ forbidding discrimination in pay between women and men. Contrary to the hopes of campaigners for a general non-discrimination article, there was no support for direct applicability amongst the Member States at the drafting of the Treaty. Therefore, an individual cannot rely on its provisions to challenge discrimination by either national governments or by employers, providers of services, etc. Legally binding measures that are taken *under* Article 13 *may* though provide rights to non-discrimination which individuals can enforce against such individuals or institutions.

(ii) Initiation of policy measures

• Unanimity at the Council of Ministers

The adoption of measures under Article 13 involves first overcoming the procedural hurdle of obtaining a unanimous decision in the Council following consultation with the European Parliament. Political will is critical in determining whether any action will be taken at all and the scope of that action. When the Council considers measures against sexual orientation discrimination, the unanimity requirement may be especially challenging since it remains controversial in some Member States. There are seven Member States that still have not enacted anti-discrimination legislation in this field: Austria, Belgium, Germany, Greece, Italy, Portugal, and United Kingdom.⁴

The future looks brighter in the aftermath of the conclusions of the Cologne European Council in June 1999. It was agreed that high on the agenda at the next IGC in 2000 should be the “institutional issues left open in Amsterdam that need to be settled before enlargement”.⁵ These include a possible extension of qualified majority voting in the Council, a move that would ease the passage of legislation if applied to Article 13.

• Role of the European Parliament

Under the present construction of Article 13, the most progressive institution in the field of sexual orientation discrimination, the Parliament, has only been granted the minimum role of consultation in decisions taken to implement policy.⁶ This contrasts with the general shift of the Treaty towards a more extended role for the most representative institution in the decision-making process. The Court of Justice has argued that even the role of consultation is crucial to the “institutional balance” of the EU stating that the “due consultation ... constitutes an essential formal requirement breach of which renders the measure concerned void”.⁷ Consultation entails more than a procedural commitment on the part of the Council to ask the Parliament for its opinion. If after the consultation procedure the final text adopted “differs in essence from the text on which [it] has already been consulted”,⁸ the Parliament must be re-consulted.

Looking to the future, it should be noted that the IGC in 2000 may also lead to an extension of the Parliament’s role under Article 13 to one of co-decision that would allow it to veto legislation.⁹

(iii) The Treaty context

Article 13 opens with the phrase: **“Without prejudice to the other provisions of the Treaty”**. This seems to indicate that other parts of the Treaty are not to be constrained by the new article. Such wording seems to undermine the general impact of the article as a foundational principle.

The phraseology used also contrasts with Article 12 EC on nationality discrimination, which is restricted to “...the scope of the application of the Treaty” instead of the expression used in Article 13: **“...within the limits of the powers conferred by [the Treaty]”**. This indicates that the field of application of the two articles was intended to be different. The word “powers” in Article 13 has the potential of allowing a wide scope of action only if it is interpreted broadly. It seems more likely that, however, the term “powers” will be interpreted to mean “competence”, on the basis that non-English versions of the article use the latter term.¹⁰ The Court of Justice has distinguished “scope” of the Treaty as having a broader meaning than “competence” of the Community.¹¹

Article 13 can therefore **only provide a legal basis for measures to combat discrimination in areas in which the European Community already has competence.**

C. WHAT TYPES OF ACTION MAY BE TAKEN UNDER THE NEW ARTICLE?

The provision embodying the general principle of equality will only become significant if further measures are adopted under Article 13. The meaning of “**appropriate action**” that might be taken to combat discrimination is however unclear. A broad range of measures emanating from the article does seem implicit. This includes binding legislation, such as regulations (which apply directly throughout the EU) and directives (which require implementation by each state in national law). There is also the possibility for non-binding instruments, such as action programmes (frameworks for providing EU financial support for projects and initiatives) and codes of practice (recommended practice statements, for example, procedures for combating harassment in the workplace). It may be assumed that Article 13 allows for the adoption of all the types of legal instruments explicitly provided for in the EC Treaty (regulations, directives, decisions, recommendations, opinions),¹² as well as the more general instruments that are not mentioned in the Treaty, but commonly relied upon by the institutions – notably conclusions and resolutions. Naturally, these do not form binding EU law, but may give an indication of the view of the Member States.¹³

(i) A directive

The most immediate prospect for the legislative use of Article 13 lies in the form of an anti-discrimination *directive*.

Article 249 EC states “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

In other words, whilst Member States are obliged to implement directives in national law, they are normally framed in such a way that the state retains some discretion over the precise means by which it attains the objective laid down in the directive. For instance, an anti-discrimination directive could require all Member States to create institutions to assist individuals in the enforcement of their rights to non-discrimination. However, it would remain a choice of each state as to what type of institution they created, such as whether it was in the model of an agency or an ombudsperson.

As shall be discussed further in Chapter 3, the Commission has already indicated its intention to submit two proposals for directives based on Article 13. One would be a directive forbidding employment discrimination on all Article 13 grounds, and the other would forbid discrimination in a wider range of fields, but confined to the discrimination on grounds of racial or ethnic origin.

The Commission's commitment to these directives shows that binding legislation is certainly regarded as a form of "appropriate action" pursuant to Article 13.¹⁴ At the same time, EU policy against racial discrimination has also included soft law (non-binding) measures such as the "Action Plan Against Racism"¹⁵ issued in 1998, which followed the European Year Against Racism and Xenophobia initiative in 1997. The plan outlined the Commission's intentions for steps taken under Article 13 in the field of racial discrimination, but may be used as a source of inspiration for progress in the fight against other forms of discrimination. The suggested approaches included mainstreaming anti-discrimination across EU policies by developing new exchange models and strengthening information and communication actions.

(ii) Indirect effect on EU legislation

It is significant that the non-discriminatory essence of Article 13 seems likely to infiltrate into other proposals for EU legislation. The Commission already expressed its intention to include non-discrimination clauses where appropriate in other legislative proposals.¹⁶ The provision's indirect legislative impact has already been felt in the field of the free movement of workers. The proposed amendment to Council Regulation 1612/68, on the free movement of workers, is modelled on Article 13, and thereby includes explicit mention of sexual orientation as grounds of discrimination prohibited within the scope of the regulation.¹⁷ Even if the proposal is rejected, a pressure to include anti-discriminatory clauses in other pieces of EU legislation in the longer term will have at least been generated.

(iii) Mainstreaming policies

Mainstreaming involves the weaving of policies furthering equal treatment into the substance of decision-making and policies. In relation to sexual equality law, the Commission has defined this as:

"the systematic consideration of the differences between the conditions, situations and needs of women and men in all Community policies, at the point of planning, implementing and evaluation".¹⁸

This principle can clearly be extended to the other grounds mentioned in Article 13. For example, in relation to sexual orientation discrimination it can mean the reconsideration of references to "spouse" in EU legislation, as this excludes same-sex (and opposite-sex) unmarried partnerships. One of the advantages of encouraging a policy of mainstreaming is also that such a strategy is not limited to governmental organisations and it fosters a more pro-active approach.

Overall, it can be said that although the application of Article 13 is constrained by the areas in which the EU has competence, there is the potential for a wide range of effective measures and an indirect influence on the rest of EU law. The types of action that may be taken by the EU in the fight against homophobic prejudice and unequal treatment will be examined in further detail in Chapter 3.

2. OTHER RELEVANT CHANGES IN THE FIELD OF HUMAN RIGHTS

The next section examines the other provisions of the Amsterdam Treaty that further the EU's role as a protector of fundamental human rights. The right to equal treatment is the most fundamental of human rights as demonstrated by Article 1 of the Universal Declaration of Human Rights 1948 which expresses that:

All human beings are born free and equal in dignity and rights.

If it is considered that fundamental human rights have been given a higher status than ever before in the new Treaties, it follows that EU decision makers should attach greater priority to respect for human rights, including the principle of equal treatment, in future policy-formulation.

A. ARTICLE 6 EU

Article 6 of the Treaty on the European Union states:

1. **The Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.**
2. **The Union shall respect fundamental freedoms, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.**
3. **The Union shall respect the national identities of its Member States.**
4. **The Union shall provide itself with the means necessary to attain these objectives and policies.**

The importance of Article 6 EU is that since the Treaty of Amsterdam, the Court of Justice may expressly take these principles into account when considering the validity of EU law. This should

help reinforce the pre-existing position of the Court that a condition of the legality of EU law is respect for fundamental rights. Moreover, when Article 6 EU is combined with Article 13 there is a strong foundation for the argument that fundamental rights include non-discrimination.

B. ARTICLE 7 EU

1. **The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.**

2. **Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.
The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State. (...)**

This new article creates the possibility of suspending the rights of a Member State in the case of a “serious and persistent breach” of the principles in Article 6 EU. Naturally, this is an extreme sanction, indeed a weapon of last resort only likely to be used in most unusual circumstances. Nonetheless, it demonstrates symbolically that respect for human rights is a condition of continuing membership of the EU, and provides a foundation for the Parliament (amongst others) to scrutinise the record of the Member States on human rights, in order to identify and prevent any state slipping into a “serious and persistent” abuse of human rights.

C. ARTICLE 49 EU

With regard to the expansion of the Union through the future accession of states, Article 49 EU states, in its first paragraph:

Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent

of the European Parliament, which shall act by an absolute majority of its component members.

In referring to Article 6(1), the EU is declaring that one of the conditions for accession is the respect for fundamental human rights. It may be argued that any applicant state that shows a clear and persistent violation of human rights ought not to be allowed to accede to the EU. This complements the provisions in Article 7 EU requiring ongoing respect for human rights after accession. Again, only a serious breach of human rights is likely to block accession, but it does require the human rights situation in the applicant states to be scrutinised, and this includes the treatment of lesbians and gay men.¹⁹

3. THE FUTURE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU: A CHARTER OF FUNDAMENTAL RIGHTS?

Since the late 1960s the Court of Justice has said that it had a duty to protect “the fundamental human rights enshrined in the general principles of Community law...”²⁰ The Court very quickly began to develop fundamental rights as a ground for the annulment of EC law as was shown in *Internationale Handelsgesellschaft*.²¹ It also went on to state in *Hauer*²², referring to the decision in *Nold*²³, that:

“Fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from the constitutional traditions common to Member States ... international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories...”²⁴

One of the most important sources of “inspiration” is the European Convention on Human Rights (ECHR), which is seen as part of the general principles of EU law.²⁵ The exact scope of EU powers in the area of fundamental rights however remains uncertain and it has also been argued that the EU should establish its own catalogue of fundamental human rights to make the situation more clear.²⁶ This was most recently argued in a report to the Commission by an expert panel on fundamental rights.²⁷

The situation may become clearer after the decision of the Cologne European Council to establish a Charter of fundamental rights and freedoms. This will constitute a distinct set of human rights norms for the EU that will contain the civil and political rights guaranteed by the ECHR, certain socio-economic rights, as well as fundamental rights that pertain to the citizens of the

European Union (such as the right to free movement within the Union). Although the existence of the Charter has been agreed upon, the substance of the document may involve more debate. A draft document is to be prepared in advance of the European Council in December 2000 where it will be “considered whether and, if so, how the Charter could be integrated into the treaties”.²⁸ Such a Charter would necessarily contain an equality clause that needs to be wider than the present Article 13, ensuring that discrimination on the grounds of sexual orientation would be regarded as a violation of human rights. The development of such a Charter should therefore be one focus for future lobbying in the fight against discrimination on the grounds of sexual orientation.

Sejal Parmar

is a Ph.D. researcher in the department of law of the European University Institute, Florence. Her principal research interest is equality and EU law.

- 1 Case C-249/96, [1998] ECR I-621. Also in [1998] IRLR; judgment delivered 17 February 1998 at para. 48. The case concerned a lesbian who was refused travel concessions for her female partner, where such concessions had been granted to the female unmarried partner of her male predecessor in the same position.
- 2 Article 12 states:
Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.
- 3 Article 141 states:
1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
(...)
- 4 Appendix to Waaldijk, K.: “What Legal Recognition of Same-Sex Partnerships Can Be Expected in EC Law and When? Lessons from Comparative Law” for the conference *Legal Recognition of Same-Sex Partnerships*, King’s College, University of London, 1 to 3 July 1999.
- 5 See Presidency Conclusions, Cologne European Council, 3-4 June 1999, para. 52.
- 6 See further Bell, M. (1998): “Sexual orientation and anti-discrimination policy: the European Community” in Carver, T. & Mottier, V. (eds.): *The politics of sexuality – identity, gender, citizenship*, London: Routledge/ECPR Studies in European political science.
- 7 Case C-392/95, *European Parliament v. Council of the European Union*, ECR I-3213, Judgment of 10.6.1997, para. 14.
- 8 *Ibid.*, para. 15.

- ⁹ See Presidency Conclusions at note 5.
- ¹⁰ See further Bell, M. (1999): "The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?", *Maastricht Journal of European and Comparative Law*, Vol. 6 (1), pp. 5-28.
- ¹¹ Case C-152/82, *Forcheri v. Belgium* [1983] ECR 2323.
- ¹² Article 249 EC.
- ¹³ See further Waddington, L. (1999): "Testing the limits of the EC Treaty article on non-discrimination", *Industrial Law Journal*, Vol. 28, pp. 133-151.
- ¹⁴ Flynn, P. (1999): "Vienna – a new start for the fight against discrimination" in *Europaforum Wien: Article 13 – anti-discrimination: the way forward*, Vienna: Europaforum Wien, pp. 60-63.
- ¹⁵ COM(98) 183 final of 25 March 1998.
- ¹⁶ *Ibid.*
- ¹⁷ Proposal from the European Parliament and Council amending Council Regulation (EEC) No. 1612/68 on freedom of movement of workers within the Community, OJ [1998] C 344/9.
- ¹⁸ Commission (1997): "Annual Report from the Commission: Equal Opportunities for Women and Men in the European Union 1996" COM(96) 650, 12.2.97, p. 2.
- ¹⁹ For example, see Commission (1997): "Commission Opinion on Romania's application for membership of the European Union" COM(97) 2003, 15.7.97.
- ²⁰ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419, [1970] CMLR 112, para. 7.
- ²¹ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, [1972] CMLR 255.
- ²² Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, [1980] 3 CMLR 42.
- ²³ Case 4/73, *Nold v. Commission* [1974] ECR 491, [1974] 2 CMLR 338.
- ²⁴ Para. 15 of the judgment.
- ²⁵ Case 155/79, *AM. & S. Europe Ltd v. Commission* [1982] ECR 1575, [1982] 2 CMLR 264.
- ²⁶ See among others:
Andrew Clapham: "A Human Rights Policy for the European Community" (1990) YBEL 309;
J. Coppel and A. O'Neill: "The European Court of Justice: Taking Rights Seriously", (1992) 12 Legal Studies 227;
J. H. H. Weiler and N. Lockhart: "'Taking Rights Seriously': The European Court and its Fundamental Rights Jurisprudence" (1995) 32 Common Market Law Review 51, 579;
Gráinne de Búrca: "Fundamental Human Rights and the Reach of EC Law" (1993) 13 Oxford Journal of Legal Studies 28.
- ²⁷ European Commission/Employment & Social Affairs (1999): "Affirming fundamental rights in the European Union – time to act", Report of the expert group on fundamental rights. Luxembourg: OIPEC.
- ²⁸ See Presidency Conclusions at above note 5, here: Annex IV: European Council decision on the drawing up of a charter of fundamental rights of the European Union.

Chapter 3:

Equal rights and EU policies

by Mark Bell

INTRODUCTION

Whilst Article 13 EC has only been in force since 1 May 1999, the two year gap between the negotiation of the Treaty of Amsterdam and its eventual ratification has allowed a lively and constructive debate to develop on how the European Union should start to implement these new powers. Article 13 sets no time limits for its implementation. Nonetheless, the keen anticipation of the EU institutions, together with civil society, ensures that the provision will not become a “dead letter”. Indeed, such has been the determination to make swift progress on improving EU anti-discrimination law that both the Commission and the European Parliament have already indicated their views on the first steps for Article 13.

The former Social Affairs Commissioner, Pádraig Flynn, first set out the European Commission's attitude in December 1998, and this was reiterated in a discussion paper circulated by the Social Affairs Directorate-General in May 1999.¹ As it stands, the Commission is intending to propose a three-strand package of measures:

- a **directive on employment discrimination** to forbid unequal treatment in the workplace based on racial or ethnic origin, religion or belief, age, disability or sexual orientation;
- a **directive forbidding discrimination in employment, education, social security, sport and access to goods and services**. This will apply only to discrimination based on an individual's racial or ethnic origin;
- an **action programme** to strengthen co-operation with Member States and civil society. This would focus on promoting exchange of experience and networking between institutions and organisations working against discrimination across the European Union.²

The **European Parliament** has been a long-standing supporter of stronger anti-discrimination law at the EU level. Nonetheless, it is only recently that it has gone beyond general statements of principle and has engaged in specific discussion as to how anti-discrimination law should be structured. The clearest expression of the Parliament's perspective emerges from its December 1998 resolution on the Commission action plan against racism.

This expressed the view that given “the fundamental differences in the reasons for discrimination as well as the specific nature of discrimination in the different areas of life”, the Commission should “give preference ... to specific rules which precisely cover specific forms of discrimination, rather than general provisions”.³ The report of the rapporteur is perhaps more explicit. It called for “special anti-discrimination directives for the different areas”, as this might “make it easier to achieve a speedier agreement in Council on specific measures”.⁴

At a more general level, a working document by the Employment and Social Affairs Committee⁵ suggested establishing a monitoring mechanism, whereby all Member States would be obliged to submit periodic reports on the action taken to combat discrimination on all of the grounds mentioned in Article 13. This would ensure ongoing attention at the national level to promoting equal treatment, as well as facilitating exchange of experience and the identification of best practice. Alongside this reporting obligation, the working document also stressed the need for the adoption of additional legislation at the EU level. In particular, it called for “horizontal and group specific measures to embed the principles of non-discrimination in all EU policies and programmes; these measures should include a general horizontal framework directive and action plans addressing particular problems faced by the specific groups covered by Article 13”.

COMMON V. SEPARATE ANTI-DISCRIMINATION LAW

One of the most striking aspects of both the Parliament and Commission opinions is the support for a diversified approach to anti-discrimination law. More precisely, this implies a combination of directives dealing with specific **grounds**, such as racial or ethnic origin, alongside directives dealing with specific **areas**, such as employment. The former are sometimes referred to as “vertical” directives, and the latter “horizontal” directives.

Considering that Article 13 is a reflection of the fundamental principle of equality, one would assume that the Commission would adopt a combined or co-ordinated approach based on the need for measures to combat discrimination on all grounds mentioned in it – not just in employment but in all other areas. Such an approach would avoid undermining the principle of equality itself through introducing different levels of protection for different essential aspects of the same human being and thus promoting a hierarchy in the fight against discrimination.

The logic behind the proposed vertical, one ground approach in areas other than employment seems to be based on an assumption that it will be easier to reach a consensus in the Council of Ministers on a directive against racism in these areas. Therefore, it would be preferable to proceed with this first and to gradually seek the extension of similar rules to other grounds, such as sexual orientation. The basic flaw of this reasoning is that it would make legislation implementing a fundamental principle dependent on the changing political wind instead of on the principle itself. It is also possible that the Council will feel little pressure to agree further discrimination legislation, especially since the Commission package does not propose any further such action to implement Article 13.

A more effective mechanism for dealing with the true complexity of discrimination is to focus on the adoption of “horizontal” measures – those which deal with specific subjects, such as employment, education, etc. – but which apply across all grounds mentioned in Article 13. A potential model for this may be found in draft legislation currently before the Irish Parliament. The Equal Status Bill 1999 proposes to forbid discrimination in, *inter alia*, access to goods and services, housing and education. Discrimination will be forbidden on nine grounds: gender, marital status, family status, sexual orientation, religious belief, age, disability, race, and membership of the travelling community.⁶ Reference should be made to the experience in the Netherlands, where the 1994 Equal Treatment Act prohibits discrimination in employment and access to goods and services in respect of eight different grounds: religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation, and civil status.

The rest of this chapter explores a variety of EU policy fields, and the types of action that can now be taken by the EU to help the fight against a wide range of discriminations. This will be divided into two sections:

1. *discrimination in employment*
2. *discrimination outside employment.*

1. DISCRIMINATION IN EMPLOYMENT

The European Union has a rich experience in combating discrimination in the workplace. Existing EU law forbids discrimination in employment on two grounds: gender and EU nationality.

In respect of **gender discrimination**, Article 141 EC requires “equal pay for male and female workers for equal work or work of equal value”. In addition, the 1976 “equal treatment direc-

tive” stipulates that in employment “there shall be no discrimination whatsoever on grounds of sex”.⁷ Following a decision of the Court of Justice in 1996, these rules extend to discrimination against transsexual persons.⁸

EU law also forbids discrimination against other **EU citizens**. Article 39 EC requires the “abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”

The practical benefit of these laws is that they allow individuals who believe that they have suffered unlawful discrimination to challenge such acts in the courts, with the possibility of individual compensation where the complaint is upheld. Moreover, as the Court of Justice has held both the provisions against gender and EU nationality discrimination to have **direct effect**,⁹ individuals can seek to enforce non-discrimination requirements against a national government where it has failed to incorporate these rules into national law, or has done so incorrectly. Therefore, EU anti-discrimination law is a powerful weapon for empowering individuals to challenge acts of discrimination and weaknesses in existing national legal provisions. The great opportunity created by Article 13 is the extension of such laws to a much wider range of discriminations, including sexual orientation.

For those groups not currently protected against discrimination in EU law, there must be essentially two goals in the employment field:

- achieving the same level of protection in law as already exists for discrimination on grounds of gender or EU nationality
- learning from the experience of gender discrimination law by ensuring that the legal framework is effective and accessible for individual victims of discrimination.

As noted earlier, the Commission’s current intention is for a horizontal directive on employment discrimination. This would forbid discrimination on all the grounds mentioned in Article 13 except for sex, which has already been prohibited in EU law. The ban would apply to access to employment, vocational training, working conditions, dismissals, pay, and membership of professional or trade union organisations.¹⁰

“Victimisation”, where an individual who brings a complaint, or participates in proceedings surrounding a complaint of discrimination, is subject to adverse treatment as a result, is to be forbidden. The Commission has also indicated its willingness to see the existing rules governing the “burden of proof” in sex discrimination cases extended to other forms of discrimination. These are set out in Directive 97/80/EC¹¹ and provide for a shift in the burden of proof to the employer, once facts are established from which it may be presumed that there has been direct or indirect discrimination.

When considering this proposal, it is crucial that the provisions are both precise and comprehensive to ensure problems are not encountered at the enforcement stage. Three issues in particular will need careful scrutiny in order to ensure sexual orientation discrimination is addressed effectively:

- harassment
- recognition of same-sex partnerships
- exceptions to the discrimination ban.

A. HARASSMENT

Not much statistical evidence exists on the experience of lesbians and gay men in employment. However, the few studies that have been undertaken tend to confirm that one of the most common forms of workplace discrimination is harassment.

In Sweden, a 1997 survey questionnaire answered by 650 lesbians, gay men and bisexuals revealed that 27% had suffered harassment at work. Significantly, the greatest problem was harassment by colleagues.¹²

In the UK, a 1993 survey with 1873 respondents recorded that 48% had experienced harassment in the workplace based on their sexual orientation.¹³

Given this context, it is encouraging that this is one area where the EU has already recognised the problems faced by gay men and lesbians. The Commission's 1991 Code of Practice on sexual harassment states:

“...lesbians and women from racial minorities are disproportionately at risk. Gay men and young men are also vulnerable to harassment. It is undeniable that harassment on grounds of sexual orientation undermines the dignity of those affected and it is impossible to regard such harassment as appropriate workplace behaviour.”¹⁴

However, the Code of Practice is not binding in law. So whilst it may be regarded as persuasive evidence that harassment of women is contrary to the equal treatment directive, it has been less effective in providing a legal remedy for instances of sexual orientation harassment.¹⁵

Nonetheless, the Code forms a good basis from which to argue in favour of an explicit ban on all types of harassment in any new anti-discrimination directive. Harassment is a phenomenon that occurs on many grounds. As can be seen from the above quote, the Code also recognises the

link between harassment and racial minorities. Indeed, if one considers the situation of, for example, a disabled lesbian, it may be difficult to ascertain whether her harassment is due to her gender, sexual orientation or disability. Similarly, the Code notes the special vulnerability of young men and gay men, revealing the potential overlaps between age and sexual orientation discrimination. A clear statement in a new anti-discrimination directive that harassment on any of the grounds listed in Article 13 constitutes unlawful discrimination would make a major contribution to ensuring the directive was more effective and more relevant to individuals' actual workplace situations.

B. RECOGNITION OF SAME-SEX PARTNERSHIPS

One of the main areas where lesbians and gay men face everyday discrimination is in relation to the non-recognition of their partners. Within the field of employment, this can mean substantial discrimination in terms of pay. For instance, the non-recognition of same-sex partners in relation to pension entitlements or health insurance schemes. In the case of *Grant v. South West Trains*,¹⁶ the discrimination occurred in the free travel concessions provided by the railway company for employees' partners. Married or unmarried couples were recognised, provided they were of the opposite sex. This was not just a symbolic insult to lesbian and gay couples, it also meant a loss of benefits estimated during the case to be worth around UK £ 1000 each year.

Attention to this issue is especially important following the precedent set in the 1998 reform of the EU's internal staff regulations. These provide that:

Officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation *without prejudice to the relevant provisions requiring a specific marital status*.¹⁷

This final clause in the article takes away most of the practical benefit to lesbians and gay men of the commitment to non-discrimination. Thus, whilst dismissal of an EU employee on grounds of her or his sexual orientation would be a breach of the staff regulations, it remains possible for the institutions to deny lesbians and gays equal treatment in respect of their partners. Furthermore, in January 1999, the EU Court of First Instance upheld the legality of the institutions' practice of not recognising non-marital partnerships, even where this concerned a gay partnership legally recognised as on the same footing as marriage in the national law of the Member State of origin.¹⁸ This decision has now been appealed to the Court of Justice.

This is likely to be a controversial issue in the drafting of an anti-discrimination directive. Only a minority of Member States provide full legal recognition for same-sex partnerships (Denmark, Sweden, the Netherlands). At the same time, a significant number of other states are consider-

ing increased legal recognition in national law. Therefore, focus must be maintained on ensuring this issue is effectively addressed in new legislation through an emphasis on the *trend* in national law and practice.

C. EXCEPTIONS TO THE DISCRIMINATION BAN

The final issue that needs to be considered is the question of exceptions to the ban on discrimination. Exceptions are a common feature of all anti-discrimination statutes. Often these are for the benefit of the potential victims of discrimination. For example, in the equal treatment directive, an exception is created to allow certain forms of positive action.¹⁹

In other instances, the exceptions relate to specific areas where the legislator feels it is neither appropriate nor necessary to impose a legal requirement of non-discrimination. In respect of sexual orientation, the prerogatives of religious employers have consistently proven controversial in the drafting of anti-discrimination laws. As a result, exceptions for such employers from non-discrimination requirements are found in existing legislation in Ireland, the Netherlands, Denmark and Sweden.

For example, in Ireland, section 37 of the 1998 Employment Equality Act permits:

discrimination by religious, educational and medical institutions, run for religious purposes, where they provide more favourable treatment to an employee or prospective employee which is reasonable in order to maintain the religious ethos of the institution or take action necessary to prevent an employee undermining that ethos.²⁰

Alternatively, in Denmark, section 6(1) of the 1996 law against discrimination in the labour market states that the provisions forbidding discrimination:

shall not apply to an employer whose enterprise has the express object of promoting a particular political or religious opinion, unless this is in conflict with European Union law.²¹

From the perspective of lesbian and gay rights groups (especially), such exceptions are often objectionable. There is a justifiable concern that they will, for example, allow discrimination against gay and lesbian teachers to continue in the very areas where protection is most needed.

However, none of the Member States mentioned above are likely to wish to see their national provisions overturned by EU law. Indeed, whilst the priority may be to avoid such an exception to the ban on discrimination, a pragmatic fall-back position should be to ensure that any such

exception is strictly limited. Whereas in Denmark, religious employers are completely exempt from the scope of the law, in Ireland and the Netherlands religious employers must still obey the law, but with the possibility of justifying discrimination on the grounds of upholding their ethos. This places the burden on the religious institution and at least allows for the possibility that more extreme instances of discrimination would not be acceptable to the courts.

The prospects of an EU directive forbidding discrimination in employment seem positive. Public commitments to supporting such legislation have been made by both the former Commission and the former European Parliament. Whilst it is too early to determine the outlook of their successors, it does not seem unreasonable to suppose the broad support for a horizontal directive on employment discrimination will continue. This being the case, gay and lesbian NGOs need to think more about the specifics of what they want from such a law – and how these demands may coincide with the objectives of other NGOs. Three key issues have been outlined, but naturally there are many others to consider; for instance, the creation of institutions, such as ombudspersons or equality agencies, to assist victims of discrimination to enforce their rights. Outside the employment field, there have been no firm commitments to action by the EU on sexual orientation discrimination. Yet, Article 13 creates a range of new possibilities, and it is to these that this chapter now turns.

2. DISCRIMINATION OUTSIDE EMPLOYMENT

With employment discrimination, it is clear that the EU enjoys the necessary legal powers to adopt binding legislation; the issue is more whether or not it chooses to exercise these powers, and if so, in what direction. In contrast, outside the field of employment, the powers of the EU become much more fragmentary. These can be separated into essentially three levels:

1. areas where the EU may adopt binding legislation forbidding discrimination throughout the Member States;
2. areas where the Union is constrained to taking non-binding measures – it may promote equal treatment, but it cannot compel the Member States to require it in national law;
3. areas outside the scope of the EU's authority.

Discrimination can occur in many diverse areas, but for the purposes of this section, the focus will be on four sectors: access to goods and services; education; healthcare and housing.

A. ACCESS TO GOODS AND SERVICES

A common area of discrimination law is the question of equal access to goods and services. For example, the right to hire municipal buildings for meetings, the right to enter a bar or access to a hotel. There is a relatively strong argument that these fall within the scope of the EU's powers under Article 13.

First, access to goods and services is very clearly within the remit of the Union where it involves receipt of goods or use of a service in a cross-border context. One of the fundamental principles underlying the construction of the Union has been the dismantling of barriers to the free movement of goods, services, capital and persons. Articles 49-55 EC allow for free movement to provide or receive services. "Services" are defined as being "normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons" (Article 50). It is important to clarify here that the requirement of remuneration for services under the EC Treaty excludes services of a non-economic nature,²² notably including services provided in the public sector, such as public healthcare and state education.²³ At the same time, it should be noted that in national anti-discrimination legislation it is often typical for healthcare and housing to be addressed under the aegis of access to services. It seems appropriate for the Commission to consider reproducing this scheme in EU anti-discrimination law.

To the extent that discrimination may interfere with the exercise of the right to provide or receive services, then this falls within the scope of the EC Treaty. An example of the impact of these provisions may be taken from the Court of Justice. In *Commission v. Greece*,²⁴ nationality restrictions on the right to be inscribed in the Greek shipping register were held to be unlawful nationality discrimination. This applied equally to non-economic shipping, as the Court held that EU migrant workers also required equal "access to leisure activities available in that State".

Moreover, even where there is no cross-border element, the EU has a competence in this area. Specifically, Article 153(1) EC sets the objective of ensuring a "high level of consumer protection". Article 153(2) states that "consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities". Protecting consumers against discrimination in their access to goods and services would seem to be entirely consistent with and supported by these various objectives.

Therefore, in various ways, access to goods and services already falls within the scope of the EC Treaty. This being the case, it does not seem difficult to imagine that Article 13 could form a suitable legal base for a directive that prohibited sexual orientation discrimination in this field.

This argument is further supported by the expressed intention of the Commission to include access to goods and services within the terms of its directive against racial discrimination. Were such a directive successfully adopted, it would naturally raise the question of why the other grounds mentioned in Article 13 did not enjoy similar legal protection.

B. EDUCATION

By way of contrast, the legal competence of the EU in the field of education is less emphatic.

Article 149(2) EC calls for action to, *inter alia*, encourage mobility of students and teachers, and to promote exchanges of information and experience on issues common to the education systems of the Member States.

However, with regard to the means at the disposal of the EU to meet these objectives, “enormous care is taken in spelling out the limits of the competence being conferred, and in making it clear that the Community’s role is purely ancillary”.²⁵ Indeed, Article 149(4) states that measures may be taken “excluding any harmonisation of the laws and regulations of the Member States”. It is difficult to determine exactly what impact this restriction has on the scope for non-discrimination measures. Interpreted narrowly, it could be taken as only prohibiting EU harmonisation of the basic structure of the educational system. It is worth recalling that nationality discrimination in education is already restricted under EU law,²⁶ although this jurisprudence cannot be directly applied to the situation of legislation pursuant to Article 13. Perhaps the most encouraging signal is the Commission’s decision to include education in the scope of its proposed directive on racial discrimination, demonstrating that at least for that institution, Article 149(4) is not a barrier to anti-discrimination measures.

Certainly, there is space for the adoption of promotional measures aiming to improve awareness of discrimination. For instance, a scheme to develop non-discriminatory teaching materials would be possible or an exchange of experience project looking at means of combating homophobic bullying in schools. In fields such as education, the commitment of the Commission to bring forward action programmes under Article 13 is especially important. An action programme on sexual orientation, or alternatively on discrimination in education could provide a framework for funding the kinds of projects suggested above. This could allow for future progress towards an EU directive against all forms of discrimination in education, including that based on sexual orientation.

C. HEALTHCARE

The situation in the field of healthcare is rather similar to that concerning education. Article 152 EC specifies the powers of the EU in the field of “public health”:

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

For the achievement of these objectives, Article 152(4) provides powers for the Council and Parliament to adopt “incentive measures designed to protect and improve human health, *excluding any harmonisation of the laws and regulations of the Member States*” [emphasis added]. Thus, as in the field of education, promotional projects on discrimination in health services seem most attainable, whilst binding legislation to forbid discrimination must be balanced against respect for a certain level of national discretion. It is perhaps significant that unlike education, healthcare has not been explicitly included in the Commission’s proposed directive on racism.

At the same time, stronger grounds for optimism may be found from within the experience so far in EU health policy. In the programmes against AIDS, the importance of non-discrimination has been repeatedly emphasised. For example, Decision 647/96/EC of the Parliament and of the Council established a framework for action against AIDS and certain other communicable diseases (1996-2000).²⁷ Annex D specifies the objective of ensuring that “persons suffering from HIV/AIDS receive assistance in line with their needs and are not discriminated against in any way”. Whilst such programmes cannot provide a legal remedy against such discrimination, they may form an important contribution to raising awareness of the issue at the national level. The most immediate impact of Article 13 may be to allow such programmes to be more specifically tailored to meeting the health needs of lesbians and gay men, and more generally a raising of awareness of the need to integrate concern for equal treatment into health initiatives.

D. HOUSING²⁸

If education and healthcare may be regarded as areas where the EU enjoys an intermediary level of competence, housing is an example of a field where the Union’s powers are quite limited. Indeed, access to housing is not mentioned explicitly anywhere in the EC Treaty. The closest ref-

erence is that in Article 136, where the EU is set the objective of “improved *living* and working conditions” [emphasis added]. This is supplemented by the reference in Article 137(2) to combating “social exclusion”; poor housing or homelessness being connected to the fight against exclusion. Nonetheless, Article 137(2) only foresees the adoption of measures concerned with exchange of experience and best practice rather than binding legislative instruments.

The weakness of the EU's powers in this field is reflected in the absence of housing from within the Commission proposals for anti-discrimination directives. For its part, the Parliament has called on the Commission to propose a “Code of conduct on non-discrimination in the housing market”;²⁹ but whether such a measure could be justified under the existing terms of the EC Treaty remains open to question. The proposal reminds us though of the potential utility of non-binding legislative instruments, such as a Code of Practice. In particular, this could be a useful strategy to experiment with in the fields of healthcare and education.

EU ANTI-DISCRIMINATION LAW AND SEXUAL ORIENTATION – A SUMMARY

This chapter has focused on the ability of the European Union to enact new measures to forbid discrimination across a range of areas. As has been demonstrated, the EU enjoys different powers in different fields. In the field of employment, the competence of the Union is well established and the debate concerns not whether, but how the EU will prohibit workplace discrimination. In other areas, the EU shares responsibility with the national governments. Therefore, in some cases it may choose to adopt binding legislation, whilst in others it may decide to leave more discretion to the Member States. A comprehensive body of anti-discrimination law at the EU level will doubtless take time, and non-binding instruments, such as codes of practice or recommendations, can be seen as stepping stones to the establishment of binding norms. Alongside legislative initiatives, it is important not to diminish the contribution the Union can make through action plans. Exchange of experience programmes and the like can provide a vital means for allowing the “cross-fertilisation” of national laws, hopefully resulting in an overall improvement in the level of protection against discrimination. The great benefit conferred by Article 13 is that it clarifies the inherent duty on the European Union to work towards the elimination of discrimination, and provides a flexible foundation to support a wide range of different measures to meet this objective.

Above all, even in areas where the primary responsibility lies with the Member States, there is a need to increase awareness of sexual orientation, and equal opportunities in general, in the policy-making process as a whole. By incorporating concern for equal treatment at the earliest

stage in policy formulation, unintended discrimination may be avoided, and a sensitivity to the needs of diverse communities can be created. Article 13 naturally encourages an increased priority for equality issues, and importantly includes sexual orientation as one of the aspects to be considered in this respect.

Mark Bell

is a lecturer in the department of law at the University of Leicester, England. Previous publications have included research on EU anti-discrimination law and EU immigration and asylum law.

- 1 Commission, DG V (1999): "Discussion paper on the possible contents of the two legislative proposals to implement Article 13".
- 2 Flynn, P. (1999): "Vienna – a new start for the fight against discrimination" in *Europaforum Wien: Article 13 – anti-discrimination: the way forward*, Vienna: Europaforum Wien, p. 62.
- 3 Para. 17, Resolution on the communication from the Commission "An action plan against racism" (COM (1998) 183), OJ [1999] C 98/491, adopted 18.12.98.
- 4 European Parliament (1998): Report for the Committee on Civil Liberties and Internal Affairs on the communication from the Commission "An action plan against racism" [Oostlander], EP Doc. A4-478/98, 3.12.98, para. 4.2.
- 5 European Parliament, Committee on Employment and Social Affairs (1999): "Working document: A Framework for Action on Non-Discrimination at EU Level Based on Article 13 of the Amsterdam Treaty", 25 March 1999, PE 229.570/fin.
- 6 Up-to-date information on the progress of the Bill is available at: <<http://www.irlgov.ie>>.
- 7 Article 2(1), Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; 76/207/EEC, 9.2.76 (OJ [1976] L 39).
- 8 C-13/94, *P. v. S. and Cornwall County Council* [1996] ECR I-2143.
- 9 For instance, C-167/73, *Commission v. France* [1974] ECR 359; C-43/75, *Defrenne v. SABENA* [1976] ECR 455; C-152/84, *Marshall v. Southampton and South West Hampshire Health Authority* [1986] ECR 723.
- 10 See DG V discussion paper, above note 1.
- 11 Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ [1998] L 14/6.
- 12 Skolander, B. (1998): "Sweden" in ILGA-Europe: "Equality for Lesbians and Gay Men: A relevant issue in the civil and social dialogue", Brussels: ILGA-Europe, p. 87.
- 13 Palmer, A. (1993): "Less equal than others – a survey of lesbians and gay men at work", London: Stonewall, p. 10.

- ¹⁴ Introduction, Para. 5, Commission Recommendation on the dignity of women and men at work, adopted 27 November 1991, OJ [1992] L 49/1.
- ¹⁵ This has been the subject of litigation in the UK: *Smith v. Gardner Merchant Ltd.* [1996] IRLR 342 HC, [1998] 3 All ER 852 CA.
- ¹⁶ C-249/96, [1998] ECR I-621.
- ¹⁷ Article 1a, Council Regulation (EC, ECSC, Euratom) No. 781/98 of 7 April 1998 amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities in respect of equal treatment, OJ [1998] L 113/4, 15.4.98. Emphasis added.
- ¹⁸ T-264/97, *D. v. Council*, judgment of the Court of First Instance, 28 January 1999. Appeal reference: C-122/99P.
- ¹⁹ Article 2(4) states “this directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities (...)”.
- ²⁰ Rose, K. (1998): “Ireland” in ILGA-Europe, above note 12, p. 61.
- ²¹ Lov om forbud mod forskelsbehandling på arbejdsmarkedet m. v.; Law no. 459 of 12 June 1996, *Lovtidende*, pp. 2526-2527. Many thanks to Kim Jensen of the Danish national association for gays and lesbians (LBL) for supplying me with an English translation of the law.
- ²² For example, the provision by a student’s association of free advice on abortion clinics; C-159/90, *Society for the protection of the unborn child v. Grogan* [1991] ECR I-4685.
- ²³ See further Craig, P. and de Búrca, G. (1999): “The evolution of EU law”, Oxford: OUP, pp. 769-770.
- ²⁴ C-62/96, [1997] ECR I-6725.
- ²⁵ Dashwood, A. (1996): “The limits of European Community powers”, *European Law Review*, Vol. 21, pp. 113-128, 122. Particular thanks to Gisella Gori for assistance on this point.
- ²⁶ C-293/83, *Gravier v. City of Liège* [1985] ECR 593; C-152/82, *Forcheri v. Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées – École Ouvrière Supérieure* [1983] ECR 2323.
- ²⁷ OJ [1996] L 95/16, adopted 29 March 1996.
- ²⁸ For a more lengthy discussion of the EU’s competence in this area, see Bell, M. (1999): “The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?”, *Maastricht Journal of European and Comparative Law*, Vol. 6 (1), pp. 5-28.
- ²⁹ Para. 25, above note 3.

Chapter 4:

Towards equality in the freedom of movement of persons

by Kees Waaldijk

INTRODUCTION

Without any doubt, migration – or the freedom of movement of persons – is an area in which the Union has competence to enact binding legislation (Articles 3 and 14 EC). This is not only true for “workers from the Member States” (Articles 39 and 40 EC) but also for any other “citizen of the Union” (Articles 17, 18, and 43 EC) and for “nationals of third countries” (Articles 61, 62, and 63 EC). Therefore, migration is a field in which any measure combating sexual orientation discrimination would clearly fall within the scope of Article 13.

Just as free movement of persons belongs to the core business of the EU, restrictions on free movement of persons belong to the hard core of sexual orientation discrimination. Almost all Member States have immigration rules in force that treat same-sex partners less favourably than (married) different-sex partners. Often, these rules do not recognise same-sex partners at all.¹ Similarly, many national immigration rules contain various forms of discrimination on grounds of sex, national origin, health condition or age. Therefore, migration is also a field in which anti-discrimination measures, as provided for in Article 13, are much needed.

However, a binding legislative measure, based on Article 13, prohibiting discrimination on the grounds of sexual orientation (etc.) by the Member States in the area of migration would only solve part of the problem. It is not just the Member States that discriminate against gays and lesbians in their immigration rules, but also the Union itself. In one of the most important regulations, Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, certain immigration rights are made the exclusive privilege of heterosexual spouses. And this exclusion of same-sex (and other unmarried) partners has been copied since 1968 in various other EC rules on free movement.²

Therefore, Article 13 should not only be seen as an additional legal basis for prohibiting discrimination by Member States in this field but also as a persuasive invitation to abolish or amend discriminatory rules in EC law itself. The latter would normally be done through EC legislation, but it can partly also be done by way of judicial interpretation of the relevant regulations and directives. Article 13 should also be seen as a guiding principle for the drafting of measures on immigration policy required by the new Article 63 EC (see below).

Anti-homosexual discrimination in the field of migration takes several forms. In the context of rules on the immigration of foreign partners there are at least four possible categories – more (or easier) immigration rights may be given:

1. **to married (opposite-sex) spouses than to unmarried partners** – this is true for the EC rules and for most national rules; it amounts to indirect sexual orientation discrimination because same-sex partners cannot marry each other, as yet;
2. **to married opposite-sex spouses than to registered same-sex partners** – this will be the case in jurisdictions that do not recognise foreign partnership registrations; such discrimination could be called direct sexual orientation discrimination because the main difference between marriage and registered partnership is that the latter is open to same-sex couples;
3. **to married opposite-sex spouses than to married same-sex spouses** – this form of direct sexual orientation discrimination will only arise after at least one jurisdiction in the world has opened up the institution of marriage for same-sex couples;
4. **to unmarried opposite-sex partners than to unmarried same-sex partners** – this form of direct sexual orientation discrimination, common in the areas of employment and housing, seems rare in the field of immigration.³

To outlaw discriminations of type 1, through litigation or legislation, will probably be rather more difficult, and rather more revolutionary, than to outlaw those of types 2, 3 or 4. Outlawing discrimination of the latter three types would only benefit small groups of people and cause only limited change in some national or European immigration rules. However, such limited change might pave the way for eventually establishing full equality between married heterosexual spouses and unmarried homosexual partners.

There are, however, many other obstacles to the free movement of lesbians and gay men in the European Union; for example, more repressive criminal laws on homosexual acts, a lesser degree of legal recognition of same-sex partners in family and social security law, the non-availability of health insurance and pensions for same-sex partners. All such impediments may

severely limit the possibility and desirability for gays and lesbians to move to another country. Some of these obstacles may be directly challenged under the above-mentioned free movement provisions of the EC Treaty. This complex issue and the scope for using Article 13 to strengthen such challenges, however, will not be discussed here.

The rest of this chapter examines the two main categories covered by European immigration law: European Union citizens on the one hand, and third-country nationals on the other. As regards EU citizens, attention will be focused on the main subcategory: workers from one Member State who are employed in another Member State. Since similar rules apply to other categories of EU citizens moving within the EU (e. g., students, pensioners), the latter will not be discussed separately.

1. EU CITIZENS: WORKERS

A. THE LEGAL SITUATION OF SAME-SEX PARTNERS

The immigration rights of married partners of EU citizen who are exercising their EU freedom of movement are completely governed by EC law. These citizens have the right to be accompanied by their married partner. For workers this is because of Article 10 of Council Regulation 1612/68 on freedom of movement for workers within the Community⁴:

Article 10

1. **The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:**
 - (a) his spouse and their descendants who are under the age of 21 years or are dependants;
 - (b) dependent relatives in the ascending line of the worker and his spouse.
2. **Member States shall facilitate the admission of any member of the family not falling within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.**
3. **For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States.**

In the *Reed* case, the Court of Justice has held that the term “spouse” in Regulation 1612/68 “refers to a marital relationship *only*”.⁵ It would, therefore, appear that this regulation is of no use to a worker with a same-sex partner. In many cases, the easiest solution would be for them to rely *individually* on the freedom of movement. Then each of them would have an independent right to residence, for example as a worker, self-employed person, student or pensioner. However, sometimes this will not be possible for both, because of a lack of work, skills, means and/or age, or because the partner is not an EU citizen. So the question remains: Could a same-sex partner somehow be considered to be “his spouse” for the purposes of Regulation 1612/68?⁶

If the *Reed* judgment still stands, the only solution for same-sex partners would be to get married. This might soon be possible, if for example the Supreme Court of either Hawaii or Vermont ruled that same-sex marriage is possible. Moreover, the Dutch Parliament is likely to pass a bill to open up marriage for same-sex couples before the end of the year 2000.⁷ The Court of Justice could of course ignore North American developments and restrict the meaning of the word “spouse” to its traditional heterosexual notion. But for the Court to ignore a same-sex marriage validly contracted in the Netherlands would be highly problematic, because family law is still clearly the domain of the Member States. Therefore, we need to assume that the Court will respect the validity of such a marriage. The same-sex spouse would then be a “spouse” for the purposes of Regulation 1612/68, and there would be no discrimination of type 3 (see above). Such an outcome could be promoted by the inclusion of a non-discrimination clause in the regulation.

However, such a broadening of the notion of “spouse” would not be enough. At the very least, registered partners should also be brought under this term – in order to end discrimination of type 2. *Registered Partnership*, with most consequences of marriage attached to it, has been introduced in Denmark, Sweden, the Netherlands and, outside the EU, in Norway, Iceland, and Greenland. Similar legislation is being prepared in France, Belgium, Finland, Spain, Germany, Luxembourg, Portugal and, outside the EU, in the Czech Republic, Switzerland and Slovenia. This development in so many countries cannot be ignored at EU level. The great legal similarities between marriage and registered partnership would make it very easy for the Court of Justice to include registered partners in the term “spouse”.⁸ The judgment of the Court expected in the case of *D. and Sweden v. Council*⁹ will shed some light on the willingness of the Court to take that step. There is no need to wait for an immigration test case about the issue: Article 13 provides a powerful argument to amend Regulation 1612/68 so as to put registered partners in exactly the same position as married heterosexual partners.

At present unmarried (and unregistered) partners fall outside the notion of “spouse”. That was the central outcome of the *Reed* case. However, that case was about opposite-sex cohabitantes and not about same-sex cohabitantes who do not have the option of getting married. Furthermore,

it was decided in 1986, since when a lot has changed, both socially and in law.¹⁰ In its *Reed* judgment the Court of Justice itself said: “Regulation No 1612/68 has general application, is binding in its entirety and is directly applicable in all Member States. It follows that an interpretation given by the Court to a provision of that regulation has effects in all of the Member States, and that any interpretation of a legal term on the basis of social developments must take into account the situation in the whole community, not merely in one Member State.” The Court then concluded that there was no indication “of a general social development which would justify a broad construction”.¹¹ Given the subsequent legal developments in most of the Member States, these words can now be read with some hope. However, in the light of its judgment in the *Grant* case (see Chapter 2), it is far from certain that the Court could be persuaded to overturn *Reed*. A legislative amendment to Regulation 1612/68 seems the more secure road to end discrimination of types 1 and 4.

A starting point for the inclusion of cohabitants in Regulation 1612/68 can be found in Article 10(2) which provides that Member States shall “facilitate the admission of any member of the family not falling within the provisions of paragraph 1 if dependent on the worker (...) or living under his roof in the country whence he comes”. The difficulty is in two f-words in this provision. The use of the word “facilitate” indicates that such family members do not have a genuine right to immigration; there is only a vague duty for the Member States to facilitate family reunion. And the use of the word “family” makes it doubtful whether the provision covers cohabitants, especially same-sex cohabitants. It has been argued that same-sex partners should indeed be counted as “member of the family”.¹² This would be in line with the gradually widening interpretation the European Court of Human Rights is giving to the notion of “family life” in Article 8 of the European Convention on Human Rights.¹³ It is also evident from the wording of Article 10(1) that Article 10(2) deals with “family” outside the already broad circle of spouses, parents, children, grandparents and grandchildren. It would therefore be in line with the principle of Article 13 EC to interpret this provision as at least also covering cohabiting partners of either sex. Here too, a legislative amendment to that effect would be the safest road to equality. Simultaneously, the duty to facilitate should be converted into a real right. The additional conditions of being “dependent” on the worker or of living under the same roof seem more than sufficient to stop any improper use of such a right.

B. PROPOSED CHANGES TO THE LAW

The Commission has accepted that Regulation 1612/68, including its provisions on family members, needs to be amended. It submitted a proposal to this effect to the Council on 14 October 1998.¹⁴ The proposal, based on Articles 40 and 251 EC, would only require a qualified majority in the Council.

The new text proposed for the first paragraph of Article 10 is as follows:

- 1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:**
 - (a) his spouse or any person corresponding to a spouse under the legislation of the host Member State, and their descendants;**
 - (b) relatives in the ascending line of the worker and his spouse;**
 - (c) any other member of the family of the worker or that of his spouse who is dependent on the worker or is living under his roof in the Member State whence he comes.**

The Commission also proposed that a new Article 1a be included in Regulation 1612/68:

Article 1a

Within the scope of this Regulation, all discrimination on grounds of sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation shall be prohibited.

With these proposed amendments some steps would indeed be taken on the road to fuller equality for same-sex partners of EU workers. Although the proposal is not directly based on Article 13, the Commission apparently also sees it as a contribution to the implementation of that article. However, the proposal is too vague to guarantee an end to *all* discrimination on the ground of sexual orientation.

As regards discrimination of type 4, the proposed anti-discrimination provision in Article 1a should be sufficient to stop any Member State from giving lesser immigration rights to unmarried same-sex partners than to unmarried opposite-sex partners. It follows from the *Grant* judgment that the Court of Justice labels such a distinction as discrimination on the grounds of sexual orientation. The proposed Article 1a would make it clear that Member States are forbidden to make such a distinction relating to the free movement of workers and their partners.

It would probably also be sufficient to deal with discrimination of type 3, between married same-sex spouses and opposite-sex spouses.

However, with regard to discrimination of type 2, between registered partners and married spouses, the proposal is not specific enough. The words “any person corresponding to a spouse under the legislation of the host Member State” suggest that registered partners from one Member State only need to be given the same immigration rights as married spouses in another.

er Member State with registered partnership legislation. That would of course limit the free movement of registered partners of EU workers to a still small number of Member States. This can be solved by adding the words “or of the Member State whence he comes” or by deleting the words “under the legislation of the host Member State”. A first effort to amend the proposal to that effect was narrowly defeated in the Parliament on 4 May 1999.¹⁵

Also with regard to discrimination of type 1, between unmarried cohabittees and married spouses, the proposal is not specific enough. It continues using the word “family”, which the national authorities might continue to interpret as excluding unmarried partners (of the same-sex). It is not certain that the Court would be prepared to interpret the word “family” in line with the anti-discrimination provision in the proposed new Article 1a. Therefore a clause should be added, providing that the expression “member of the family” in Article 10(1)(c) also covers the cohabiting partner of either sex.

The good thing about the proposed text is, of course, that it gives a genuine right to other family members – and not just an obligation for the Member States to “facilitate”. However, the Parliament has considerably watered down this proposal by approving on 4 May 1999 an amendment taking out the words “or is living under his roof in the Member State whence he comes”.¹⁶

2. THIRD-COUNTRY NATIONALS

No legal binding EC rules exist, as yet, to regulate the immigration of foreign partners of non-EU citizens. The new Article 63(3), however, provides that within five years of the entry into force of the Amsterdam Treaty, EC rules must be adopted with regard to several aspects of immigration law, including family reunion. Thus, immigration policy has been transferred from the so-called third pillar of the EU to the first pillar, the EC. Now both the Parliament and the Court of Justice will have a role to play in this field.

The drafting of such rules is likely to be inspired by the non-binding resolution on the “Harmonisation of national policies for family reunification”, adopted by the immigration ministers of the Member States on 1 June 1993¹⁷, and by the proposal of the Commission for a “Convention on rules for the admission of third-country nationals to the Member States of the European Union”, submitted to the Council on 30 July 1997.¹⁸

The 1993 resolution contains seventeen “Principles governing Member States’ Policies on Family Reunification”. These principles are not legally binding, but the ministers “agreed to seek to ensure by 1 January 1995 that their national legislation is in conformity with these principles” (paragraph 5 of the preamble). The principles only apply to “family members of non-EC nationals who are lawfully resident within the territory of a Member State on a basis which affords them an expectation of permanent or long-term residence” (principle 1). According to principle 2, the Member States will “normally grant admission” to “the resident’s spouse (that is, a person bound to him or her in a marriage recognized by the host Member State)” and to their children. As far as other “family members” are concerned, the Member States only “reserve the possibility” of permitting their entry and stay “for compelling reasons which justify the presence of the person concerned” (principle 10).

The 1997 Commission proposal for a convention is even more explicit in its exclusion of unmarried partners. According to Article 26(1) the “spouse” of a legally resident third-country national will only be admitted if “the marriage is compatible with the fundamental principles of the law of the Member State”. And of other family members, only dependent descendants and ascendants will be considered for family reunification (Article 26(3)).

Evidently, the non-discrimination principle of Article 13 has so far been absent in the drafting of EU texts on family reunification. Article 13 may now have an important role to play in guaranteeing that the EC immigration rules to be adopted on the basis of Article 63 EC will recognise the full equality of married, registered, unmarried, opposite-sex and same-sex partners of third-country nationals. Simultaneously, Article 12 EC, prohibiting discrimination on the basis of nationality, may help to guarantee that there will be no discrimination between EU citizens and third-country nationals as regards their family reunification rights.¹⁹

A different but related issue is the recognition of refugees. Article 63(1) EC also requires the adoption, within five years after 1 May 1999, of EC rules with “minimum standards with respect to the qualification of nationals of third countries as refugees”. On 10 February 1999, the Parliament passed a “Resolution on the harmonisation of forms of protection complementing refugee status in the European Union” (A4-0450/98). In paragraph 14 the Parliament “proposes that complementary protection should apply (...) to persons who have fled their country of origin, and/or cannot return because they have justified fears of being (...) subjected to (...) violence on account of their sexual orientation (...)”. Although it may be difficult to classify the non-admission of a person with a well-founded fear of being persecuted for reasons of homosexuality as *direct* discrimination on the basis of sexual orientation, Article 13 can be used as a powerful argument that such a person should indeed qualify as a refugee.²⁰

In conclusion it is submitted that Article 13 should serve both as a legal basis and as a political impetus to broaden and strengthen one of the core elements of EC law: the free movement of

persons. It should guarantee this freedom equally to EU citizens and third-country nationals, whatever their civil status or sexual orientation, and to their partners, whatever their nationality or sex.

Dr. Kees Waaldijk

LL.M. works as a lecturer and research fellow at the Faculty of Law of the University of Leiden, the Netherlands. He teaches legal methods and specialises in issues of law and homosexuality. He is a member of the Dutch Council for Family Affairs and served on the Dutch Government's commission of legal experts advising on the opening up of marriage to same-sex partners.

- 1 See K. Waaldijk: "The Legal Situation in the Member States", in K. Waaldijk and A. Clapham (eds.): *Homosexuality: A European Community Issue*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1993, pp. 71-130; see also the regularly updated World Legal Survey of ILGA at <http://www.ilga.org>.
- 2 See directives 73/148, 75/34, 90/364, 90/365, 90/366, 93/96.
- 3 However, it applied in the United Kingdom from 1985 until 1994.
- 4 Official Journal [1968] L 257/2.
- 5 C-59/85, *Netherlands v. Ann Florence Reed* [1986] ECR 1283, para. 15, emphasis added.
- 6 Unfortunately, the use of male pronouns to indicate both men and women is excessively common in EC rules.
- 7 Bill 26672, introduced in Parliament on 8 July 1999; see translation and summary of it in *Euro-Letter* of August 1999 and updates on this draft legislation at www.coc.nl/index.html?file=marriage.
- 8 K. Waaldijk: "Free Movement of Same-Sex Partners", *Maastricht Journal of European and Comparative Law*, 3/1996, pp. 271-285; and K. Waaldijk: "La libre circulation des partenaires de même sexe", in D. Borrillo (ed.): *Homosexualités et Droit*, Paris: Presses Universitaires de France 1998, pp. 210-230.
- 9 D. is employed by the Council and claims spousal benefits for his registered partner. In this case the Court of First Instance, in its judgment of 28 January 1999 (T-264/97) refused, in my opinion erroneously, to respect Swedish family law in the field of EU staff law.

- ¹⁰ Since then, it has been repeatedly suggested that unmarried/unregistered cohabitants should also be brought under the term “spouse”, see further: H. C. Taschner: “Free movement of students, retired persons and other European citizens”, in H. G. Schermers et al. (eds.): *Free Movement of Persons in Europe*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1993, pp. 427-436; H. U. Jessurun d’Oliveira: “Lesbians and Gays and the Freedom of Movement of Persons”, in K. Waaldijk and A. Clapham, above note 1, pp. 289-316.
- ¹¹ Paragraphs 12, 13 and 15 of the judgment of 17 April 1986.
- ¹² See further:
M. Supperstone and D. O’Dempsey: “Immigration: The Law and Practice”, London: Longman 1994;
A. Clapham and J. H. H. Weiler: “Lesbians and Gay Men in the European Community Legal Order”, in K. Waaldijk and A. Clapham, above note 1, pp. 7-69;
N. Blake: “Family Life in Community Law: The Limits of Freedom and Dignity”, in E. Guild (ed.): *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union*, The Hague/Boston/London: Kluwer Law International 1999, pp. 7-17.
- ¹³ See for example the ECHR judgment of 22 April 1997 in the case *X, Y and Z v. the United Kingdom*.
- ¹⁴ COM(1998) 394 final – 98/0229(COD), adopted by the Commission on 22 July 1998; Official Journal [1998] C 344/9.
- ¹⁵ Amendment 6 to the *Hermange Report* of the European Parliament: A4-0252/99.
- ¹⁶ Amendment 7 to the *Hermange Report* of the European Parliament: A4-0252/99.
- ¹⁷ SN 2828/1/93 WGI 1497 REV 1; for the full text and a commentary see: E. Guild: “The Developing Immigration and Asylum Policies of the European Union”, The Hague/Boston/London: Kluwer Law International 1996.
- ¹⁸ COM(97) 387 final – 97/0227 (CNS), Official Journal [1997] C 337/9; for a commentary see: S. Peers: “Raising Minimum Standards, or Racing for the Bottom? The Commission’s Proposed Migration Convention”, in E. Guild, above note 12, pp. 149-166.
- ¹⁹ See M. Bell: “The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?”, *Maastricht Journal of European and Comparative Law*, 1/1999, pp. 5-28.
- ²⁰ See A. Tanca: “European Citizenship and the Rights of Lesbians and Gay Men” in K. Waaldijk and A. Clapham, above note 1, pp. 267-288.

Chapter 5:

Lobbying the European Union in practice: Public access to documents

by Madeleine de Leeuw

As the EU begins to implement its new powers under Article 13, it will naturally be important for lesbian and gay rights groups to monitor developments in the policy-making and legislative process. One of the lessons of the 1996/7 IGC was that effective lobbying depends upon an awareness of how the debate is progressing within the EU institutions, which in turn demands access to information on the current state of policy proposals. This chapter provides a practical introduction on how to gain access to documents within the European Union.

TRANSPARENCY AND OPENNESS IN THE DECISION-MAKING PROCESS

From being virtually a non-topic, transparency and openness in the decision-making process have become major issues in the Union since 1992. The public debate surrounding ratification of the Maastricht Treaty, the Danish “No” and the French small majority vote in the referenda on the Treaty, made it clear that the citizens felt alienated from the Union and its decision-making processes, and that they had lost confidence in it.

The Member States have become aware of the fact that if they want to press ahead with the integration process they need the consent of the citizens. Therefore, the Union has to be brought closer to its citizens. One way of achieving this is by increasing transparency and openness. This will not only make the institutions more democratic, but also the Union’s legitimacy in the eyes of the ordinary citizen will be enhanced.

Since 1992, the institutions have taken measures to open up the Union, one of the most important being the adoption in 1993 of a Code of Conduct on public access to Commission and Council documents.¹ Another regards the modification of the Council's rules of procedure to provide for open debates in specified circumstances and for exceptions to the "principle of confidentiality" of its deliberations. The accession in 1995 of the two Nordic Member States, which have traditionally an open system of government, and the appointment of the European Ombudsman have partly contributed to the continuation of the trend towards more transparency and openness.

These issues were also major topics in the preparation to the Intergovernmental Conference of 1996. The recognition of the importance of these issues for the Union is shown by the constitutionalisation of the principle of openness in the Treaty of Amsterdam. According to the amended Article 1 EU decisions must be taken as openly as possible and as closely as possible to the citizen. "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State" have further been granted, for the first time, the right of access to documents of the European Parliament, Council and Commission (Article 255 EC). The general principles and limits to this right have to be determined by the Council and the Parliament (under the co-decision procedure) by 1 May 2001. The Commission is currently preparing its legislative proposal in this respect. Until the adoption and coming into force of the new legislation, the Code of Conduct on public access to documents shall apply.

THE CODE OF CONDUCT

The Code of Conduct concerning public access to Commission and Council documents is a non-binding, inter-institutional agreement, which lays down the rules for processing applications for access and the grounds for refusing access. It has been implemented by the institutions in separate Decisions. Requests for access have to be made under the respective Decisions.²

The Code lays down the general principle that the public will have the widest possible access to documents held by the Commission and the Council. However, this applies only to documents "drawn up" by the two institutions as Paragraph 3 of the Code stipulates that "where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or any other national or international body, the application must be sent direct to the author." Documents drawn up by the Commission (internal documents) include for example, preparatory documents, such as draft proposals for legislation, interim reports, and explanatory documents, such as memoranda or studies.³ Documents circulating in the Council are for example, notes drafted by the Secretariat-General, notes/papers of the Presidency and summary records.

Under the Code, any person may apply (in writing) for access without having to state their interests in making the request. Replies to such requests have to be made within one month.⁴ If access is granted, the applicant may have access to the document either by consulting it on the spot or by having a copy sent. The system of charging for copies of documents is optional for the Commission and fixed for the Council. The fee for the latter amounts to 10 Euros plus 0,036 per sheet if the consignment exceeds 30 pages.⁵

If an application is rejected, the applicant is informed of the grounds of refusal, and has one month to make a so-called “confirmatory application” to have the decision reviewed. In the Commission, initial requests for access are examined by the appropriate Directorate-General or department whereas confirmatory applications are examined by a Unit in the Secretariat-General. Requests for access to Council documents are dealt with by Directorate-General F of the Council’s Secretariat.⁶

If the confirmatory application is rejected, the applicant may lodge within one month a complaint to the Ombudsman or start judicial proceedings before the Court of Justice under the conditions specified in Articles 195 and 230 EC. The route to the Ombudsman has the advantage that it is simple and free of costs.

The Code sets out two categories of exceptions to the principle of “widest possible access”. The first determines that the institutions will refuse access to any document where disclosure could undermine:

- (a) the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations);
- (b) the protection of the individual and of privacy;
- (c) the protection of commercial and industrial secrecy;
- (d) the protection of the Community’s financial interests;
- (e) the protection of confidentiality as requested by the natural or legal person that supplied the information or as required by the legislation of the Member State that supplied the information.

As this category is drafted in obligatory terms, the institutions must refuse access to documents where certain circumstances exist.⁷

Under the second category the institutions *may* refuse access “in order to protect the institution’s interest in the confidentiality of its proceedings.” This leaves it to the institution’s discretion as to whether or not to refuse a request for access to documents relating to its proceedings. In the *Carvel* case⁸ the Court observed that the institutions must nevertheless, when exercising their discretion, balance the interests of the citizens in gaining access to its documents against any interest of their own in maintaining the confidentiality of its proceedings. In the *Carvel* case

the Council had automatically refused access to the minutes and supporting documents of various Council meetings simply on the grounds that these documents referred to its deliberations. The Court subsequently annulled this automatic refusal, as the Council had not complied with the obligation of balancing the interests involved.

COMMITTEES SURROUNDING THE COMMISSION

There are two types of committees that surround the Commission: those created by the Commission itself and those created by the Council.

The first category includes the many consultative and expert groups that assist the Commission in its discussions and in the formulation of policy initiatives. For the purpose of the rules on access to documents, the Commission considers these committees as part of the Commission. The documents of these committees therefore constitute Commission documents and are covered by the Code of Conduct and the Commission Decision on access.

The second category, the so-called comitology committees control and assist the Commission in implementing Council decisions. Until recently, requests for access to the documents of these committees (i. e. minutes and the internal regulation of committees) had to be made to the committee itself, on the grounds that these are not Commission, but committee documents. This has now changed through the new Decision which lays down the procedures for the exercise of implementing powers conferred on the Commission (“comitology Decision”)⁹ and determines that these documents are covered by the Code of Conduct and the Commission Decision on access. Moreover, under this Decision, the Commission is required to publish a list of comitology committees in the *Official Journal* and to set up a public register containing the references of all documents sent to the Parliament relating to committee proceedings.

THE COUNCIL'S PUBLIC REGISTER

Since 1999 the Council keeps a register of documents, which enables the public to identify the documents they want. The register contains the title, reference number, a reference to the originator and the addressee of non-classified documents, the date on which it was produced and archived and, where appropriate, the date of the meeting to which the document pertains. The text will, however, not be displayed as access to the documents listed is not automatic, but remains to be decided under the Council Decision on access. The register includes only references of documents drawn up since January 1999 onwards.

OTHER INSTITUTIONS AND BODIES

Following an own-initiative inquiry of the European Ombudsman, most of the other institutions and bodies have adopted rules on public access to documents similar to those of the Commission and the Council. Requests for access to documents have to be made directly to those institutions and bodies.¹⁰

SOME USEFUL ADDRESSES:

THE COUNCIL

Applications for access to internal Council documents should be submitted in writing in one of the official languages of the Union to:

The General Secretariat of the Council of the European Union
 Rue de la Loi 175
 B-1048 Brussels
 Phone: (32-2) 285.61.11
 Fax: (32-2) 285.73.97 and 285.73.81.

The register of the Council can be found on the following Internet web-site:
<http://register.consilium.eu.int>.

Guidelines on how to submit a request for access to Council documents and the Council Decision 93/731/EC on public access to Council documents can be found on the Internet:

- Go to the homepage of the Council, <http://ue.eu.int/index.htm>, click on the heading “public register”, then click on the heading “how to submit a request for access to Council documents”.

The Council has also published the “Information handbook of the Council of the European Union” concerning public access to its documents, which can be obtained from the:

Office for Official Publications of the European Communities (OOPEC)
 2 rue Mercier
 L-2985 Luxembourg
 Phone: (352) 29.29-1
 Fax: (352) 49.57.19.

This handbook provides practical information on existing sources of information and on the implementation of measures adopted with regard to openness and transparency (including public access to Council documents). It also contains many useful addresses of, for example, the Agencies, the Court of Justice, the Ombudsman, etc.

Questions about access to documents can be asked to:

Ms I. Van Rooyen (General-Secretariat): phone (32-2) 285.63.32, fax (32-2) 285.63.61, or by sending an e-mail to: public.relations@consilium.eu.int.

THE COMMISSION

Applications for internal Commission documents should be submitted in writing in one of the official languages of the Union to:

The European Commission
Rue de la Loi 200
B-1049 Brussels
Phone: (32-2) 299.11.11
Fax: (32-2) 295.01.38

The European Commission
Bâtiment Jean Monnet
Rue Alcide de Gasperi
L- 2920 Luxembourg
Phone: (352) 43.01-1
Fax: (352) 43.61.24

Requests for access to Commission documents (or for any publication published by the OOPEC) may also be made to the Commission Representation in Member States or the Commission Delegation in non-member countries (the “Citizen’s Guide on public access to Commission documents”, see below, gives the addresses).

The Commission has published the “Citizen’s Guide on public access to Commission documents” in which it is explained how to submit a request. It contains the Code of Conduct on public access to Commission and Council documents and the Commission Decision (94/90/ECSC, EC, Euratom) on public access to its documents. The booklet can be obtained from the Office for Official Publications of the European Communities (see above). It has also been published on the Internet:

- Go to the homepage of the Commission: <http://europe.eu.int/comm/index.htm>, click on the heading “Citizen’s Guide on public access to Commission documents”.

Further information on how to obtain access to Commission documents can be obtained from:

The Secretariat-General of the European Commission
Unit SG/C/2 “Europe and the Citizen 1”
N-9, 2/11
Rue de la Loi 200
B-1049 Brussels.

Madeleine de Leeuw

is a Ph.D. researcher at the European University Institute in Florence. She is writing her dissertation on the issue of transparency and openness in the decision-making process of the European Union. The project includes comparative research on the legal situation in the Netherlands and the United Kingdom.

- 1 Code of Conduct (93/730/EC), O.J. 1993 L 340/41 (adopted on 6 December 1993).
- 2 Council Decision (93/731/EC) on public access to Council documents, O.J. 1993 L 340/43 (adopted on 20 December 1993); Commission Decision (94/90/ECSC, EC, Euratom) on public access to Commission documents, O.J. 1994 L 46/58 (adopted on 8 February 1994). The Commission Decision declares in Article 1 that the Code of Conduct has been adopted and lays down further the procedural rules on handling requests for access. Instead the Council largely reproduces in its Decision the rules and conditions governing access as laid down in the Code of Conduct with some modifications.
- 3 See the Citizen's Guide on access to Commission documents, p. 15.
- 4 The time-limit for replies to the initial request and confirmatory applications made to the Council may be extended exceptionally by one month, see Council Decision of 6 December 1996 amending Council Decision 93/731/EC, O.J. [1996] L 325/19.
- 5 Commission Decision of 19 September 1996 amending Decision (94/90/ECSC, EC, Euratom) of 8 February 1994 on public access to Commission documents; see the Decision of the Secretary-General of the Council of 27 February 1996 relating to fees in the context of public access to Council documents, O.J. [1996] C 74/3.
- 6 In case of confirmatory applications the Secretary-General drafts the reply, but the confirmatory application itself is decided upon by the Information Working Party (one of the permanent groups which prepares the work of the Council).
- 7 See for example, the *WWF* case in which the Court of First Instance ruled that documents relating to investigations which might lead to an infringement procedure must be refused under the heading of the public interest in order to protect the confidentiality that the Member States are entitled to expect of the Commission in such circumstances, Case T-105/95 *WWF UK v. Commission* [1997] ECR II-313.
- 8 See Case T-194/94, *John Carvel and the Guardian newspapers Ltd v. Council* [1995] ECR II-2765.
- 9 Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), O.J. [1999] L 184/23.
- 10 The European Parliament Decision (97/632/ECCS, EC, Euratom) of 10 July 1997 on public access to documents, O.J. [1997] L 263/27; The European Monetary Institute Decision No 9/97 concerning public access to administrative documents of the European Monetary Institute, O.J. [1998] L 90/43; The Court of Auditor's Decision No. 18/97 laying down internal rules for treatment of application for access to documents held by the Court, O.J. [1998] C 295/1; The European Investment Bank rules on public access to documents, O.J. 1997 C 243, p. 13; The Economic and Social Committee Decision on public access to ESC documents, O.J. [1997] L 339/18; The Committee of Regions Decision of 17 September 1997 concerning public access to documents of the Committee of the Regions, O.J. [1997] 351/70; The Decision of the Governing board on public access to European Training Foundation documents, O.J. [1997] C 369/10; European Environmental Agency Decision of 21 March 1997 on public access to European Environment Agency documents, O.J. [1997] C 282/5; The European Centre for the Development of Vocational Training and the European Monitoring Centre for Drugs Addiction have adopted the Commission's rules on public access; The Translation Centre for the Bodies of the European Union rules for access to translation Centre documents, O.J. [1998] C 46/5; The European Foundation for the improvement of Living and Working Conditions has adopted rules on public access to Foundation documents on 21 November 1997 (not published in the O.J.). The Court of Justice of the European Communities has not yet adopted such rules. Addresses of these institutions can be found in the "Information handbook of the Council" (see page 54) and on the Internet web-site: <http://europa.eu.int/en/agencies.html>.

Chapter 6:

After Amsterdam

*by Jackie Lewis, Alberto Volpato
and Kurt Krickler*

The new Treaty reinforces the European Union's capacity to promote equality, guarantee fundamental rights and fight discrimination.

Social Action Programme 1998-2000.

The opportunities created by the Treaty of Amsterdam for action by the EU in the areas of discrimination, human rights and social policy have been outlined in previous chapters. It will be evident that the new provisions, despite their limitations, represent an advance in building firmer foundations for progress towards the construction of a genuinely social Europe.

ILGA-Europe and other organisations concerned with equality and human rights have therefore pressed for action to be taken which makes the most of these opportunities. This chapter outlines some of the developments since the Amsterdam Treaty was concluded relating to the implementation of Article 13, the debate on fundamental rights, and the development of social policy, and some of the campaign work that has been undertaken.

These developments do not, of course, exist in isolation: the continuing process of increasing integration, the negotiations on enlargement and the preparations for the next Intergovernmental Conference, scheduled to begin early in the year 2000, form part of the background against which organisations need to develop their strategies and demands. This chapter therefore sets out ILGA-Europe's proposals for EU action, under the current Treaty provisions, to combat legal and social discrimination on the grounds of sexual orientation, as an integral part of promoting equal treatment for all. It also outlines proposals for demands for future revisions to the Treaties as a contribution to the debate that has already begun.

1. WHAT HAS HAPPENED SO FAR

A. ARTICLE 13

The **Commission** and the **Member States** began preparing the ground for proposals on the implementation of Article 13 soon after the Amsterdam Treaty was signed in October 1997. A **working group of high-level officials** on non-discrimination, with representatives from all Member States, was formed. The British and Austrian Presidencies, in conjunction with the Commission, convened informal meetings in 1998 to discuss possible measures under Article 13.

One of the main tasks of the working group was to draw up a detailed picture of existing national anti-discrimination legislation. This mapping exercise resulted in national reports on such legislation and relevant shortcomings at the national level. The input from this working group will have had significant influence on the proposals of the Commission for further action.

In April 1998, the Commission announced the “launch of a broad debate on the use of Article 13” in its Social Action Programme 1998/2000. The SAP, which outlined the Commission’s plans for the development of European social policy during the period, was prepared by the directorate-general with responsibility for employment, industrial relations and social affairs (DG V). At the 2nd European Social Policy Forum in June 1998, organised by DG V, there were strong demands made by many participants, particularly by representatives of non-governmental organisations (NGOs), the Platform of European Social NGOs and the European Trade Union Confederation (ETUC), for early and effective implementation of Article 13.

However, there was no real discussion with NGOs on possible measures for the implementation of Article 13 until the conference in Vienna in December 1998 organised by DG V, attended by representatives of social and human rights NGOs including ILGA-Europe. At the same conference, the Social Affairs Commissioner Pádraig Flynn announced his proposals for a three-strand “package” (see Chapter 3).

In the middle of March 1999, however, the Commission resigned. Although Commissioner Flynn had instructed his services to proceed with the preparatory work on concrete Commission proposals, it was evident that no proposals would be presented to the Council until after a new Commission had been appointed. This has, of course, delayed the process.

DG V, responsible for preparing the Commission proposals, set up a Social Policy Forum follow-up **working group on anti-discrimination** with representatives of the Platform and of the social partners (the ETUC, UNICE and CEEP). The first meeting in March 1999 discussed the general approach of the three-strand package. For the second meeting in May, DG V, for the first time,

presented detailed “discussion papers” summarising the proposed content of each strand of the package (see Chapter 3). ILGA-Europe participated in both meetings as one of the representatives of the Platform.

The **European Parliament** also started its Article 13 activities soon after the Amsterdam Treaty was signed. In October 1997, Members of the Parliament (MEPs) formed the **Equal Rights for Gays and Lesbians Intergroup**, which subsequently invited ILGA-Europe to participate in its monthly meetings. Intergroups provide forums for MEPs from different political groupings to discuss how to press forward an agenda on a particular issue at the EU level, and can invite experts, national representatives and officials from other EU institutions to meetings. Outi Ojala, a Finnish MEP from the European United Left/Nordic Green Left grouping, was the president of the Intergroup until March 1999.

The use of Article 13 has been one of the main issues considered by the Intergroup. In January 1998, Commissioner Pádraig Flynn attended to talk about the Commission’s plans. Representatives of the British and Austrian Presidencies, who were also members of the working group of high officials, and a representative of DG V were guests at other meetings during the year.

In July 1998 a joint meeting of the Intergroup with the Disability Intergroup and the Intergroup on Ageing resulted in a common position paper on the use of Article 13. A further joint meeting of the three Intergroups in April 1999, in which representatives of the Commission and NGOs also participated, considered the outline “package” presented by Commissioner Flynn, and possible strategies for co-ordinating lobbying activities.

In March 1999, the Parliament’s **Committee on Employment and Social Affairs** adopted the working document “A Framework for Action on Non-discrimination at EU Level Based on Article 13 of the Amsterdam Treaty”. This document, drafted by vice-chair Outi Ojala and chair Stephen Hughes as rapporteurs, presented detailed proposals for action by the Council, Commission and Member States. However, it has not been adopted by the European Parliament Plenary, which would have made it more influential.

The overall tenor of discussions in these forums – the Social Affairs Committee, the Intergroups, and consultation meetings with the Platform – has been that while, in general, the three-strand package was welcomed, it was not far reaching enough.

On many occasions, the approach of the proposed “vertical” directive on areas outside employment was particularly criticised in that it would present different levels of protection for the various grounds in Article 13 and would, therefore, in itself be discriminatory. However, these views

have so far been almost completely ignored by the Commission; the only change evident is that there has been some recognition of the need to address issues relating to multiple discrimination. The Commission's response, as expressed by DG V in the working group meetings with the Platform and the social partners, is that it believes its approach would have the best chances to surmount the hurdle of unanimity in the Council.

Additionally the **Platform** has provided a forum for continuing discussion between its member organisations on the use of Article 13 and on a common strategy for lobbying to achieve effective and comprehensive implementation measures. ILGA-Europe is a member of the Platform working group set up to discuss these issues and to prepare a common response to the Commission proposals. It is expected that this will be submitted to DG V in September 1999.

The **ETUC** fully supported the working document adopted by the Parliament's Employment and Social Affairs Committee. It has also suggested to the employers' representatives in the Social Dialogue Committee that Article 13 and Article 141 (equal treatment/equal opportunities for women and men) be one of the subjects for discussion on a possible recommendation. The employers responded by suggesting a joint seminar, with no commitment to negotiate.

B. FUNDAMENTAL RIGHTS

The debate on fundamental rights in the EU, which was given impetus by the report of the Comité des Sages in 1996 and the discussion on its recommendations at the 1st Social Policy Forum in that year, has continued. The Commission announced its intention to carry forward the debate, building on the report of the Comité des Sages, in its 1998 Social Action Programme. It appointed a high level group of experts on fundamental rights, chaired by Professor Simitis, to examine fundamental rights under the Treaties following the Treaty of Amsterdam, and the possible inclusion of a Bill of Rights in the next Treaty revision.

The expert group's report, "Affirming Fundamental Rights in the European Union: Time to Act", was published in February 1999 and makes specific recommendations for the inclusion of guaranteed rights in the Treaty. At the European Council in Cologne in June 1999, it was decided to start the process of drawing up a draft for such a Charter of Fundamental Rights to be debated during the next intergovernmental conference scheduled for 2000. The text of this Charter is to be considered at the European Council meeting in Paris in the second half of 2000.

The Platform and the ETUC used the opportunity of the 2nd European Social Policy Forum in June 1998 to launch a joint campaign for a European Bill of Rights. The campaign is aimed at the widest possible support for the inclusion of a Bill in the Treaty and at encouraging a wider debate about its content.

C. OTHER DEVELOPMENTS

The Social Action Programme (SAP) for 1998/2000 sets out the Commission's framework for the development of European social policy under three main themes: jobs, skills and mobility, the changing world of work, and an inclusive society. The SAP has a strong focus on measures related to employment, and many of these reflect the "four pillars" of the Employment Guidelines for 1998: employability, entrepreneurship, adaptability and equal opportunities focussing primarily on gender discrimination. However, the section in the SAP on an inclusive society includes broad aims relating to achieving equality, fighting discrimination, promoting social inclusion and improving social protection.

In its response, the Platform stated that the "the emphasis on jobs must not mask the fact that social policy is not just about workers, but also and more broadly the individual before, during and after working life, with broader social rights". It called for concrete proposals for combating discrimination and social exclusion, and stressed that "mainstreaming equal opportunities must be construed in a wider sense which embraces all sections of the population". The Platform will continue to work for the implementation of these policies.

The 1999 Employment Guidelines, endorsed by the Vienna European Council in December 1998, are based on the same four pillar structure but have added the new objective of combating discrimination against "people with disabilities, ethnic minorities and other groups disadvantaged in the labour market" to the employability pillar. It was also agreed that a gender mainstreaming approach should be followed in implementing all four pillars. The national action plans will be evaluated, and the Guidelines reviewed, at the Helsinki European Council in December 1999.

It has also long been acknowledged that the prospective enlargement of the EU will require further revisions to the Treaties. The Amsterdam Treaty did not deal with many of the aspects of institutional reform which were originally part of the agenda for the IGC, but it specifies that a new IGC to revise the Treaty must be held before there are more than 20 Member States. With eleven countries actively preparing for membership, it must be ensured that non-discrimination in accordance with Article 13 and human rights – after Amsterdam clearly part of the "acquis communautaire" and therefore part of the obligations of membership – be addressed within the accession preparation process.

2. ILGA-EUROPE'S CAMPAIGN WORK

A. ACTIVITIES TO DATE

ILGA-Europe has pressed for the swift and comprehensive implementation of Article 13 through lobbying activities towards the Commission, the European Parliament and the Member States. These activities have included:

- letters in early 1998 to the Foreign Ministers of the Member States highlighting the need for action on Article 13 to include sexual orientation discrimination
- letters to all members of the working group of high officials, with a copy of ILGA-Europe's 1998 report "Equality for Lesbians and Gay Men"
- meetings with representatives of the Austrian Presidency in Vienna in July 1998 and of the German Presidency in Bonn in May 1999
- support for the administration of the Intergroup, active contribution to its debates and participation in the joint meetings with the Disability Intergroup and the Intergroup on Ageing
- contributing to the work of the Platform and its debates on combating discrimination and related issues, including the formulation of the Platform's response to DG V's discussion papers on implementing Article 13
- participation in a wide range of events at national and EU level.

ILGA-Europe welcomes the proposals for a horizontal directive prohibiting discrimination in employment and occupation and for a multi-annual Action Programme to combat discrimination, both covering all grounds listed in Article 13. However, it is disappointed that the Commission proposal for a directive prohibiting discrimination in areas other than employment is limited to only one of the grounds listed in Article 13. By failing to address the need to combat all forms of discrimination, the Commission is failing to promote the principles of equal treatment and fundamental rights – which is one of the stated aims of the other two strands of the package.

ILGA-Europe has, therefore, pressed for the proposed directive on areas other than employment to be extended to cover all grounds listed in Article 13. This viewpoint was conveyed to DG V in a meeting with its acting deputy director-general, Ms Odile Quintin in April 1999.

B. FUTURE ACTIVITIES

ILGA-Europe will continue, in liaison with its member organisations, to lobby towards the European Commission, the European Parliament and the Member States with regard to the comprehensive implementation of Article 13 and the other opportunities offered by the Amsterdam Treaty. ILGA-Europe's detailed recommendations are set out below. ILGA-Europe will actively assist the establishment of the Equal Rights for Gays and Lesbians Intergroup in the new period of the Parliament.

ILGA-Europe will continue to support the campaign for the inclusion of a Bill of Rights in the Treaty and lobby for the explicit inclusion of the right to equal treatment on all grounds in such a Bill.

ILGA-Europe will also continue its active participation in the work of the Platform of European Social NGOs to build solidarity and achieve justice and equal opportunities for all.

**Jackie Lewis, Alberto Volpato*
and Kurt Krickler**

are members of the ILGA-Europe executive board.

* Alberto Volpato is also a member of ÉGALITÉ, the organisation for lesbian/gay equality in the European institutions. His views expressed (in sub-chapter "1. What has happened so far") are those of the author and cannot be taken to represent an official position of the European Commission.

RECOMMENDATIONS

These recommendations are divided into those for action to be taken on the basis of the Treaty of Amsterdam, which is now in force, and those for action in the context of the next intergovernmental conference.

1. ACTIONS UNDER THE CURRENT TREATY PROVISIONS

A. THE EUROPEAN COMMISSION

The European Commission should

- adopt, by the end of 1999, proposals for legislative measures to prohibit discrimination based on all Article 13 grounds (unless already covered by existing EC legislation) in all areas of Community competence
- ensure that these proposals
 - cover both direct and indirect discrimination and harassment
 - require appropriate and effective procedures to be put in place to enable people who believe they have suffered discrimination to seek redress, including through the inversion of burden of proof, the appointment of national ombudspersons/authorities, measures to protect individuals from adverse treatment motivated by their complaint (“victimisation”) and the possibility of collective complaints by associations
 - cover the prohibition of discrimination between different-sex and same-sex partners
- adopt a proposal, as already envisaged, for a multi-annual Programme to finance projects to combat discrimination based on all Article 13 grounds
- adopt an approach to all initiatives which promotes the principle of equal treatment for all including
 - the insertion of anti-discrimination clauses in EU legislative proposals and

- appropriate mechanisms to “mainstream”, in all relevant Community programmes and initiatives, the fight against discrimination based on sexual orientation, race and ethnic origin, religion or belief, age and disability, as is already the case for discrimination based on sex
- integrate in its proposals the opinion of the European Parliament Committee on Employment and Social Affairs calling for national action plans and Commission reports on progress
- broaden the objectives of the “Equal Opportunities” pillar of the Employment Guidelines to include the promotion of equal opportunities and anti-discriminatory practices relating to all grounds in Article 13
- mainstream the combating of discrimination on all grounds across all other objectives of the Employment Guidelines
- broaden the mandate of the European Monitoring Centre on Racism and Xenophobia to include the monitoring of discrimination based on all Article 13 grounds
- seek the assistance of committees of representatives of Member States and committees of experts with respect to all grounds listed in Article 13
- ensure proper consultation of representative European non-governmental organisations (NGOs) active in all areas related to Article 13, and the Platform of European Social NGOs, throughout the phases of the implementation of Article 13, and, in this context, facilitate the exchange of views between NGOs and relevant Council and Member States committees and working groups
- recognise the need to support, through the provision of adequate levels of EU funding, the establishment and/or continued operation of European NGOs, federations and networks which are properly representative of particular groups directly affected by the forms of discrimination listed in Article 13.

B. THE COUNCIL

should adopt swiftly the measures.

C. THE EUROPEAN PARLIAMENT

The European Parliament should

- call upon the Commission, the Council and the Member States to take prompt and effective action for comprehensive implementation of Article 13
- give its support, when consulted by the Council on the above measures, and, if the measures proposed by the Commission are not comprehensive and/or do not cover sexual orientation and/or other grounds, propose amendments in order to respect the comprehensive aim and spirit of article 13 as an expression of the fundamental principle of equality.

D. THE MEMBER STATES

The Member States should

- adapt without delay their internal legislation, if needed, by repealing and amending any laws, regulations or administrative provisions that are contrary to the principle of equal treatment on all grounds stipulated in Article 13
- provide support and co-operation to projects and initiatives generating from the multi-annual Programme.

E. THE SOCIAL PARTNERS

The social partners should

- mainstream the promotion of equal treatment and the combating of all forms of discrimination across all areas within the social dialogue
- include anti-discrimination clauses (covering all grounds in Article 13) in collective agreements, including agreements concluded at Community level under Article 139 EC
- consider other initiatives to promote good practice and combat discrimination at workplace and institutional level.

2. THE NEXT INTERGOVERNMENTAL CONFERENCE

The next Intergovernmental Conference scheduled for the year 2000 to further revise the Treaties, should adopt amendments to the Treaties to:

- make the promotion of equal treatment, on all grounds listed in Article 13, one of the specific tasks of the Union
- require that the promotion of equal treatment and the elimination of discrimination, on all the grounds listed in Article 13, is integrated into all Community policies
- strengthen Article 13 to give it direct effect and provide the positive right to equal treatment, to apply to all persons whether they are citizens of the EU or not
- strengthen the role of the European Parliament through the use of the codecision procedure for adopting legislation to implement anti-discriminatory measures
- allow the adoption of such measures through qualified majority vote in the Council
- include a Bill of Rights to guarantee civil, political, social, economic and cultural rights for all who live in the European Union

Appendix:

More Information about the EU

SOME IMPORTANT FOUNDING/TREATY DATES

- 1952: European Coal and Steel Community (ECSC)
- 1958: European Atomic Energy Community (Euratom)
- 1958: European Economic Community (EEC) – Treaty of Rome
- 1987: The Single European Act
- 1993: The European Union (EU) – Treaty of Maastricht
- 1999: Treaty of Amsterdam

The Treaty of Maastricht established the European Union. The Treaty of Amsterdam amended both the Treaty on European Union and the Treaty establishing the European Community.

MEMBER STATES

15 Member States as of 1995:

- 1958: Belgium, France, Germany, Italy, Luxembourg, Netherlands
- 1973: Denmark, Ireland, United Kingdom
- 1981: Greece
- 1986: Portugal, Spain
- 1995: Austria, Finland, Sweden.

THE THREE PILLARS

Since the Treaty of Maastricht, the Union is based on three “pillars”:

- 1st Pillar:** the European Community based on the Treaty of Rome and subsequent amendments, which provides for a common market based on the free movement of goods, persons, capitals and services, an economic and monetary union and common policies and activities.

Since the Treaty of Amsterdam it includes visas, asylum, immigration, judicial co-operation in civil matters.

2nd Pillar: Common Foreign and Security Policy, based on the Treaty on European Union.

3rd Pillar: Police and Judicial Co-operation in Criminal Matters, based on the Treaty on European Union.

INSTITUTIONS (and their web-sites)

[The European Council = heads of states and governments]

- The Council of the European Union <http://ue.eu.int/index.htm>
- The European Commission <http://www.europa.eu.int/>
- The European Parliament <http://www.europarl.eu.int/>
- The European Court of Justice <http://curia.eu.int/>
- The Court of Auditors <http://www.eca.eu.int/>
- The Economic and Social Committee <http://www.ces.eu.int/>
- The Committee of the Regions <http://www.cor.eu.int/>
- The European Ombudsman <http://www.euro-ombudsman.eu.int/>

EUROPEAN PARLIAMENT

The European Parliament is the assembly of the elected representatives of the 370 million Union citizens. There are 626 Members of the European Parliament (MEPs) distributed between Member States by reference to their population.

The Parliament's main functions are as follows:

- it considers the Commission's proposals and is associated with the Council in the legislative process by means of various procedures (co-decision, co-operation, consultation, etc.);
- it has the power of supervision over the Union's activities through its confirmation of the appointment of the Commission (and the right to censure it) and through the written and oral questions it can put to the Commission and the Council;
- it shares budgetary powers with the Council in voting on the annual budget and overseeing its implementation.

It also appoints an Ombudsman empowered to receive complaints from Union citizens concerning mismanagement in the activities of the Community institutions or bodies. Finally, it can set up temporary committees of inquiry, whose powers are not confined to examining the actions of the Community institutions but may also relate to actions by Member States in implementing Community policies.

Much of the work of the Parliament is done in its committees, which prepare reports on legislative proposals from the Commission and present them for debate by the full Parliament. Committees can also draw up reports on their own initiative.

COUNCIL OF THE EUROPEAN UNION

The Council of the Union (the Council, sometimes referred to as the Council of Ministers) is the Union's main decision-making institution. It consists of the ministers of the fifteen Member States responsible for the matters on the agenda: foreign affairs, agriculture, industry, transport or else. Despite the existence of these different ministerial compositions depending on the matter in hand, the Council is nonetheless a single institution.

Each country in the Union in turn holds the Presidency of the Council for six months. Decisions are prepared by the Committee of Permanent Representatives of the Member States (Coreper), assisted by working groups of national government officials. The Council is assisted by its General Secretariat.

EUROPEAN COUNCIL

The European Council is the term used to describe the regular meetings of the Heads of State or Government of the Member States. It meets at least twice a year and the President of the European Commission attends as a full member. These meetings are sometimes referred to as European summits. The Treaty on European Union states that the Council "shall provide the Union with the necessary impetus for its development and shall define the political guidelines thereof" (Article 4).

EUROPEAN COMMISSION

The Commission is the institution with the power of legislative initiative, implementation, management and control of the Community policies, programmes, and initiatives. It is the guardian of the Treaties.

There are twenty Commissioners (two each from France, Germany, Italy, Spain and the United Kingdom and one each from all the other countries) who undertake to act in the interests of the Community as a whole.

The Commission is appointed for a five-year term, by agreement among the Member States, and is subject to a vote of appointment by the Parliament, to which it is answerable, before it can be sworn in.

The Commissioners are assisted by an administration made up of directorates-general (DGs) and specialised departments with responsibility for specified areas of Community policy, located mainly in Brussels.

The Directorate-General for Employment, Industrial Relations and Social Affairs, DG V, has the prime responsibility for social policy. It prepares the Commission's Social Action Programmes and publishes action plans, with detailed work plans for the period ahead, on various aspects of policy.

THE ECONOMIC AND SOCIAL COMMITTEE

The Economic and Social Committee (ESC) is a consultative assembly made up of representatives of three groups: employers, workers, and "various interests" (e. g., agriculture, consumer protection organisations, science and technology). Its members are appointed by the Council, from nominations by the governments of Member States, for a period of four years.

It must be consulted by the Commission on proposals on a wide range of Community policies. It can also draw up reports on its own initiative.

COMMITTEE OF THE REGIONS

The Committee of the Regions is another consultative body to support the work of the Council and the Commission. It is composed by the representatives of regional and local bodies. They are unanimously appointed for a four-year term by the Council upon proposals of the Member States. They are completely independent in their activities.

COURT OF JUSTICE

The Court of Justice of the European Communities is made up of fifteen judges assisted by nine advocates-general appointed for six years by agreement among the Member States. It has two principal functions: to check whether instruments of the European institutions and of govern-

ments are compatible with the Treaties, and, at the request of a national court, to pronounce on the interpretation or the validity of provisions contained in Community law.

The Court is assisted by a Court of First Instance, set up in 1989, which has special responsibility for dealing with administrative disputes in the European institutions and disputes arising from the Community competition rules.

OTHER IMPORTANT FEATURES

TYPES OF LEGISLATION

There are several types of binding legislation which can be adopted: Regulations, Directives, and Decisions. Regulations have direct effect, they apply in all Member States without the need for national legislation. Directives are binding on the Member States as to the results to be achieved, but leave the form and method to the discretion of the Member States. They must be implemented into national law in order to generate legal effect. Decisions are legally binding for those to whom they are addressed.

The Parliament, the Council and the Commission can also adopt recommendations and resolutions but these are not binding.

CODECISION PROCEDURE

The codecision procedure (Article 251 EC) was introduced by the Treaty of Maastricht. It gives Parliament the power to adopt instruments jointly with the Council. In practice, it has strengthened Parliament's legislative powers in the following fields: the free movement of workers, right of establishment, services, the internal market, education (incentive measures), health (incentive measures), consumer policy, trans-European networks (guidelines), environment (general action programme), culture (incentive measures) and research (framework programme).

In its 1996 report on the scope of the codecision procedure, the Commission proposed that the procedure be extended to all Community legislative activity.

The Treaty of Amsterdam has simplified the codecision procedure and extended it to new areas such as social exclusion, public health and the fight against fraud.

CONSULTATION PROCEDURE

Under this procedure the Council must consult the Parliament and take its views into account. However, it is not bound by Parliament's position but only by the obligation to consult it. This is the procedure that applies to measures based on Article 13.

INTERGOVERNMENTAL CONFERENCE (IGC)

This is the term used to describe negotiations between the Member States' governments with a view to amending the Treaties. An IGC is of major importance as regards European integration, where changes in the institutional and legal structure – or simply in the content of the Treaties – have always been the outcome of intergovernmental conferences (e. g., Single European Act and Treaty on European Union).

The IGC which ended at the Amsterdam European Council on 16 and 17 June 1997 with the adoption of the Treaty of Amsterdam was the sixth in the history of the Community. The next is scheduled to start in early 2000.

THE SOCIAL PARTNERS

The social partners are employers and trade unions. The general cross industry organisations recognised by the Commission for consultation within the social dialogue process are the ETUC for the trade unions, UNICE and CEEP respectively for the private and public sector employers.

PLATFORM OF EUROPEAN SOCIAL NGOS

The Platform of European Social Non-Governmental Organisations, established in September 1995, now brings together 25 European NGOs, federations and networks, including ILGA-Europe. The Platform seeks to develop and strengthen a civil dialogue between European NGOs and the institutions of the EU.

Member organisations of the Platform work either to address specific social issues (such as social exclusion, poverty, public health or homelessness) or to address the needs of particular groups of people (e. g., disabled people, migrants, unemployed people, and women). They are all actively seeking to contribute towards the building of a stronger and more just society, both in Europe and around the world. Members of the Platform represent thousands of organisations engaged in a wide range of activities at local, regional, national and international level.

COUNCIL OF EUROPE

The European Union (or its European Council) should not be confused with the Council of Europe, an international organisation based in Strasbourg that comprises today 41 European member states. Its main role is to strengthen democracy, human rights and the rule of law throughout its member states. It is also active in enhancing Europe's cultural heritage in all its diversity, and acts as a forum for examining a whole range of social problems, such as social exclusion, intolerance, the integration of migrants, the threat to private life posed by new technology, and bio-ethical issues.

The Council of Europe has adopted a series of important conventions and charters, notably the European Convention on Human Rights and the European Social Charter, and established a range of authorities and institutional machinery, arising from its international treaties.

EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights signed in Rome on 4 November 1950 established, for the first time, a system of international protection for human rights. It entitles individuals to apply, for the enforcement of their rights, to the European Court of Human Rights based in Strasbourg. This Court should not be confused with the Court of Justice of the European Communities based in Luxembourg.

ABBREVIATIONS

CEEP: European Centre of Public Enterprises

CMLR: Common Market Law Review

DG: Directorate-General

EC: European Community

ECR: European Court Reports

ECJ: European Court of Justice (properly known as the Court of Justice of the European Communities)

EMU: Economic and Monetary Union

EP: European Parliament

ESC: Economic and Social Committee, sometimes known as ECOSOC

ETUC: European Trade Union Confederation

EU: European Union

IGC: Intergovernmental Conference

MEP: Member of the European Parliament

NGO: Non-governmental organisation

OJ: Official Journal of the European Communities

SAP: Social Action Programme

UNICE: Union of Industrial and Employers' Confederations of Europe



ILGA-Europe

Inquiries to ILGA-Europe can be directed to the addresses given on page 2. More information on/from ILGA-Europe is also available at the following web-sites:

<http://www.steff.suite.dk/ilgaeur.htm>

<http://www.steff.suite.dk/survey.htm>

<http://www.steff.suite.dk/partner.htm>

The *Euro-Letter*, a monthly newsletter published on behalf of ILGA-Europe, can be found as of issue # 30 at

<http://www.steff.suite.dk/eurolet.htm>

or: <http://www.france.qrd.org/assocs/ilga/euroletter.html>

ILGA-Europe is a non-profit organisation. Donations are very welcome and can be transferred to ILGA-Europe's bank account in Denmark:

Bank account number: 1199-1-671-0571, BGBank A/S,
Girostrøget 1, DK-0800 Høje Tåstrup;
SWIFT code: BIKU DK KK

ILGA-Europe also accepts payments by VISA, Euro/Master and JCB Cards.

This guide is published with the financial support of the Directorate-General X of the European Commission. Neither the European Commission nor any person acting on its behalf is liable for any use made of the information contained in this guide.

The Treaty of Amsterdam,

which came into force on 1 May 1999, marks a significant milestone for lesbians and gay men in the European Union.

The changes introduced by the Treaty include a new clause, Article 13, which covers discrimination on the grounds of sexual orientation, together with sex, racial or ethnic origin, religion, belief, disability and age. This is the first time that any express reference to discrimination on grounds other than sex or nationality has appeared in the Treaties. It follows extensive campaigning by non-governmental organisations, including ILGA-Europe.

Article 13 ends any doubt about whether the Community has the legal competence to adopt legislation and policies to address discrimination on the grounds listed within it. The debate is now about what action can and should be taken. But what does Article 13 mean? What are the implications of the new Treaty? What opportunities does it offer for concrete action on discrimination?

ILGA-Europe has produced this **guide** as a contribution to that debate and to promoting wider participation in it.