



EUROPEAN COMMISSION ON
SEXUAL ORIENTATION LAW

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Short statements

about the proposed directive on implementing the principle
of equal treatment between persons irrespective of
religion or belief, disability, age or sexual orientation
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European Commission on Sexual Orientation Law (ECSOL)

ECSOL is a permanent group of legal experts that aims to function as an independent voice on issues related to LGBT rights in Europe, engaging its members both in ad hoc projects and discussions and in the development of more structured and ongoing research.

ECSOL welcomes the publication of a proposal for a directive aiming to ensure the application of the principle of equal treatment to lesbian, gay and bisexual persons outside the field of employment. At the same time, it wishes to highlight some ambiguities in the text of the newly proposed directive, concerning in particular material scope, marital status, and religion-based educational institutions

Material scope

With respect to material scope of the proposal, ECSOL regrets to highlight that the protection against discrimination in the area of goods and services seems to be rather limited, in particular when compared with the corresponding one in the Race directive.

According to Articles 3.1 and 3.1.h in that directive the ban on race discrimination applies 'to all persons [...] in relation to [...] access to and supply of goods and services which are available to the public, including housing.'

By contrast, in the proposal the prohibition covers individuals 'only insofar as they are performing a professional or commercial activity' [Arts. 3.1 and 3.1.d(2)]. Thus, the fact that goods or services supplied are being made available to the public does not seem to be enough to bring it under the application of the draft directive.

A language ambiguity contributes to making the text unclear. The English, German, Italian, and French version foresee the application to when an individual is performing a professional or a commercial activity, whereas the Swedish version restricts it to persons 'performing a professional commercial activity', thereby stipulating cumulative, not alternative, criteria.

Marital status and reproduction

Art. 3(2) of the proposal states that "This Directive is without prejudice to national laws on marital or family status and reproductive rights." This wording echoes that of Recital 22 of the Employment Equality Directive. With respect to the national prerogatives on the regulation of marital status, the Court of Justice has recently held that "civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does

not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination.” (case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 1 April 2008, para 59). It seems, therefore, that a blanket exception such as the one foreseen by art. 3(2) of the proposal does not take into account the duty for member states to respect the Community principle of equal treatment in the exercise of their competence over matters of civil and marital status. ###

While “without prejudice to national laws on marital or family status” does not include “without prejudice to the benefits dependent thereon” (as in recital 22), it is clear that “Family status” is much too vague.

One concern is that member states or the ECJ might interpret the last part of the wording as taking all sexual orientation discrimination related to access to adoption or donor insemination outside of the Directive, even in cases in which unmarried heterosexual individuals are eligible. If a Member State allows unmarried individuals to adopt children (E.B. v. France), or unmarried women to receive donor insemination (eg, UK, Belgium, Spain), then the proposed Directive should apply if a private adoption agency or fertility clinic refuses to serve a lesbian or gay individual.

If a Member State allows a married, registered or unregistered same-sex couple to adopt or seek donor insemination (eg, UK), then the Directive should also apply to private adoption agencies or fertility clinics.

In Canada and the US, in at least 3 cases (the most recent from the Supreme Court of California) refusal to inseminate a lesbian woman has been treated as direct discrimination based on sexual orientation in access to a service. In 2007, when the UK voluntarily adopted regulations prohibiting sexual orientation discrimination in access to goods and services, the biggest political debate was about a requested exception for Roman Catholic adoption agencies. The UK Government refused to grant it.

A better wording of the exception could then be:

”3(2) This Directive is without prejudice to national laws restricting access to marriage, or restricting access to adoption or reproductive services to married couples.”

Religion-based educational institutions

Art 3(3) of the proposal provides in English: “This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief.”

The question about the second sentence is whether “based on religion or belief” restricts the circle of institutions that can be exempted or the number of grounds on which allowable differences in treatment can be based.

The French version supports the first interpretation: “La présente directive est sans préjudice des responsabilités des États membres en ce qui concerne le contenu, les activités et l’organisation de leurs systèmes d’éducation, y compris en matière d’éducation répondant à des besoins spécifiques. Les États membres peuvent permettre des différences de traitement s’agissant de l’accès aux établissements d’enseignement fondés sur la religion ou les convictions.” Otherwise it would have been “fondées”.

Some language versions of the explanatory memorandum support that interpretation, too. The English explanatory memorandum, for example, paraphrases the second sentence of art. 3(3) as saying “and they may provide for differences in treatment in access to religious educational institutions.”

The Swedish language version of the draft Directive supports the interpretation of a blanket exception for religious institutions. Furthermore, the same exception with the same wording appears in Recital 18. Finally, also in the Swedish version the explanatory memorandum supports this interpretation. Further support for this may perhaps also be found in the fact that exceptions that relate to a specific ground are otherwise found in art. 2 and not in art. 3.

The German, Dutch and Italian versions of art. 3(3), however, support the latter interpretation:

“Die Zuständigkeit der Mitgliedstaaten für die Lehrinhalte, die Aktivitäten und die Gestaltung ihres Bildungssystems einschließlich der Sonderpädagogik bleibt von dieser Richtlinie unberührt. Die Mitgliedstaaten können eine Ungleichbehandlung aufgrund der Religion oder Weltanschauung beim Zugang zu Bildungseinrichtungen vorsehen.”

“Deze richtlijn laat de verantwoordelijkheid van de lidstaten voor de inhoud van het onderwijs, de activiteiten en de opzet van hun onderwijsstelsels, met inbegrip van de opzet van buitengewoon onderwijs, onverlet. De lidstaten kunnen voorzien in verschillen in behandeling op grond van godsdienst of overtuiging wat de toegang tot onderwijsinstellingen betreft.”

“La presente direttiva non pregiudica le responsabilità degli Stati membri per i contenuti dell’insegnamento, le attività e l’organizzazione dei propri sistemi d’istruzione, inclusa la messa a disposizione dell’insegnamento speciale. Gli Stati membri possono prevedere differenze di trattamento nell’accesso ad istituti scolastici basate su una religione o convinzione.”

The confusion may have been caused by the late addition of sexual orientation in the original text. From an LGB perspective the German and Dutch versions provide a better crafted proviso: sexual orientation discrimination would not be covered by the proposed exception because access can only be restricted if based

on religion or belief. However, these versions, by not specifying that this possibility is limited to religious educational institutions, would also imply that state schools (non-religious schools) would be allowed to discriminate on grounds of religion, and that can hardly be intended. In the German version, both Recital 18 and the explanatory memorandum clearly state that the possibility to restrict access is granted to religious educational institutions only. The same is said in the Italian version of Recital 18, which nevertheless radically reverses the intended meaning of art. 3(3) by stating: “In particolare il diritto nazionale può prevedere differenze nell’accesso ad istituti scolastici basati su una religione o convinzioni personali.”

Neither seems it likely that it was intended (as the French version and the explanatory memoranda suggest) that religious schools should be more free than non-religious schools to discriminate not only on grounds of religion, but also on other grounds protected under the Directive.

If Art. 3(3) of the proposal can only be intended to allow religiously-managed schools to take religious belief into account in admissions, then it is rather clear that the current text goes much wider than this. In ECSOL’s view, it could be argued that the clearly intended meaning of the second sentence of art. 3(3) is that Member States may provide for differences in treatment based on a person’s religion or belief in access to educational institutions whose ethos is based on religion or belief. This would constitute a double restriction of the scope of the proposed exception. ECSOL believes that this meaning is the only reasonable one and that it should be made explicit in the text of the Directive, and in its explanatory memorandum, in all versions.

A further reason for concern with this provision is that it foresees no proportionality test. Even if it is read narrowly, it appears a blanket permission to discriminate on grounds of religion, irrespective of the context. This is particularly problematic in countries (such as Ireland) where the great majority of schools are religiously-managed and exclusion of persons of another religion can substantially impair a child’s choice of school.

Standing in Court

A textual comparison between Art. 7(2) and Recital 23 of the proposal highlights an interesting approach to standing in court in cases of collective discrimination where no actual victim is identifiable. The former is the standard provision from the Race and Framework Directives allowing associations to act on behalf or in support of individual litigants. In contrast, Recital 23 states that associations should be able to engage in proceedings “including on behalf or in support of any victim”. This seems to imply that legal standing for associations should not be limited to cases involving an identified individual victim. In the light of the decision of the Court of Justice in Case 54/07 Firma Feryn, it would be appropriate to remove this inconsistency in the text of the proposed Directive by revising Article 7(2) to reflect the broader wording found in Recital 23.