

**ILGA-Europe's position
on the proposal for a Council Directive
on the principle of equal treatment
between persons irrespective of religion or belief,
disability, age or sexual orientation**

*A Working Document
October 2008*

Table of contents

I. General comments.....	2
II. Key strengths of the proposed directive.....	3
III. Issues to be addressed in the legislative process.....	3
A. Concept of discrimination (Article 2, paragraph 8)	4
B. Restrictions on transactions between individuals (Article 3, paragraph 1.d) .	4
C. Exceptions related to marital and family status (Article 3, paragraph 2)	6
1) What forms of discrimination should be covered by this directive?.....	7
2) What is the relevant European case law?	9
3) ILGA-Europe's Concerns.....	12
D. Exceptions related to reproductive rights (Article 3, par.2)	14
E. Material scope and exceptions related to education (Article 3, par. 3).....	15

ILGA-Europe's position on the proposal for a Council Directive on the principle of equal treatment

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

I. General comments

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

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

As a general remark, ILGA-Europe would like to stress the importance of respecting the following key principles in the process of negotiating the text of the Directive:

- ❖ **Consistency and coherence with existing Article 13 legislation¹** should be a guiding principle. It is important to refrain from introducing exemptions that create differences between the levels of protection for the different grounds of discrimination.

We need to look at making proposals to limit the number of differences between this proposed directive and the Race Directive (2000/43). There are a number of differences in this directive compared to the Race Directive. There should however be a strong presumption in favour of the same framing and wording in both directives. **Deviation from that principle of conformity should have strong reasons behind it, not least to secure that interpretations made by the ECJ with regard to the Race Directive be applicable also to this directive.**

- ❖ **The objective of equal treatment should be the rule rather than the exception.** Therefore, exceptions clauses restraining equal treatment must be

¹ In particular, the Race Equality Directive (2000/43) and Employment Equality Directive (2000/78).

strictly limited and subject to a strict standard of justification that can be tested before the courts. Blanket exemptions should thus be avoided.

ILGA-Europe also calls for a commitment to level up the **gender equality legislation** at the latest by 2010 to ensure the same legal protection for all grounds of discrimination.

II. Key strengths of the proposed directive

The directive introduces significant advances to the EU anti-discrimination legal framework by leveling up the protection for four grounds – age, disability, religion and sexual orientation – and by covering the same scope as in the Race Equality Directive (2000/43/EC). This is essential to move closer to putting an end to a hierarchy in the legal protection that exists at European level.

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

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

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

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

III. Issues to be addressed in the legislative process

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

In general, ILGA-Europe is concerned by some exemptions included in the text which may limit the principle of equal treatment and which introduce differences with the scope of the Race Directive. ILGA-Europe also has concerns about the impact of provisions

related to marital status, family status and reproductive rights in limiting the protection against forms of discrimination based on sexual orientation.

A. Concept of discrimination (Article 2, paragraph 8)

Art.2, par.8: “This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.”

There is a general concern about the potential use of this kind of blanket provisions. There is also a concern about possible interpretations of this provision in relation to access to goods and services.

ILGA-Europe questions whether there is a legitimate need for such a blanket exception. While recognising that this clause is based on language of the European Convention on Human Rights (ECHR), we nonetheless ask whether this provision is relevant and needed in the framework of an EU anti-discrimination legislation.

Should this provision be deemed relevant, we call on the introduction of a proportionality test in the paragraph. This would ensure that states would have to show that measures taken by states and public authorities do not go beyond what is necessary in order to achieve this objective.

ILGA-Europe Proposal

Article 2 - Paragraph 8

Original text with proposed amendments in bold:

*This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary **and proportionate to the aims of public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others.***

B. Restrictions on transactions between individuals (Article 3, paragraph 1.d)

Art.3., par. 1.d: Access to and supply of goods and other services which are available to the public, including housing. Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity.

Given that one of the main aims of this proposed directive is to level up protection against Article 13 grounds of discrimination, it is imperative that the directive is adopted with the same material scope as the Race Directive 2000/43 to ensure that the levels of legal protection are the same for the grounds of race, religion/belief, age, disability and sexual orientation.

This is why ILGA-Europe considers that the reference to individual transactions related to a professional or commercial activity is problematic to the extent that:

- ❖ It introduces a difference in the scope of the exception from the ban on discrimination in the area of goods and services which becomes so much wider with respect to the present grounds than it is according to the Race Directive.
- ❖ It creates a double limitation to the scope of the directive given that subparagraph (d) already limits the application of the directive to goods and other services which are “available to the public”.

Moreover, ILGA-Europe is concerned about the fact that the definition of what constitutes a “professional or commercial activity” is currently not clearly defined in the text. In the context of access to housing, there is anxiety around possible interpretations of “professional or commercial activity” which could lead to discrimination.

On one hand, we accept that individuals who rent out a room in the house in which they live would want to be able to choose to whom they will rent the room. Art. 8 of European Convention on Human Rights does recognise the right to respect for a person’s private life and home; in practice, this means that a person is allowed to choose who he/she wishes to rent out a room with shared access to kitchen and bathroom facilities in her or his own small apartment.

On the other hand, we want to avoid a situation whereby a private owner could refuse to rent his/her apartment in an apartment block to a same-sex couple or to someone of another religion for instance. Based on the current text of the proposed directive, it is unclear whether or not this latter situation would be considered a commercial activity.

The proposal is therefore to use family life and private life as the test and to formulate the recital in order to ensure that private and family life are protected in relation to transactions carried out in the provisions of goods and services between individuals. This approach is in line with the European Convention of Human Rights.

ILGA-Europe Proposal

Our proposal is therefore to delete the sentence “***Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity***” in article 3.1(d) and to amend the corresponding recital 16.

The text proposed as an amendment for recital 16 is taken from the Race Directive (2000/43, recital 4). It would arguably allow for the protection of private and family life in relation to transactions carried out in the provisions of goods and services, while limiting the scope of exemptions to this Directive. This text would also contribute to consistency of interpretation between EU directives on equal treatment.

PROPOSED AMENDMENT – ARTICLE 3.1(d)

Original text with deletion in bold:

Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) Social protection, including social security and healthcare; (b) Social advantages; (c) Education; (d) Access to and supply of goods and other services which are available to the public, including housing. [DELETION - Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity.]

PROPOSED AMENDMENT – RECITAL 16

Original text:

All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute their professional or commercial activity.

To be replaced with:

It is important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

C. Exceptions related to marital and family status (Article 3, paragraph 2)

ILGA-Europe is very concerned that the provisions related to marital and family status and reproductive rights (article 3(2) and recital 17) could be interpreted and transposed into law in a way that would lead to the continuation of less favourable treatment and discrimination in access to goods and services, to social protection (including social security and healthcare) for people on the basis of their sexual orientation.

Indeed, any exemption related to marital or family status should be considered in light of the fact that it is very often by virtue of being with a partner of the same sex that people are discriminated against in accessing goods and services, in access to social benefits and social protection. Exemptions related to marital status and family status therefore have the potential to seriously limit the impact of this directive in relation to extending protection against discrimination on grounds of sexual orientation.

These concerns stem from the fact that:

1. Some terms used in article 3(2) and recital 17, are ambiguous and lack legal clarity and thus raise questions about how the provisions will be transposed. In particular, it is not clear what is understood by “national laws on family status”.
2. It is not clear whether the introduction of Article 3(2) could be interpreted to limit the competence of the European Court of Justice to rule on some cases of unequal treatment between same-sex couples and opposite-sex couples.

3. The wording of article 3(2) does not adequately reflect the relevant jurisprudence of the European Court of Justice and the European Court of Human Rights in relation to respect for principle of non-discrimination (Maruko case) and to the principle of proportionality (Karner v. Austria).

ILGA-Europe recognises that Member States are entitled to decide on the form of recognition they wish to give to same-sex couples. ILGA-Europe also agrees that the aim of this directive is not to change national laws related to marital status.

However, ILGA-Europe also considers that the form of legal recognition given to same-sex couples by Member States must be in accordance with international human rights standards with the respect to the right to non-discrimination. **National competence in this sphere does not, and should not preclude states from taking legal measures to address acts of discrimination in access to a service or to a social benefit.**

ILGA-Europe would like to remind Member States that this proposed directive is aimed at tackling discrimination on the grounds of sexual orientation, among other grounds, and that there is no justification to limit protection for same-sex couples against discrimination in accessing a service or a benefit, when a difference in treatment is strictly based on sexual orientation, and not on marital status.

1) What forms of discrimination should be covered by this directive?

ILGA-Europe would like to remind Member States that this proposed directive is aimed at tackling discrimination on the grounds of sexual orientation, among others, and that there is no justification to limit protection for same-sex couples against discrimination in accessing a service or a benefit, when a difference in treatment is strictly based on sexual orientation, and not on marital status.

Any exemption related to marital or family status needs to be considered in light of the fact that it is very often by virtue of being with a partner of the same sex that people are discriminated against in accessing goods and services, in access to social benefits and social protection. For example:

1. In access to goods and services, including housing

It is important to highlight that such discrimination often occurs by virtue of being with a partner of the same sex. LGB people rarely experience discriminatory treatment in a public place or in filing for a bank loan if they are on their own. Typical cases reported by NGOs, as well as complaints taken up by equality bodies, include the following:

- ❖ same-sex couples being denied entry to restaurants or bars, or forced to leave premises
- ❖ couples being denied services or access to double rooms in hotels
- ❖ denied access to bank loans or insurance services available to unmarried opposite-sex couples
- ❖ refusal to rent apartments to same-sex couples

EXAMPLES

Case reported by **Associação ILGA Portugal:**

In 2006, a *de facto* same-sex couple was denied access to a travel insurance policy by an important insurance company, although the insurance policy accepted *de facto* opposite-sex couples.

Statistics from **SOS Homophobie in France:**

In 2005 and 2006, discrimination in access to goods and services represented 7-8% of the complaints received by the organisation. These included discrimination in hotels (e.g. tourists in Paris refused double room) and in shops (e.g. refusing tattoo of man's name on a man).

Case reported by **SKUC-LL in Slovenia:**

In October 2007, a lesbian couple was thrown out on the street from a bar in Ljubljana by a security guard. The man responsible for security said that this bar was not for "such people", because it is a "heterosexual bar".

2. In access to health care

Same-sex couples often experience discrimination within health services. Typical cases include:

- ❖ health practitioners refusing to share medical information with a patient's same-sex partner, even with this patient's approval, or refusing visitation rights to patient's same-sex partner²
- ❖ limited health insurance coverage available for same-sex couples where it is available for unmarried opposite-sex couples

EXAMPLE

Testimony – Woman from **Ireland**³

"I rang [the hospital] because I was concerned. I didn't know where she [my partner] was. I just came home and she wasn't here. I was just wondering, 'Is she okay?' They said, 'We can't disclose that information to you.' I went up [to the hospital] then and the receptionist said, 'Are you a family member?' I said, 'No, she's my partner.' She said, 'I can't let you know. Sorry.' ... I thought maybe if I hadn't said I was her partner, maybe she might have been a bit more polite"

3. In access to social security

Same-sex couples are often refused access to social security benefits (such as dependent allowance, pensions, etc.) which are increasingly available to unmarried opposite-sex couples. Refusing social security benefits that are available to unmarried opposite-sex couples to same-sex couples constitutes discrimination on grounds of sexual orientation.

² Stonewall's Website, section on mental health: www.stonewall.org.uk/information_bank/health/1287.asp

³ Ireland - Report on "Recognising LGB Sexual Identities in Health Services", Research by the Equality Authority, February 2008


<http://www.equality.ie/index.asp?locID=135&docID=712&COMMAND=PRINTER>

EXAMPLE

Complaint brought before the Irish Equality Authority⁴

A gay man was refused an adult dependent allowance for his partner under the claimant's invalidity pension. The claimant was permanently unfit for work due to a terminal illness and expected to qualify for adult dependent allowance on the claimant's invalidity pension for his partner who had taken unpaid leave from his job to care for him. While such an adult dependent allowance is payable to unmarried heterosexual couples, the claimant was first refused the invalidity pension from the Department of Social and Family Affairs. The claim was settled in favour of the claimant by the Equality Authority under the Equal Status Acts on the sexual orientation ground.

The directive needs to ensure that people will be protected against such forms of discrimination on grounds of sexual orientation in access to goods and services, social protection and housing.

 **ILGA-Europe calls on Member States to ensure that no exception is included in the directive which would prevent protection against forms of discrimination cited above.**

2) What is the relevant European case law?

ILGA-Europe considers that article 3(2), as well as recital 17, of the proposed directive need to be carefully examined in light of recent European Court of Justice case law, European Court of Human Rights case law and legal reports of the Fundamental Rights Agency. European jurisprudence gives clear guidance on how to articulate the balance between respect for national competence in the area of marital status and respect for the principle of non-discrimination in relation to sexual orientation.

1. *European Court of Justice* – **Case Maruko v. Versorgungsanstalt der deutschen Bühnen**

In the ruling on *Maruko v. Versorgungsanstalt der deutschen Bühnen* (Case C-267/06, 1 April 2008), the European Court of Justice recognised that:

(1) The competence of states in relation to marital status should not preclude states from complying with the principle of non-discrimination

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

According to legal experts, on one hand, this means that Member States can decide what couples (same-sex, opposite-sex or both) have access to marriage, what legal consequences are attached to these marriages and which legal advantages can therefore be denied to persons who are not married. But, on the other hand, this is true

⁴ Complaint “Claimant v The Department of Social and Family Affairs”, 2006. See 2006 Annual Reports (www.equality.ie/)

only as long as Member States are dealing with consequences (e.g. different kinds of benefits) that do not fall within the scope of Community law. Within the scope of Community law, the legal consequences of Member States' national laws on marital status must not be given effect if these consequences are contrary to any Community law rules, such as legislation regarding discrimination.

(2) Differences in status between same-sex and opposite-sex couples can constitute discrimination.

The Court held that refusal to grant the survivor's pension to life partners constitutes direct discrimination on grounds of sexual orientation in cases where same-sex couples are in comparable legal situation to opposite-sex couples:

“If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.” (Par. 72)

2. European Court of Human Rights

Member States should also respect case law from the European Court of Human Rights, under *Karner v. Austria* with respect to differences in treatment between same-sex and opposite-sex unmarried/unregistered couples, as well as under *E.B. v. France* in relation to adoption.

Karner v. Austria

In *Karner v. Austria* (Case on tenancy for surviving same-sex partners, Application No. 40016/98, 24 July 2003), the European Court of Human Rights recognised that:

(1) Differences in treatment based on sexual orientation required particularly serious reasons by way of justification

“The Court reiterates that [...] a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Furthermore, very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention [...]. Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.” (Par. 37, emphasis added).

(2) The justification for a difference in treatment based on sexual orientation needs to abide by the principle of proportionality between the means employed and the aim sought to be realised

In *Karner v. Austria*, the Court referred to the principle of proportionality to respond to concerns about the articulation of rights recognised to same-sex couples in relation to the protection of the traditional family unit.

The Court concluded that, while it could accept that the protection of the traditional family unit was, in principle, a weighty and legitimate reason which could justify a difference in treatment, *“The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to Member States is narrow, as the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act [ndlr: legislation on tenancy for surviving partners and family members] in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion.”* (Par. 1, emphasis added).

More specifically with regards to tenancy rights for surviving same-sex partners, the case clearly showed that there is no justification for the difference in treatment of homosexual and heterosexual partners, given that laws on tenancy rights are aimed at providing social and financial protection from homelessness and not at pursuing any family- or socio-political aims. This can arguably be extended to other laws aimed at providing social and financial protection, and not just on housing rights.

E.B. v. France

In *E.B. v. France* (Case on adoption by a lesbian woman as an individual, Application no. 43546/02, 22 January 2008), the Court said that exclusion of individuals from the application process for adoption of children simply because of their sexual orientation is discriminatory and is in breach of the European Convention of Human Rights.

“In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention.” (Par. 93)

“The Court points out that French law allows single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation.” (Par. 94)

This case was an opportunity for the Court to make another reference to the principle of proportionality in relation to justification of difference in treatment and to reiterate that, for the purposes of Article 14 of the European Convention on Human Rights, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised”. (Par. 91)

3. EU Fundamental Rights Agency – 2008 Report on Homophobia

The recent legal analysis⁵ published by the EU Fundamental Rights Agency (FRA) should also be considered as it interprets Recital 22 (on marital status) of the Employment Framework Directive (2000/78) in light of international human rights law.

The FRA analysis concludes that: *“international human rights law complements EU law, by requiring that same-sex couples either have access to an institution such as a registered partnership that would provide them with the same advantages that they would have if they had access to marriage; or, failing such official recognition, that their de facto durable relationships extends such advantages to them.”*⁶

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

3) ILGA-Europe’s Concerns

ILGA-Europe is concerned that exceptions included in the directive may be interpreted in a restrictive manner and hence, that these exceptions may limit protection against forms of discrimination based on sexual orientation described earlier.

1. Lack of clarity of terms used in article 3(2)

Some of the terms used in article 3(2) and recital 17, are ambiguous and lack legal clarity and thus raise concerns about how the provisions might be transpose into national law.

Reference to “national laws on family status” creates ambiguity as it is unclear what is included under this status, i.e. whether it refers to married couples and/or unmarried couples and/or couples with children and/or single parents. The term “family status” opens the door for instance to possible distinctions between unmarried same-sex couples and unmarried opposite-sex couples in access to goods and services (e.g. refusal of insurance policy to same-sex couple in Portugal and refusal of carers benefit in Ireland, see pages 2-3 above). As mentioned earlier, difference in treatment between same-sex couples and opposite-sex couples in comparable situation constitutes direct discrimination based on sexual orientation as recognised by the European Court of Justice in *Maruko*.

Clarity is needed in order to ensure that the term “family status” would not be interpreted in a way that would prevent individuals from being able to challenge a difference made

⁵ Fundamental Rights Agency, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, June 2008. http://fra.europa.eu/fra/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf

⁶ See Legal Analysis (p.29) http://fra.europa.eu/fra/material/pub/comparativestudy/FRA_hdgso_part1_en.pdf

between unmarried opposite-sex and same-sex couples, for instance in access to a restaurant or in relation to visitation rights in a hospital.

The reference to “family status” could also lead to discrimination against single parent with children and perhaps against a child who has two legal parents of the same sex, which should be contrary to both the European Court of Human Rights and the UN Convention on the Rights of the Child.

2. Inclusion of exemption in the general provisions as opposed to the recitals

It should be noted that there is no precedent for including blanket exceptions related to marital status, family status and reproductive rights in the provisions of EU directives based on Article 13. The Employment Framework Directive (2000/78) only refers to national competence in the area of marital status in the preamble (recital 22), and not in the general provisions of the directive. Moreover, Recital 22 of the Directive 2000/78 was recognised as a clear limitation of the Employment Directive by legal experts. In a resolution adopted in May 2008, the European Parliament also acknowledged that “exceptions linked to marital status in Directive 2000/78/EC has limited the protection against discrimination on the ground of sexual orientation offered by that Directive”.⁷

Moreover, the legal implications of keeping article 3(2) in the provisions of the proposed text need to be carefully examined. Can we be sure that the inclusion of article 3(2) will not prevent access to courts, including the European Court of Justice? ILGA-Europe is concerned that the fact that the exemption relating to marital status is included in the general provisions of the proposed directive would limit the competence of the European Court of Justice to rule on cases of discrimination based on sexual orientation in access to goods and services, to social protection and social advantages. This would then constitute a serious challenge to the principle of access to justice for those who experience discrimination based on their sexual orientation.

In addition, the inclusion of article 3(2) in the new directive could arguable allow for continuation of unequal treatment and discrimination which would go against the ECJ ruling which recognized that differences in status between same-sex and opposite-sex couples can constitute discrimination. As discussed above, it could also come into conflict with the European Court of Human Rights under the case law in *Karner v. Austria* and *E.B. v. France*.

3. Lack of reference to European jurisprudence

ILGA-Europe considers that the proposed directive should not only be drafted to be in accordance with European case law, but that it should explicitly refer to relevant European jurisprudence. There is a clear need to properly articulate the balance between respect for national competence in relation to marital status and full and effective protection against discrimination based on sexual orientation. Explicit reference to case law would give clear guidance to Member States on how to interpret the directive

⁷ Progress made in equal-opportunities and non-discrimination in the EU (transposition of Directives 2000/43/EC and 2000/78/EC) P6_TA-PROV(2008)0212, 20 May 2008.

in accordance with jurisprudence of the European Court of Justice and the European Court of Human Rights.

To this end, provisions of the proposed directive should refer to the ECJ ruling in Maruko, i.e. that in the exercise of their competence, states need to comply with the principle of non-discrimination.

ILGA-Europe Proposal

This is why we consider that:

- While national competence in the field of marital status law cannot be challenged, it is important to acknowledge that Member States must comply with the principle of non-discrimination in exercising this competence.
- Reference to the national laws on marital and family status in the preamble should be sufficient to acknowledge competence of Member States in this area
- References to family status should be deleted as this term creates ambiguity and legal uncertainty.

PROPOSED AMENDMENT – ARTICLE 2

To be deleted:

This Directive is without prejudice to national laws on marital or family status and reproductive rights.

PROPOSED AMENDMENT – RECITAL 17

Original text:

While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. This Directive is without prejudice to national laws on marital or family status, including on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.

To be replaced with:

This Directive is without prejudice to national laws on marital status. As held by the Court of Justice, 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.

D. Exceptions related to reproductive rights (Article 3, par.2)

The inclusion of reproductive rights in this provision is of great concern. Access to reproductive health services falls within the material scope of the directive as a service. However, the impact of the provision is likely to be discriminatory for many people. This clause could mean that a state might limit access to IVF to married or opposite-sex

couples and/or to heterosexual single women without a possibility to be challenged. It could also lead to refusing access to reproductive services to persons with disability for instance. Furthermore, it can be argued that this exclusion of reproductive rights is not in line with recital 13 which recognises that women are often the victims of multiple discriminations. This is particularly true for reproductive health. Women's rights are human rights and therefore it is highly unjust to exclude reproductive rights from anti-discrimination laws as it would affect women in the first place.

E. Material scope and exceptions related to education (Article 3, par. 3)

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

There is a concern that blanket exclusions go further than is necessary to comply with the principle of subsidiarity, leading, for some children, to the complete denial of the right to education. We do not deny that this is an area in which the Member States retain a significant competence. However, this does not go as far as preventing the EU to legislate against discrimination in education, as evidenced by the inclusion of precisely this prohibition in the Race Equality Directive. These exceptions are also of concerns for each of the other grounds, i.e. disability (especially the exemption related to special needs education), religion and belief (cf. access to educational institutions based on religion or belief), and age (protection against discrimination for young people in education in general).

In general, there is anxiety about clauses that restrict or narrow down the application of the directive without a clear and legitimate rationale. In the case of education, this proposal introduces exemptions to the sphere of education which were not present in the Race Directive 2000/43. Thus there is a need to reassert that the right to education is the main rule in this directive, and not an exception. This is also imperative to maintain the respect for the ECHR (1st protocol art. 2 first sentence), for the UN Convention on the Rights of the Child (art. 28) and for the UN Convention on Economic, Social and Cultural Rights (art. 13).

If we cannot challenge the fact that the content of teaching and the organisation of education systems are the responsibility of Member States (EC treaty, Art 149(1)), we can argue that access to education and treatment of individuals within the education systems does fall within the scope of the EC Treaty. Moreover, it can also be argued that states have competence to decide how they organize national school systems as long as the end result is not discrimination. This is also all very much in line with the ECJ ruling on recital 22 of Directive 2000/78 in the Maruko case.

As previously mentioned (see recital 18), there are concerns about the introduction of exemptions in the sphere of education, especially since such exemptions which were not present in the Race Directive 2000/43. But should it not be possible to delete this provision, we would suggest amending paragraph 3 in the following way:

- ❖ By acknowledging the fact that the content of teaching and the organisation of education systems (EC treaty, Art 149(1)) are the responsibility of Member States but that in the exercise of this competence, Member States must comply with the provisions relating to the principle of non-discrimination.
- ❖ By finding wording which avoids opening for discrimination based on religion in non-religious schools – which can hardly be the purpose of the provision – or discrimination based on the other grounds in religious schools – which should not be allowed, in conformity with the provision of the Employment directive.

ILGA-Europe Proposal

PROPOSED AMENDMENT – ARTICLE 3.3

Original text:

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.

Proposed amendment #1:

*This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems **to the extent that measures are consistent with the principle of non-discrimination. Member States may allow educational institutions with an ethos based on a particular religion or belief to give preferential treatment in access to the educational institution on grounds of that particular religion or belief, provided this does not give rise to discrimination on other prohibited grounds.***

Proposed amendment #2:

*This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems **to the extent that measures are consistent with the principle of non-discrimination. 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.***