

The impact of the framework equality directive on the protection of LGB persons and same-sex couples from discrimination under EU law

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PART IV

Sexual Orientation

The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law

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I. Introduction

This chapter aims to assess the impact of the Framework Equality Directive 2000 (Directive 2000/78)¹ on the protection of lesbian, gay and bisexual (LGB) individuals and same-sex couples from discrimination under European Union (EU) law.² The analysis will begin by explaining that until the adoption of the Framework Equality Directive (FED) 2000, the only steps that the EU took for the protection of the rights of LGB persons and same-sex couples consisted of soft law measures which, as such, lacked teeth. In addition, unlike discrimination on the grounds of gender reassignment, discrimination on the grounds of sexual orientation was held by the Court of Justice of the EU (CJEU) not to be included in the prohibition of discrimination on the grounds of sex and, hence, the various EU law provisions prohibiting the latter could not be applied to assist LGB individuals. The chapter will then analyse the Framework Equality Directive 2000, demonstrating how it has improved the position of LGB persons and same-sex couples under EU law but also highlighting its shortcomings. Moreover, it will be considered whether the gaps in protection left by the Directive are satisfactorily filled by other instruments, in particular by the EU Charter of Fundamental Rights (CFR)³ which,

* I would like to thank the editors of this book and Phillip M Ayoub for their very helpful comments on previous drafts of this chapter. Needless to say, all errors remain mine.

¹ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Equality Directive, FED).

² It should be noted that for ease of reference the umbrella terms 'EU' and 'EU law' will be used throughout this chapter, even when referring to periods preceding the establishment of the EU when the matters of equality were addressed as pertaining to the competence of the E(C)C.

³ Charter of Fundamental Rights of the European Union [2016] OJ C202/393.

in Article 21, prohibits discrimination on, *inter alia*, the grounds of sexual orientation. Finally, it will be examined whether other legal instruments potentially coming into force in the future will be able to cover these gaps. Specifically, the proposed Equality Directive,⁴ which is currently in a state of legal limbo, will be considered. Apart from a detailed analysis of the FED and other relevant legislation, the chapter will also critically assess the judgments by the CJEU that offer an interpretation of the above instruments.

II. LGB Rights under EU Law before the Introduction of the Framework Equality Directive

The recognition of gay and lesbian rights only began in the 1970s, following the awareness raised by the Stonewall riots in New York in June 1969 and the vocalisation of the concerns of the gay and lesbian community through the activities of early gay rights organisations.⁵ Nonetheless, gay and lesbian rights as a new 'genre' of human rights found their place in human rights protection much later and usually as a result of purposive judicial interpretation rather than the amendment of human rights instruments to make explicit reference to them.

Thus, the Council of Europe's European Convention on Human Rights (ECHR) did not – and still does not – include any reference to gay and lesbian rights. Similarly, the prohibition of discrimination in Article 14 does not make explicit reference to sexual orientation as a protected ground. Nevertheless, the Strasbourg Court has held that sexual orientation is covered by the open 'or other ground' clause in this provision.⁶ Moreover, the Court's jurisprudence has revealed that a number of other ECHR provisions can be employed either alone or in combination with Article 14 ECHR to vindicate the human rights of LGB persons.⁷

Similarly, the founding Treaties of what later became the EU (ie the three Community Treaties)⁸ made no reference to fundamental human rights, let alone to LGB rights. This does not appear surprising, given that some of the founding states of the EU and the Council of Europe maintained a criminal

⁴ Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM (2008) 426 (Proposal for Equality Directive). This was accompanied by a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Non-Discrimination and Equal Opportunities: A renewed commitment, COM (2008) 420.

⁵ For an excellent account of the history of the gay rights movement in the US, see L Faderman, *The Gay Revolution: The Story of the Struggle* (New York, Simon & Schuster, 2015).

⁶ *Salgueiro da Silva Mouta v Portugal*, App no 33290/96 (ECtHR, 21 December 1999), para 28 (sexual orientation).

⁷ Eg Arts 3 (freedom from torture and inhuman or degrading treatment), 8 (right to private and family life), and 12 (right to marry) ECHR.

⁸ The European Coal and Steel Community (ECSC) Treaty, the European Economic Community (EEC) Treaty, and the European Atomic Energy (Euratom) Community Treaty.

provision prohibiting sodomy (ie male-to-male consensual sex) at the time that both of these organisations were conceived.⁹ Nevertheless, tentative steps towards protecting the rights of this segment of the population had already been taken by the EU in the 1980s. Admittedly, until 1999, all such initiatives were confined to soft law measures.¹⁰

The very first of these soft law measures was taken in 1984, when the European Parliament adopted a resolution on sexual discrimination, inviting the Commission to propose legislation on combating discrimination of homosexual persons in access to employment.¹¹ Two further resolutions were adopted in 1986 – one on fascism and racism in Europe and one on violence against women – both mentioning sexual orientation as relevant to acts of intolerance.¹²

The following decade saw the adoption of a European Parliament resolution on a plan of action in the context of the 1991–1992 ‘Europe against AIDS’ programme, which stressed the need to include gay men in preventive measures against AIDS.¹³ There were, also, actions which sought to raise awareness of the issues affecting the gay and lesbian community, the best example being an EU-funded project which considered the impact on lesbians and gays of the completion of the European internal market.¹⁴ In 1994, the European Parliament Committee on Civil Liberties and Internal Affairs decided to draw up a report – the so-called ‘Roth Report’¹⁵ – which identified the various problems faced by ‘homosexuals’ at the time and called on the Member States as well as the EU institutions to take action to remedy them. Among other things, the report asked the Commission to present a draft Council Directive on combating discrimination on the basis of sexual orientation in a wide range of areas of human life. The report also ‘affirmed’ the European Parliament’s ‘conviction that all citizens must be treated equally, irrespective of their sexual orientation’¹⁶ and noted that it ‘[c]onsiders that the European Community is under the obligation to apply the fundamental principle of equal treatment, irrespective of each individual’s sexual orientation, in all legal provisions already adopted or which may be adopted in future’.¹⁷ The European Parliament subsequently issued a ‘Resolution on equal rights for homosexuals and lesbians in the EC’, which was

⁹ This was the case in Germany, Ireland, the United Kingdom and Norway.

¹⁰ See, eg PM Ayoub and D Paternotte, *LGBT Activism and the Making of Europe* (Hampshire, Palgrave Macmillan, 2014).

¹¹ European Parliament Resolution on sexual discrimination at the workplace [1984] OJ C104/46.

¹² European Parliament Resolution on the rise of fascism and racism in Europe [1986] OJ C141/461; European Parliament Resolution on violence against women [1986] OJ C176/73.

¹³ European Parliament Resolution on a plan of action in the context of the 1991–1992 ‘Europe against AIDS’ programme [1991] OJ C158/54.

¹⁴ K Waaldijk and A Clapham (eds), *Homosexuality: A European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy* (Dordrecht, Martinus Nijhoff, 1993).

¹⁵ European Parliament, Report of the Committee of Civil Liberties and Internal Affairs on equal rights for homosexuals and lesbians in the EC (26 January 1994) A3-0028/94.

¹⁶ Roth Report (n 15).

¹⁷ *ibid* para 2.

a (much) watered-down version of the Roth Report.¹⁸ This resolution, instead of calling on the Commission to present a draft Directive prohibiting discrimination on the grounds of sexual orientation, merely requested it 'to present a draft Recommendation on equal rights for lesbians and homosexuals'.¹⁹

In response to these initiatives, the Commission took a number of similarly modest steps. For instance, it included sexual harassment on the grounds of sexual orientation in its code of practice on measures to combat sexual harassment.²⁰ Similarly, in 1998, the staff regulations for officials of the European Communities were amended to include a clause prohibiting discrimination on grounds of sexual orientation.²¹

During this period, the CJEU, was likewise for the first time confronted with cases involving LGBT persons. Strikingly, the Court showed itself to be rather reticent in relation to the protection of LGB rights, in contrast to its willingness to protect the rights of trans persons.

The first case that reached the CJEU – *P v S and Cornwall* [1996]²² – involved a male-to-female trans person who sought to rely on EU law to challenge the decision of her employer to dismiss her as a result of her decision to undergo gender reassignment surgery. Given that, in the mid-1990s, only discrimination on the grounds of sex and nationality was prohibited by EU law, the claimant argued that the contested dismissal amounted to discrimination based on sex. Since dismissal falls within the scope of 'working conditions', it was argued that the discrimination complained of amounted to a breach of the Equal Treatment Directive 1976 (Directive 76/207).²³ The Court was receptive to these arguments, holding that discrimination on the grounds of gender reassignment amounts to discrimination on the grounds of sex and is thus contrary to EU law.

Shortly after this ruling, in *Grant* [1998]²⁴ the Court was called on to decide whether the prohibition of discrimination on the grounds of sex also included

¹⁸ European Parliament Resolution on equal rights for homosexuals and lesbians in the EC [1994] OJ C61/40.

¹⁹ *ibid.*

²⁰ European Commission, A code of practice on measures to combat sexual harassment, Annex to the Commission Recommendation on the dignity of women and men at work [1992] OJ L49/1.

²¹ Regulation 781/98 amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities in respect of equal treatment [1998] OJ L113/4.

²² Case C-13/94 *P v S and Cornwall City Council* EU:C:1996:170. For comments, see L Flynn, 'Annotation of Case C-13/94, *P v S and Cornwall County Council*, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143' (1997) 34 *Common Market Law Review* 367; R Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 50 *Modern Law Review* 334, 339–344.

²³ Council Directive 76/207/EEC 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 [1976] OJ L39/40.

²⁴ Case C-249/96 *Grant v South-West Trains* EU:C:1998:63. For comments, see KA Armstrong, 'Tales of the Community: Sexual Orientation Discrimination and EC Law' (1998) 20 *Journal of Social Welfare and Family Law* 455; J McInnes, 'Annotation of Case C-249/96, *Lisa Jacqueline Grant v South West Trains Ltd*, Judgment of the Full Court of 17 February 1998, [1998] ECR I-636' (1999) 36 *Common*

discrimination on the grounds of sexual orientation or, if not, whether the latter form of discrimination was prohibited by EU law at the time. This case involved a lesbian employee of South-West Trains (in the UK) who was refused travel concessions for her (long-term) female partner, although her (male) predecessor in the post did receive these concessions for his (long-term) female partner. Ms Grant claimed that this amounted to (direct) discrimination on the grounds of sex prohibited by EU law relying on the requirement of equal pay for equal work in Article 119 EC (now Article 157 TFEU) and the directives on equal treatment of men and women.²⁵

However, Grant's argument was not accepted by the Court. In relation to the claim that the contested refusal amounted to discrimination on the grounds of sex, the Court employed the 'equal misery' argument, comparing Ms Grant with a (hypothetical) *male* employee claiming the same concessions for his (*male*) partner.²⁶ This methodology has been widely criticised in the literature for using the wrong comparator. The correct comparator would have been a male colleague with a *female* partner, since, in this way, the *only* characteristic changed in the comparison is the sex of the claimant, whereas under the comparison drawn by the Court, both the sex of the claimant *and* the sex of the partner were changed.²⁷ The Court then pointed out that:

in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.²⁸

Finally, the Court noted that discrimination on the grounds of sexual orientation is not covered by the prohibition of discrimination on the grounds of sex.²⁹

III. Directive 2000/78

As seen in the previous section, until the promulgation of Directive 2000/78, EU law did not grant any protection from discrimination based on sexual

Market Law Review 1043; M Bell, 'Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*' (1999) 5 *European Law Journal* 63.

²⁵ Namely, Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19 and Council Directive 76/207/EEC 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 [1976] OJ L39/40.

²⁶ Case C-249/96 *Grant* (n 24) para 27.

²⁷ Flynn (n 22) 382; Wintemute (n 22) 347–348; McInnes (n 24) 1049–1050.

²⁸ Case C-249/96 *Grant* (n 22) para 35.

²⁹ The CJEU followed the same approach in Joined Cases C-122 and 125/99 *P D and Sweden v Council* EU:C:2001:304.

orientation to LGB individuals. Moreover, unlike discrimination on the grounds of gender reassignment, discrimination on the grounds of sexual orientation was held not to amount to discrimination on the grounds of sex. Thus, there was a lacuna in the protection of this segment of the EU population. However, this gap was filled by the Treaty of Amsterdam, which introduced Article 13 EC³⁰ (now Article 19 TFEU), stipulating:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of 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.

This provision does not prohibit discrimination on, *inter alia*, the grounds of sexual orientation but is merely a competence-giving provision which, as such, lacks direct effect. Accordingly, the prohibition of discrimination on the grounds of sexual orientation did not automatically emerge from the insertion of Article 13 into the EC Treaty, but was only introduced when the EU legislature promulgated Directive 2000/78.

The latter instrument prohibits (direct and indirect) discrimination on the grounds of religion or belief, disability, age or sexual orientation, in the areas of employment, vocational training, and membership of a professional organization. It makes clear that harassment based on any of these grounds is a prohibited form of discrimination.³¹ Similarly, an instruction to discriminate on these grounds is unlawful.³² Furthermore, the Directive makes provision for a general occupational requirements exception applicable to all grounds.³³ More specific exceptions only apply to discrimination on the grounds of disability and age.³⁴ Indirect discrimination on any of the grounds laid down in the Directive can be objectively justified.³⁵ The Directive is also ‘without prejudice to measures laid down by 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 for the protection of the rights and freedoms of others.’³⁶ Taking a substantive equality approach, the Directive facilitates positive action, noting that ‘the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages

³⁰ For commentary on the steps that led to the introduction of this provision by the Treaty of Amsterdam, see M Bell and L Waddington, ‘The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article’ (1996) 25 *Industrial Law Journal* 320. For comments on Article 13 EC generally, see L Flynn, ‘The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?’ (1999) 36 *Common Market Law Review* 1127.

³¹ FED Arts 2 (prohibition) and 3 (scope).

³² *ibid* Art 2(4).

³³ *ibid* Art 4.

³⁴ *ibid* Arts 5 and 6 respectively.

³⁵ *ibid* Art 2(2)(b)(i).

³⁶ *ibid* Art 2(5).

linked to any of the grounds referred to in Article 1.³⁷ The legislation is a minimum harmonisation measure, enabling Member States to introduce or maintain provisions which are more favourable than those laid down in it.³⁸ In addition, provision is made for remedies and enforcement, with particular attention on the promotion of dialogue between social partners, the encouragement of dialogue with appropriate NGOs that have a legitimate interest in contributing to the fight against discrimination, and the promotion of the principle of equality.³⁹

The Framework Equality Directive (FED) is important in that it is the first instrument in EU law to establish a binding prohibition of discrimination on the grounds of sexual orientation. Yet it has been criticised for not going far enough, especially when compared to the instruments prohibiting discrimination on the grounds of sex, and racial or ethnic origin. In particular, the protection afforded by the Directive appears to be inferior to that provided by (its sister) Race Equality Directive 2000 (Directive 2000/43),⁴⁰ which was also adopted on the basis of Article 13 EC and promulgated just months before. Admittedly, the material scope of application is much more limited for Directive 2000/78 – it only applies to employment, vocational training and membership of a professional organisation, whereas Directive 2000/43 also encompasses social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services which are available to the public, including housing.⁴¹ Moreover, the relatively large amount of exceptions from discrimination in Directive 2000/78 means the categories of persons that fall within its scope are less protected than those under Directive 2000/43, which has a more limited scope for exceptions. Moreover, the Race Equality Directive 2000 obliges Member States to designate a body for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin,⁴² whereas no such duty is imposed by Directive 2000/78. Hence, a number of commentators have criticised the current anti-discrimination policy of the EU for creating a hierarchy among the various grounds on which discrimination is prohibited, with discrimination on the grounds of racial or ethnic origin at the top, and discrimination on the grounds of age at the bottom of the hierarchy.⁴³

³⁷ *ibid* Art 7.

³⁸ *ibid* Art 8.

³⁹ *ibid* Arts 13 and 14 respectively. For a discussion of the role that transnationally connected LGBT NGOs play as catalysts in the adoption of legislation protecting LGBT rights, especially in more recent EU Member States, see the chapter by Phillip M Ayoub in the present volume.

⁴⁰ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Equality Directive).

⁴¹ For their material scope, see Art 3 of each Directive.

⁴² Directive 2000/43 (n 40) Article 13.

⁴³ D Schiek, 'A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/73/EC Changing Directive 76/207/EEC in context' (2002) 8 *European Law Journal* 290; M Bell and L Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 *European Law Review* 349; E Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2007) 13 *Maastricht Journal of European and Comparative Law* 445.

Unfortunately, such a hierarchical relationship among the various grounds makes the law in this area ill-suited for dealing with multiple discrimination, since in certain areas (e.g. housing) discrimination on the grounds of racial origin is prohibited whilst discrimination on the grounds of sexual orientation is not. For example, if a gay Asian man is discriminated against on grounds of ethnic origin *and* sexual orientation, he can rely on Directive 2000/43 to challenge the former but he cannot rely on Directive 2000/78 to challenge the latter.⁴⁴ Finally, neither of the 2000 Directives makes it clear that discrimination by assumption and discrimination by association are also prohibited. Nevertheless, this has been established by the Court of Justice in its jurisprudence interpreting the directives.⁴⁵

The prohibition of discrimination on the grounds of sexual orientation, as laid down in the FED, was interpreted by the CJEU through a number of preliminary rulings. The first such ruling was delivered eight years after the promulgation of the Directive. *Maruko* [2008]⁴⁶ concerned a reference from proceedings between Mr Maruko and the German Theatre Pension Institution ('Vddb') relating to the refusal by Vddb to recognise Mr Maruko's entitlement to a widower's pension as part of the survivor's benefits provided for under the compulsory occupational pension scheme, of which his deceased registered life partner had been a member. The refusal by Vddb was based on the fact that its regulations only provided for such an entitlement for spouses, excluding surviving registered life partners.

When considering whether the contested refusal amounted to discrimination on the grounds of sexual orientation contrary to Directive 2000/78, the Court pointed out that:

from 2001 [...] the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different sex, that Member State created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage.⁴⁷

The Court then summarised the views of the referring court and, without providing its own conclusion as to whether registered partnerships are treated as equivalent to marriage under German law, stated:

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

⁴⁴ M Bell, 'Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive' (2009) 3 *The Equal Rights Review* 7, 9.

⁴⁵ Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C:2013:275 (discrimination by assumption); Case C-303/06 *Coleman v Attridge Law and Steve Law* EU:C:2008:415 (discrimination by association).

⁴⁶ Case C-267/06 *Maruko v Versorgungsanstalt der deutschen Bühnen* EU:C:2008:179. For a comment, see C Tobler and K Waaldijk, 'Annotation of Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported' (2009) 46 *Common Market Law Review* 723.

⁴⁷ Case C-267/06 *Maruko* (n 46) para 67.

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 2000/78.⁴⁸

To put it differently, if for a certain purpose (e.g. grant of a survivor's pension) a Member State considers same-sex registered partnerships as equivalent to marriage, it must treat them in the same way. If it treats the two types of relationships differently, *despite the fact that it considers them equivalent*, this amounts to direct discrimination on the grounds of sexual orientation which is contrary to the Directive. The *Maruko* judgment gave cause for both praise and criticism.

Starting with the former, the Court should be commended for taking a pragmatic approach when determining what type of discrimination is at issue in such a case. As noted above, it ruled that on the facts of the case, there was direct discrimination on the grounds of sexual orientation. Since marriage was not available to same-sex couples, legislation which limits the availability of a certain entitlement to married couples amounts to (direct) discrimination on the grounds of sexual orientation, if said entitlement is refused to a couple who is not married (because marriage is not open to it) but has entered into a registered partnership.⁴⁹ This finding 'renders *Maruko* remarkable'.⁵⁰

On the other hand, the view in *Maruko* that equality of treatment between same-sex registered partners and opposite-sex married persons is only required if a Member State considers the two as being in a comparable situation for a specific purpose has been criticised: by deferring this matter to the Member States, the Court was in effect leaving same-sex couples to the mercy of the latter.

The Court followed exactly the same approach in the subsequent case of *Römer* [2011].⁵¹ At issue in that case was the refusal of the German authorities to adopt for former employees, who had entered into a life partnership in Germany with their same-sex partners, the same method of calculating the supplementary pension to which they were entitled as that which was used for former employees who were married to their (opposite-sex) partner. The Court held that the Directive precludes the use of such a different method of calculating the supplementary pension if 'in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership' which is reserved to persons of the same gender; moreover, it found that there is direct discrimination on the grounds of sexual orientation because, under national law 'that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on

⁴⁸ *ibid* para 72.

⁴⁹ According to Tobler and Waaldijk, *Maruko* can be viewed as a 'move away from an approach under which only measures that are explicitly based on the prohibited criterion or on a criterion that is by nature indissociably linked to it (such as pregnancy in the case of sex) amount to direct discrimination.' – see Tobler and Waaldijk (n 46) 739–740.

⁵⁰ A Eriksson, 'European Court of Justice: Broadening the scope of European nondiscrimination law' (2009) 7 *International Journal of Constitutional Law* 731, 742.

⁵¹ Case C-147/08 *Römer v Freie und Hansestadt Hamburg* EU:C:2011:286.

the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.⁵²

The next case on the prohibition of discrimination based on sexual orientation under Directive 2000/78 was *Asociația Accept* [2015],⁵³ which emerged from proceedings between Accept, a Romanian NGO which defends and promotes the rights of LGBT persons, and the Romanian Council for Combatting Discrimination. The latter had partially dismissed a complaint lodged following public statements made by a person (Mr Becali) who presented himself as having – and was considered by public opinion to play – a leading role in a Romanian professional football club (FC Steaua). Mr Becali had ruled out the recruitment by FC Steaua of a footballer alleged as being gay. Consequently, Accept claimed that the principle of equal treatment had been breached in regard to recruitment.

In its judgment, the Court first pointed out that to establish direct discrimination on the grounds of sexual orientation, an identifiable complainant who claims to have been the victim of such discrimination is not required.⁵⁴ Instead, it suffices if the claim is brought by an NGO without identifying the person that has been harmed by the action forming the basis of the complaint. The Court then explained that it is not relevant if the statements which amount to discrimination come from a person who does not have legal capacity to bind or represent the club in recruitment matters, when this person is considered by public opinion to have such capacity. The fact that the club has not distanced itself from the statements concerned is a factor which the referring court may take into account when making its judgment.⁵⁵ The Court also made it clear that discrimination *by assumption* is prohibited by the Framework Equality Directive 2000. In other words, for discrimination on the grounds of sexual orientation to be proved, it suffices if someone discriminates against a person because *they think* that he or she is gay, irrespective of the actual sexual orientation of the latter.

This judgment must clearly be applauded, as the Court demonstrated its willingness to adopt a broad pragmatic approach when interpreting the prohibition of discrimination on the grounds of sexual orientation. It seems to have achieved substantive rather than merely formal equality, by seeking to ensure that even potential obstacles to access to the employment market which are liable to occur as a result of the existence of discriminatory measures or practices are prohibited.

⁵² *ibid*, para 52.

⁵³ Case C-81/12 *Asociația Accept* (n 45). For excellent commentary on the case, see U Belavusau 'A Penalty Card for Homophobia from EU Non-Discrimination Law: Comment on *Asociația Accept* (C-81/12)' (2015) 21 *Columbia Journal of European Law* 329 and the chapter by Kristin Henrard in this volume.

⁵⁴ Case C-81/12 *Asociația Accept* (n 45) para 36. The Court had already held this in relation to the prohibition of discrimination on the grounds of race in Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* EU:C:2008/397.

⁵⁵ Case C-81/12 *Asociația Accept* (n 45) paras 46–53.

Thus, the Court's analysis is no longer confined to a consideration of whether a specific person has been discriminated against in comparison to another person in similar circumstances at a particular instance. Instead, it more broadly considers whether a certain practice or action of a person or body is such as to create a discriminatory climate against a segment of the population which shares a characteristic which is a prohibited ground of discrimination under the Directive. Moreover, the Court's approach in *Asociația Accept* demonstrates its desire to be sensitive to the specific considerations that pertain to minorities in general,⁵⁶ and LGB individuals in particular (namely, that they may not wish to 'come out' by bringing an action claiming that they have been the victims of sexual orientation discrimination), especially in Member States where homophobia is still (highly) prevalent. Allowing actions to be brought by NGOs in situations without an identifiable victim is especially important. It ensures that LGB individuals who are not 'outed' are not faced with the difficult dilemma of either refraining from bringing an action to continue hiding their sexuality or to bring an action and thus 'come out' at a time when they may not be ready or in circumstances that will make them suffer negative consequences.

The same positive approach towards the protection of LGB persons from discrimination is evident in the subsequent case of *Hay* [2013],⁵⁷ with facts quite similar to those in *Maruko* and *Römer*. Here, the Court took the opportunity to react to the criticisms levelled against its approach in the previous cases by conducting the comparability assessment (between same-sex and opposite-sex couples) itself, instead of leaving it to the Member States.

The case involved the refusal by a French bank to award one of its employees, Mr Hay who concluded a civil solidarity pact with his male partner, special leave and a bonus granted to staff who marry. After finding that the issue related to Mr Hay's 'pay', the Court decided that Directive 2000/78 was applicable. It then proceeded to consider whether same-sex couples who entered into a *Pacte Civil de Solidarité* (PACS) were in a position comparable to opposite-sex married couples as regards the special leave and the bonus, concluding that they are.⁵⁸ In contrast, in the *Maruko* and *Römer* judgments, the Court merely provided guidelines as to how the comparability assessment should be conducted without making the assessment itself.

In line with *Maruko* and *Römer*, the Court upheld that discrimination against same-sex couples who have entered into a form of registered partnership because marriage is not available to them amounts to *direct* discrimination on the grounds of sexual orientation.⁵⁹ It noted:

The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in *Maruko* and *Römer*, is not restricted only to homosexual

⁵⁶ As first demonstrated in Case C-54/07 *Feryn* (n 54).

⁵⁷ Case C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* EU:C:2013:823.

⁵⁸ *ibid* para 36.

⁵⁹ *ibid* para 41.

couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.⁶⁰

Accordingly, for a finding of direct discrimination it is not necessary that the status which is treated worse (here, the PACS) is only open to same-sex couples. Rather, what is required is simply that the status through which additional rights or benefits are granted (in this case, marriage) is not open to same-sex couples.

Overall, *Hay* – in line with *Asociația Accept* – can be considered an example of a case which has improved the position of LGB persons and same-sex couples under EU law, by interpreting the prohibition of discrimination on the grounds of sexual orientation broadly, and appearing less hesitant to sanction clearly discriminatory actions. The Court now seems willing to conduct the comparability assessment itself and to determine whether under national law, same-sex registered partners are similarly situated with opposite-sex married couples for a particular purpose. In case of a positive determination, Member States would be required to extend entitlements which they might have preferred to bestow only on married couples also to same-sex couples who have formalised their relationships.

The most recent case concerning the prohibition of discrimination on the grounds of sexual orientation under Directive 2000/78 is *Parris* [2016].⁶¹ Dr Parris, a retired academic, brought an action against Trinity College Dublin (his former employer) and a number of Irish government departments, arguing that he had been discriminated against by the defendants by reason of his age and sexual orientation. Trinity College Dublin had refused to accept Dr Parris's request that on his death, the survivor's pension provided for by the occupational benefit scheme, of which he was a member, should be granted to his civil partner. The refusal was based on the fact that Dr Parris entered into a civil partnership with his male partner only after he had turned 60 and the occupational scheme provided that the survivor's pension was payable only if the claiming member had married or entered into a civil partnership before reaching the age of 60. However, in Ireland, civil partnerships could only be entered into since January 2011, and civil partnerships entered into abroad could be recognised only prospectively from January 2011. Thus, LGB persons born before 1 January 1951 (ie LGB persons who turned 60 before they could enter into a same-sex civil partnership in Ireland) were, in effect, excluded in all instances from claiming a survivor's benefit for their same-sex civil partner. The main question of the referring court was whether the contested rule of the occupational scheme amounted to discrimination on the grounds of age and/or sexual orientation, contrary to Directive 2000/78.

The Court held that the contested rule did not give rise to direct discrimination on the grounds of sexual orientation because it did not refer directly to the worker's sexual orientation. The Court also found that the contested rule did not give rise to indirect discrimination on these grounds either, as 'the fact that

⁶⁰ *ibid* para 43.

⁶¹ Case C-443/15 *Parris v Trinity College Dublin and Others* EU:C:2016:897.

Mr Parris is unable to satisfy that condition is a consequence, first, of the state of the law existing in Ireland at the time of his 60th birthday, in particular the absence at that time of a law recognising any form of civil partnership of a same-sex couple, and, secondly, of the absence, in the rules governing the survivor's benefit at issue in the main proceedings, of transitional provisions for homosexual members born before 1951.⁶²

Referring to Recital 22 of Directive 2000/78, the Court proceeded to highlight the deference it shows towards Member State laws regarding the regulation of marital status in their territory and, in particular, the legal recognition of same-sex relationships: these are matters with respect to which Member States have maintained their full competence, and thus have regulatory freedom over, provided that obligations under EU law are complied with.⁶³ The Court then explained that the 'Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect'.⁶⁴ From this, the Court concluded that:

EU law, in particular Directive 2000/78, did not require Ireland to provide before 1 January 2011 for marriage or a form of civil partnership for same-sex couples, nor to give retrospective effect to the Civil Partnership Act and the provisions adopted pursuant to that act, nor, as regards the survivor's benefit at issue in the main proceedings, to lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act.⁶⁵

Accordingly, the CJEU deemed the contested rule not to violate the prohibition of discrimination on the grounds of sexual orientation, laid down in the FED. Nevertheless, the contested measure was held to establish a difference in treatment directly based on the criterion of age, which however fell within one of the exceptions provided by the Directive and was thus not prohibited.

Finally, the question was raised whether the contested rule gave rise to (multiple) discrimination on the combined grounds of age and sexual orientation. The Court did not examine this in substance, merely indicating that multiple discrimination is not prohibited by the FED.⁶⁶

As argued elsewhere,⁶⁷ the judgment can be characterised as a failed opportunity for the CJEU to offer effective protection to LGB persons and same-sex couples under EU law. In particular, the *Parris* case seems to be treading cautiously around matters that are delicate from the standpoint of the Member States. The Court appears wary of being accused of imposing its own views with regard to

⁶² *ibid* para 56.

⁶³ *ibid* paras 57–58.

⁶⁴ *ibid* para 59.

⁶⁵ *ibid* para 60.

⁶⁶ *ibid* para 80.

⁶⁷ A Tryfonidou, 'Another Failed Opportunity for the Effective Protection of the Rights of Same-Sex Couples under EU law: *Parris v. Trinity College Dublin and Others*' (2017) 2(2) *Anti-Discrimination Law Review* 83–95.

a matter (namely, the legal recognition of same-sex relationships) for which there is still great diversity of opinion among the Member States.⁶⁸ By hiding behind Recital 22, the Court avoided intervening in this case. The legal recognition of same-sex relationships and the derived rights is indeed a matter wholly to be regulated at Member State level. However, the *Parris* judgment allows Member States to discriminate against LGB persons who are unable to enter into a marriage or registered partnership in a certain Member State until a certain date. These persons are differently situated from heterosexual persons who had the (legal) option of entering into a marriage or registered partnership by the required age, but chose not to do so and, thus, should be treated differently.

As in other areas where the Member States have maintained their full legislative competence, they must comply with their obligations under EU law when making legislation regulating the legal recognition of family relationships (including same-sex relationships) and the economic consequences that ensue from entering into such relationships. Accordingly, it is not correct for the CJEU in this case to simply state that the legal recognition of same-sex relationships is a matter that falls to be regulated exclusively by the Member States. Rather, it must ensure that Member State rules governing occupational pensions in situations involving same-sex couples comply with Directive 2000/78. Such compliance would require the removal of discrimination on the (combined) grounds of sexual orientation and age, without however requiring Ireland to recognise such relationships retrospectively – indeed a matter that falls to be regulated exclusively by Ireland. Compliance could be achieved by amending the rule and permitting LGB persons born before 1951 to claim the survivor's benefit for their same-sex partner even if they entered into a civil partnership or marriage after turning 60.

Notwithstanding its rather disappointing approach in *Parris*, the Court's interpretation of the Directive in other recent cases has in several respects played an important role in improving the position of LGB persons and same-sex couples under EU law.

IV. Other (Actual or Potential) Sources of Legal Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law

The aim of this section is to consider whether the other (actual or potential) main sources of protection of LGB persons and same-sex couples under EU law can fill the gaps left by Directive 2000/78.

⁶⁸ For a discussion of the different approaches to the legal recognition of same-sex relationships and the protection of LGBT rights among EU Member States, as well as the factors that influence the diffusion of new norms and laws in different groups of Member States, see the chapter by Phillip M Ayoub in the present volume.

A. The EU Charter of Fundamental Rights

The Treaty of Lisbon came into force in December 2009. It amended the EU and EC Treaties, and changed the name of the latter to 'TFEU'. In addition, it made the EUCFR binding, by providing in Article 6(1) TEU (as amended) that this document now has the same legal value as the treaties. The coming into force of the Treaty of Lisbon has been immensely important for the protection of LGB rights for a number of reasons.

Firstly, the treaty added a new mainstreaming provision – Article 10 TFEU – which provides that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' This provision proactively ensures that all EU policies should now be free from discrimination on, *inter alia*, the grounds of sexual orientation. Thus, it suitably complements the reactive protection from this sort of discrimination offered by secondary legislation (Directive 2000/78) and by the EUCFR (as will be seen below).

Secondly, as noted above, the Treaty of Lisbon made the EUCFR binding. This means that its provisions *bind* the EU institutions, and individuals can bring actions against Member States for breaching their rights under the Charter in situations that fall within the scope of EU law. As regards LGB individuals, this is significant because Article 20 of the Charter states that 'Everyone is equal before the law'. More significantly, Article 21 provides that 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited' (emphasis added). Therefore, LGB individuals can rely on this provision to challenge instances of discrimination based on their sexual orientation even in situations which are not related to employment, vocational training, and membership of professional organisations. Put differently, the Charter has expanded the material scope of the prohibition of discrimination on the grounds of sexual orientation.

Yet, one should not overestimate the ability of the Charter to protect the rights of LGB individuals. Indeed, the Member States are only bound when they are 'implementing EU law'.⁶⁹ Since it is still not entirely clear when this requirement is satisfied,⁷⁰ the extent to which this provision can be relied on against Member States will be dependent on the Court's willingness to interpret it broadly.

⁶⁹ Art 51 CFR.

⁷⁰ The Explanations Relating to the Charter of Fundamental Rights ([2007] OJ C303/17) state that the Charter is binding on the Member States 'when they act in the scope of Union law'. The most recent case-law interpreting Article 51 also adopts a broad reading of this provision: 'The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter' (Case C-617/10 *Fransson* EU:C:2013:105 para 21). However, it is yet to be clarified *when* a situation falls within the scope of EU law for this purpose. In some of its latest case-law, the Court appears

Thirdly, apart from Article 21 TFEU, the Charter also includes a number of other rights that can be of help to LGB persons, most significantly the right to human dignity and the right to private and family life. However, this is not really an innovation, since even before the coming into force of the Charter, these rights were already protected as general principles of EU law and, could therefore be relied on by LGB persons.

To date, the Court has only had the chance to apply the Charter in a single case involving LGB individuals – *Léger*⁷¹ – concerning alleged discrimination on the grounds of sexual orientation outside the field of employment. The case considered the compatibility with EU law of the blanket ban in France on blood donation by men who have had sex with other men (MSM). It was argued that this amounted to discrimination on the grounds of sexual orientation since this category of persons essentially comprised of gay and bisexual men. The Charter was deemed applicable because the contested French legislation was implementing relevant EU secondary legislation.⁷² Thus, it was necessary to consider whether a permanent ban on blood donation by the MSM population is compatible with the fundamental rights recognised by the EU legal order.⁷³ The Court noted, in particular, that the French legislation ‘must respect inter alia Article 21(1) [of the Charter] ... according to which any discrimination based on sexual orientation must be prohibited. Article 21(1) is a particular expression of the principle of equal treatment, which is a general principle of EU law enshrined in Article 20 of the Charter.’⁷⁴ The Court found that the contested ban ‘may discriminate against homosexuals on grounds of sexual orientation,’⁷⁵ since the challenged legislation ‘determines the deferral from blood donation on the basis to the homosexuality of the male donors who, on account of the fact that they have had homosexual sexual relations, are treated less favourably than male

to have adopted a rather restrictive approach to this question (see, eg Case C-45/12 *Hadj Ahmed* EU:C:2013:390; Case C-198/13 *Hernández* EU:C:2014:2055).

⁷¹ Case C-528/13 *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes and Etablissement français du sang* EU:C:2015:288. For comments, see P Dunne, ‘A Right to Donate Blood? Permanent Deferrals for “Men Who Have Sex with Men” (MSM): *Léger*’ (2015) 52 *Common Market Law Review* 1661; A Tryfonidou, ‘The *Léger* Ruling as Another Example of the ECJ’s (Disappointingly) Reticent Approach to the Protection of the Rights of LGB Persons under EU Law’ (2016) 41 *European Law Review* 91; U Belavusau, ‘Towards EU Sexual Risk Regulation: Restrictions on Blood Donation as Infringement of Active Citizenship’ (2016) 7 *European Journal of Risk Regulation* 801.

⁷² Directive 2002/98/EC of the European Parliament and of the Council setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83 [2003] OJ L33/30; Commission Directive 2004/33/EC implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components [2004] OJ L91/25.

⁷³ Case C-528/13 *Léger* (n 71) paras 45–47.

⁷⁴ *ibid* para 48. However, as explained by Belavusau, the CJEU in its judgment in this case demonstrates a ‘narrow understanding of the EU discrimination regime’ which ‘suggests that the Court is unwilling to stretch the material scope of the Equality Directive beyond the employment market and labour relations [...] by calling ‘into question the very existence of a general principle of non-discrimination on the grounds of sexual orientation’ – see Belavusau (n 71) 808.

⁷⁵ Case C-528/13 *Léger* (n 71) para 50.

heterosexual persons.’⁷⁶ Nevertheless, the measure may be justified if it satisfies the conditions laid down by Article 52 of the Charter. While the CJEU left it to the national Court to make the final decision, it provided detailed guidelines, specifically pointing out that the national Court must examine whether there are measures which can achieve the same aim (a high level of human health protection) without requiring the imposition of a complete lifetime ban on blood donation by the MSM population.⁷⁷

As explained elsewhere, the Court’s judgment is disappointing.⁷⁸ Although it found that the measure ‘may’ amount to discrimination on the grounds of sexual orientation contrary to Article 21 of the Charter, it proceeded to consider whether it is justified under Article 52. Instead, it should have ruled that the measure could under no circumstances be justified. There may indeed be some gay and bisexual men who engage in risky sexual behaviour through unprotected sex with multiple partners. Yet, this is also the case for some heterosexual men and for some heterosexual, bisexual or lesbian women. Accordingly, imposing a blanket ban only on gay and bisexual men appears to be unjustifiable. Moreover, the exclusion from blood donation applies to *all* men who have had sex with other men, even if only once in their life. Such a wide extent and duration cannot be justified on medical grounds. Indeed, medical advances have made it possible to easily detect a virus such as HIV after a certain period of time has passed since it has been contracted. Therefore, the contested *blanket* ban is unnecessary for ensuring the protection of public health. Moreover, the hands-off approach of the Court leaving it to the national Courts to decide on the justifiability of the measure in effect condones a national measure based on deep-seated homophobia and on stereotypical misconceptions about the sexual behaviour of gay and bisexual men.

Admittedly, the main reason behind the Court’s reticent approach in the judgment is likely to stem from its wish not to be seen as interfering in a matter which is sensitive from the point of view of the Member States. The contested measure touches on matters of public health and sexuality, in relation to which a wide margin of appreciation is often left to the Member States. Yet, in situations where there is a clear breach of the fundamental rights of a segment of the EU population – as was the case in *Léger* – wishing to keep the Member States happy by not interfering with their freedom to regulate sensitive matters is not acceptable.

Although the Charter does have the potential to complement Directive 2000/78 by protecting LGB individuals from discrimination outside employment, provided that the situation falls within the scope of application of the Charter, the signs so far are not very encouraging. The Court’s political and social considerations appear to form an obstacle to protecting the rights of LGB persons.

⁷⁶ *ibid* para 49.

⁷⁷ *ibid* paras 51–69.

⁷⁸ Tryfónidou, ‘The *Léger* Ruling’ (n 71). In contrast, Dunne noted that the judgment ‘appears to create a practical EU blueprint both for protecting the integrity of Member State blood supplies and guaranteeing the equal treatment of MSM donors’ – see Dunne (n 71) 1662.

B. The (Proposed) Equality Directive

As noted earlier, one of the main weaknesses of Directive 2000/78 is its limited material scope, which only covers the areas of employment and vocational training. This gap in protection will be filled if the proposed Equality Directive becomes law.⁷⁹ However, notwithstanding extensive discussion since 2008 regarding the substance of the proposed Directive and the amendments to the original proposal, there are no signs that unanimity in Council will be achieved any time soon (if at all).

The proposed directive would complement the existing FED by extending the prohibition of discrimination therein beyond the employment field to all areas covered by the RED. Moreover, the Equality Directive provides for a duty to be imposed on Member States to designate a body for the promotion of equal treatment irrespective of religion or belief, disability, age or sexual orientation, which is currently missing from Directive 2000/78.

Nonetheless, the proposed directive does not fill other gaps in protection left by Directive 2000/78. Like the latter instrument, the Equality Directive contains a wider range of exceptions from the prohibition of discrimination on the grounds of religion, disability, age or sexual orientation than the other instruments regarding the prohibition of discrimination on the grounds of gender, nationality and race.⁸⁰ Moreover, the proposal misses the opportunity to not only cater for multiple discrimination but also to enshrine the CJEU's case law on discrimination based on assumption and discrimination based on association as falling under the prohibition of discrimination.

One may ask why adopting the proposed directive would be important from a practical point of view. After all, discrimination on the grounds of sexual orientation is already prohibited in areas outside employment and vocational training by Article 21 EUCFR. Indeed, the Charter can help LGB persons who are discriminated against either by the EU institutions or by the Member States when the latter implement EU law. However, the lack of clarity about interpreting the latter requirement should not be forgotten. A restrictive interpretation is possible which considers the prohibition of discrimination on the grounds of sexual orientation outside employment and vocational training as applicable only in situations where a Member State is implementing EU law. However, by adopting the proposed directive, the EU will impose an obligation on *all* Member States to prohibit discrimination on the grounds of, *inter alia*, sexual orientation outside employment and vocational training. Hence, the uniform protection of LGB

⁷⁹ Proposal for Equality Directive (n 4).

⁸⁰ For an analysis of the proposal and/or the suggestions made by other institutions (in particular, the European Parliament) in relation to it, see Bell, 'Advancing EU Anti-Discrimination Law' (n 44); E Howard, 'EU Equality Law: Three Recent Developments' (2011) 17 *European Law Journal* 785, 788–92.

persons from discrimination in all Member States would be ensured.⁸¹ Moreover, requiring the promulgation of *national law* which will prohibit discrimination on the grounds of sexual orientation in a wide range of areas will protect LGB individuals from discrimination in these areas *even in situations that are entirely unrelated to, and thus fall outside the scope of, EU law*. Finally, since the proposed Equality Directive – like Directive 2000/78 – provides that the prohibition of discrimination will have to apply *both* in the public and the private sectors, LGB individuals will be able to rely on the implementing national legislation even against private individuals. For instance, if a same-sex couple is refused a hotel room, this will be prohibited by national law implementing the proposed directive, allowing for an action to be brought against the hotel owners.

Thus, and for the reasons summarised above, it is important to ensure that the proposed Equality Directive is promulgated soon because it will significantly improve the position of LGB persons under EU law and their protection from discrimination. Given that Commissioner Frans Timmermans, whose portfolio includes the protection of fundamental rights, has made the passing of the proposed Equality Directive one of his priorities, there is reason to feel optimistic about the possibility of this instrument becoming law in the next few years.

V. Conclusion

Overall, the FED, as interpreted and applied by the CJEU, can be deemed a success story. As O’Cinneide has noted, ‘the equality directives have come to exert a significant “destabilizing” effect on structural forms of inequality hitherto accepted as “normal” at national level, by opening up new legal avenues for individuals, NGOs, trade unions and other organizations to challenge discriminatory practices.’⁸² Yet, this does not mean that LGB individuals in the EU now enjoy complete equality with heterosexual individuals, and that they are free from discrimination in all areas of human life. As we have seen, the material scope of the FED is still confined to employment and vocational training. Consequently, Member States are only obliged to have provisions in their legislation which prohibit discrimination on the grounds of sexual orientation in this context. While in cases which fall outside the scope of the Directive, Article 21 EUCFR can come to the rescue, this is not a panacea. Unlike the FED, which requires Member States to prohibit discrimination on the grounds of, *inter alia*, sexual orientation even in situations

⁸¹ As Bell has noted, ‘A mapping study for the Commission published in 2006 found that although there was a wide range of legislation in the Member States on discrimination outside employment, this was often variable in its material scope and it was not always consistent in the range of discrimination grounds covered’ – see Bell (n 44) 16.

⁸² C. O’Cinneide, ‘The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground’ (2015) 22 *Maastricht Journal of European and Comparative Law* 370 at 373.

involving private bodies and parties, Article 21 of the Charter can only be relied on against the EU and against the Member States when implementing EU law. Furthermore, the Charter requires the existence of a link with EU law, such as Member State discrimination against LGB individuals when implementing EU legislation or discrimination on the grounds of sexual orientation against persons who have exercised their free movement rights. Conversely, the proposed Equality Directive requires the Member States to adopt legislation to implement it, which would then apply as part of the national legal system in *all* situations, irrespective of the existence of a link with EU law. Accordingly, the EU legal framework which seeks to protect LGB individuals and same-sex couples from discrimination will only be complete once the proposed Equality Directive becomes law.