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European Union Law and Gay Rights: Assessing the Equal Treatment in Employment and Occupation Directive and Case Law on Employment Benefits for Registered Same-Sex Partnerships

Jeneba Barrie

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**EUROPEAN UNION LAW AND GAY RIGHTS: ASSESSING
THE EQUAL TREATMENT IN EMPLOYMENT AND
OCCUPATION DIRECTIVE AND CASE LAW ON
EMPLOYMENT BENEFITS FOR REGISTERED SAME-SEX
PARTNERSHIPS**

Jeneba H. Barrie*

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* J.D./D.C.L. 2014, Paul M. Hebert Law Center, Louisiana State University; B.S., Political Science, University of Houston. I would like to thank Professor Olivier Moréteau and Alexandru-Daniel On for their insight and guidance throughout the writing process. I would also like to thank my husband, Mohamed B. Barrie, PharmD Candidate 2014, for his unwavering love and support throughout this process.

I. INTRODUCTION: THE ADVENT OF GAY RIGHTS IN THE EUROPEAN UNION

Recognition of rights based on sexual orientation (referred to interchangeably as “gay rights”) is a fairly new phenomenon in the European Union (EU). Before the Treaty of Amsterdam¹—specifically, article 13—sexual orientation protection had never been expressly mentioned in EU law. Article 13 makes it clear that sexual orientation discrimination—among others, such as race, sex, and religion—would be combated.”² During the development of gay rights generally in the EU, there have been three legislative texts and resolutions aimed at combating sexual orientation discrimination. These texts are: the *European Parliament Resolution* (hereinafter “Resolution”),³ article 13 in the Treaty of Amsterdam, and the *Charter of Fundamental Rights* (hereinafter “Charter of Rights”),⁴ which were recognized or passed in 1994, 1997, and 2000, respectively.

1. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam] (First mention of sexual orientation discrimination in EU law).

2. Presently art. 19 (1) of the Treaty on the Functioning of the European Union, formerly art. 13 of the Treaty on European Union. Article 19 (1) provides:

Without prejudice to the other provisions of this Treaty 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.

3. European Parliament, Resolution on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61/40) [hereinafter Resolution].

4. Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02 [hereinafter Charter of Rights]. Article 6 of the Treaty on European Union [hereinafter TEU] created the article of fundamental rights—European Union’s Charter of Fundamental Rights. This article is binding as long as EU Member States and EU institutions are applying Union law. This Charter was actually passed in 2000, and would have been modified in the failed 2004 European Constitution. Thus, its legal force was in the balance until it was successfully implemented in the Treaty of Lisbon (signed in December 2007, came into force in December 2009).

The 1994 Resolution asked Member States⁵ to provide gays and lesbians with legal protection. The Resolution recognized that gays and lesbians should be treated equally with their heterosexual counterparts. The Resolution affirmatively called for the decriminalization of homosexuality and also sought to protect sexual orientation minorities in the areas of inheritance, social security, and housing.⁶ Notwithstanding the Resolution's non-binding effect, it was noteworthy as it explicitly recognized the rights of sexual orientation minorities in the EU. Consequently, due to the Resolution's non-binding effect, EU Member States citizens could not rely upon the Resolution in court.⁷ Nevertheless, the European Parliament reaffirmed the 1994 Resolution in 1996,⁸ just before the Treaty of Amsterdam was signed.

On October 2, 1997, the then fifteen Member States signed the Treaty of Amsterdam, which went into effect in 1999.⁹ Before this provision, there was an unanswered question as to whether the EU was competent to enact anti-discrimination laws to protect sexual orientation minorities.¹⁰ One of the effects of the implementation of article 13 in the Treaty of Amsterdam was that the above question was answered in the affirmative.¹¹ The article 13 provision forbidding discrimination based on sexual orientation was also vital in leading the way for other anti-discrimination laws.¹²

5. See discussion *infra* Part IV. Member States of the EU are countries that have relinquished some national power to the European Union.

6. *Id.*

7. *Id.*

8. See Resolution of the Respect of Equal Rights in the European Union, 1996 O.J. (C 320).

9. The 15 Member States were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

10. Dimitry Kochenov, *Gay Rights in the EU: A Long Way Forward for the Union* of 27, 3 CROATIAN Y.B. OF EUR. L. AND POL'Y 469 (2007).

11. *Id.*

12. *Id.*

On December 7, 2000—shortly after the Treaty of Amsterdam went into effect—the Charter of Rights was signed.¹³ The non-discrimination clause of the Charter of Rights forbade discrimination on many grounds, including sexual orientation.¹⁴ However, the Charter of Rights was ineffective and lacked legal force until December 1, 2009, when the Treaty of Lisbon,¹⁵ in which it was incorporated, took effect.

Outside the EU, the *European Convention on Human Rights* (hereinafter “the Convention”)¹⁶ was promulgated by the Council of Europe,¹⁷ which is comprised of 47 countries including all EU Member States. The Convention was originally enacted in 1950, and has been amended several times to encompass a wider array of human rights issues.¹⁸ Even though the Convention pre-dates the establishment of the EU, every EU Member State has ratified the Convention.¹⁹ The European Court of Human Rights (hereinafter “ECHR”) was created to ensure compliance with the Convention.²⁰ Any person who believes that a state party to the Convention has violated their rights under the Convention can file a complaint to

13. Charter of Rights, *supra* note 4.

14. Charter of Rights, *supra* note 4, art. 21. The Charter is comprehensive and forbids discrimination based on “race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth right, disability age, and sexual orientation.”

15. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306)I [hereinafter Treaty of Lisbon].

16. European Convention on Human Rights (formerly, Convention for the Protection of Human Rights and Fundamental Freedoms,) Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

17. The Council of Europe was founded on May 5, 1949, as a political institution. The Council of Europe has promulgated a plethora of conventions. The Most important of these is the European Convention of Human Rights.

18. The Convention covers, among others: (art. 1) right to life, (art.11) freedom of association, (art. 14) freedom from discrimination, (art. 12) right to marriage. The amendments made through additional protocols further expand the rights granted: *E.g.* Protocol 12 (art. 1), prohibition of discrimination, Protocol 13 (art. 1) abolition of the death penalty.

19. EUROFOUND, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeanconventionfortheProtectionofhumanrightsandfundamental freedoms.htm> (last visited Jan. 19, 2014).

20. The Convention, *supra* note 16, art. 19.

the ECHR.²¹ Likewise, a High Contracting Party may file a complaint to the ECHR against another High Contracting Party for a violation of the Convention.²² All of the court's decisions are binding.²³ Nonetheless, the relevant provision on the prohibition of discrimination fails to mention sexual orientation.²⁴

The gradual development of EU powers lead to much stronger anti-discrimination laws. In 2000, the Council unanimously passed the Directive on Equal Treatment in Employment and Occupation (hereinafter "Directive").²⁵ The goal of the Directive is stated in article 1: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."²⁶ There is no doubt that earlier attempts were insufficient to combat sexual orientation discrimination. The Directive can be considered a

21. The Convention, *supra* note 16, art. 34:

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

22. The Convention, *supra* note 16, art. 33.

23. *Id.*

24. See The Convention, *supra* note 16, art. 14: "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"; see also Protocol 12, art. 1, para. 1. covers: "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other statutes" & para. 2: "No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

25. Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303/16) [hereinafter Directive]. A directive is binding upon the Member States or group of Member States to which it is addressed to. This Directive was addressed to all Member States. A directive is specific as to the results that should be achieved. Directives work to secure uniformity among the EU Member States. Although it is binding, the form or method of implementation are left at the discretion of the Member States, as long as the objective of the Directive are transposed into national law before the deadline for implementation.

26. Directive, *supra* note 25, art. 1.

beacon of hope in sexual orientation anti-discrimination law because it *specifically* banned sexual orientation discrimination in the workplace.²⁷

Although there is a plethora of issues that arises in the context of sexual orientation discrimination in the EU workplace, this essay focuses on the rights of EU citizens—in registered same-sex partnerships—to recover employment benefits. Civil statuses, such as registered same-sex partnerships, are within the competence of the individual Member States.²⁸ Nevertheless, as the rejection of employment benefits is not the only issue faced by sexual orientation minorities in the EU workplace, this essay also delves into the effects of the Directive in other employment areas. This essay also shows that, to a certain degree, the efforts to strengthen protection of sexual orientation minorities in the EU workplace are hindered by the interaction of EU law with the national laws of the Member States.

Following the brief introduction in Part I, Part II discusses the scope of the Directive. Part III focuses on the EU courts interpretation of the Directive in three seminal cases. Part IV contains an analysis of the court rulings and a survey of the effects of the Directive. Part V sets forth novel recommendations to improve the equality of sexual orientation minorities in the EU workplace. Finally, Part VI is a brief conclusion.

II. SCOPE AND CONTENT OF THE EQUAL TREATMENT DIRECTIVE

A. *Content of the Equal Treatment Directive*

As mentioned above, the Directive lays down “a general framework for combatting discrimination” on the grounds covered.²⁹ The Directive covers both direct and indirect discrimination. Direct discrimination occurs “where one person is

27. *Id.*

28. *See infra* Part IV.

29. *See supra* note 26.

treated less [favorably] than another is, has been or would be treated in a comparable situation, on any of the grounds referred to”³⁰ Likewise, indirect discrimination occurs where an “apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.”³¹ Unlike direct discrimination, there are few exceptions made in the context of indirect discrimination. For instance, indirect discrimination is acceptable if the criterion used is “objectively justified.”³² Lastly, the Directive covers harassment, which is defined as an “unwanted conduct related to any grounds . . . with the purpose of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”³³ Furthermore, unlike the direct and indirect discrimination provisions, the Directive allows Member States to define harassment in accordance with their national law.³⁴ Although the Directive is a beacon of hope, it nevertheless has some defects.³⁵

30. See Directive, *supra* note 25, art. 2.

31. *Id.*

32. Directive, *supra* note 25, art. 2 (b)(i)-(ii):

For the purposes of paragraph 1:

...

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

33. Directive, *supra* note 25, art. 2(3).

34. *Id.*

35. See discussion *infra* Part III. See also Directive, *supra* note 25, art. 2. In defining types of discrimination, among other things, definitions of discrimination, harassment are too limited.

B. Scope of the Equal Treatment Directive

Along with the force in employment and occupation, the Directive covers vocational training and employer/employee organizational memberships.³⁶ The Directive is applicable to both private and public sectors, including public entities. The Directive encompasses dismissals, pay,³⁷ working conditions, and access to employment.³⁸ The Member States may provide for a more heightened level of protection, but the Council, when drafting Directives, sets forth minimum requirements, which Member States must follow.³⁹ The Directive does not cover “payment of any kind made by state scheme or similar, including state social security or social protection schemes.”⁴⁰ Member States are allowed to opt out of the Directive’s provision on age and disability as it relates to their armed forces.⁴¹ Article 10 imposes remedies for individuals in national court (the referring court). Furthermore, in a suit based on the Directive, the burden of proof is placed upon the defendant to prove the absence of an unlawful discrimination.⁴² Currently, all 28 Member States have implemented the Directive into national law. By December 2, 2003—the deadline for the implementation—all of the “old

36. Directive, *supra* note 25, art. 3.

37. Directive, *supra* note 25, art. 3(1)(c) (This essay explores, among other issues, whether Directive art. 3(1)(c) is applicable to the parties’ claims, or whether art. 3(3)—relating to social security or state schemes—would exclude the coverage of the Directive).

38. *Id.*

39. *Id.*

40. Directive, *supra* note 25, art. 3(3).

41. Directive, *supra* note 25, art. 3(4).

42. Directive, *supra* note 25, art. 10:

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more [favorable] to plaintiffs.

Member States,” had transposed the Directive into national law.⁴³ The 10 “new Member States”⁴⁴ had implemented the Directive into national law by May 1, 2004. Two Member States, Romania and Bulgaria, joined the EU on January 1, 2007,⁴⁵ and have implemented the Directive. Croatia also became a member of the EU in 2013.

III. LANDMARK COURT DECISIONS

An important aspect of gauging anti-discrimination progress against sexual orientation minorities in the EU workplace is to analyze the rulings of the EU courts. There have been three landmark court cases. These three cases—*Sweden v. Council*,⁴⁶ *Maruko v. Versorgungsanstalt der deutschen Bühnen*⁴⁷ and *Römer v. Freie und Hansestadt Hamburg*⁴⁸—will be discussed and analyzed to determine the level of protection of sexual orientation minorities in regard to employment benefits for registered same-sex partners.

In order to better understand the rulings of the following decisions, it is essential to understand the process that the cases underwent, in particular, the ECJ’s⁴⁹ preliminary reference process.

43. See EUROPA, [http://europa.eu/rapid/press-release MEMO-08-69_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-08-69_en.htm?locale=en) (last visited Jan. 14, 2014).

44. See Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, April 16, 2003.

45. See Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, April 25, 2005.

46. Joined Cases C-122/99P & C-125/99P, *Sweden v. Council*, 2001 E.C.R. I-4319.

47. Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R I-01757.

48. Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, 2010 E.C.R. I-3595.

49. See Consolidated Version of the Treaty on European Union art. 19, 2010 O.J. (C 83) 1, at 27 [hereinafter TEU].

A. The European Court of Justice Preliminary Reference Process

The preliminary reference process is detailed in article 267 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”).⁵⁰ The article describes the process in which a Member State’s national court may refer a case to the Court of Justice of the European Union (hereinafter “ECJ” or “the Court”). The article confers jurisdiction to the Court on preliminary rulings in interpreting treaties. Furthermore, jurisdiction is conferred “where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”⁵¹ In essence when there is a question as to how to interpret EU law by the national Member States, the Member States are allowed to refer the question to the Court.

Procedurally, there are three stages to the preliminary reference. The first stage is when the national court of a Member State seeks a preliminary reference from the Court. The next stage is when the Court makes a decision regarding the interpretation of EU law or answers a legal question brought before it. Lastly, after the Court has made a decision, the national court and the litigants decide how to implement the decision of the Court. After the Court rules, the national court will then make its own decision, while

The Court of Justice of the European Union includes the Court of Justice, the General Court and specialized courts. The Court is tasked with ensuring proper application and interpretation of Treaty laws. The body of the Court consists of one judge from each Member State. The Court of Justice of the European Union shall:

[in] accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union Law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties. *Id.*

50. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, 2008 O.J. (C 115) 47, [hereinafter TFEU].

51. *Id.*

applying the Court's interpretation of EU law, or the Court's answer to the legal question brought before it.⁵²

The jurisdiction of the Court is limited in scope. As such, "there are two legal norms that can become the object of a preliminary ruling."⁵³ The Court has jurisdiction over the interpretation of Treaties and the "validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union."⁵⁴

B. The Application of the Directive in Landmark Cases

I. Sweden v. Council

Sweden v. Council consolidated two appeals from the judgment in the Court of First Instance.⁵⁵ The law applicable to the facts of *Sweden* predated the implementation of the Directive, but the ruling was made after the Directive was passed.⁵⁶ The plaintiff, Mr. D, brought action against the Council of the European Union (hereinafter "Council") after its refusal to award Mr. D a household allowance under the *Staff Regulations of Officials of the European Communities* (hereinafter "Staff Regulations").⁵⁷ The

52. Stacy Nvikos, *The European Court of Justice and National Courts: Strategic Interaction within the EU Judicial Process* (eds. Lee Epstein and Stanley L. Paulsen, Paper presented at Washington University at St. Louis on Comparative Constitutional Courts, 2001), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.6306&rep=rep1&type=pdf> (Last visited March 25, 2014).

53. See ALAIN A. LEVASSEUR ET AL., *THE LAW OF THE EUROPEAN UNION* 305-310 (2nd ed., Carolina Acad. Press 2013).

54. *Id.*

55. Case T-264/97, *D v. Council*, 1999 E.C.R.-SC I-A-1 and II-1. Prior to 2009 the Court of First Instance (hereinafter CFI) heard appeals from Commission decisions. Post-2009, the CFI is known as the General Court.

56. *Sweden*, 2001 E.C.R. I-4319, para. 4. (The Council rejected Mr. D's application for the Staff Regulation benefit in 1996. The case was decided in 2001, one year after the Directive was implemented).

57. Article 1(2) of Annex VII to the Staff Regulations of Officials of the European Communities ('the Staff Regulations') provides as follows:

The household allowance shall be granted to:

- a. A married official;
- b. An official who is widowed, divorced, legally separated or unmarried and has one or more dependent children

Council enacted the Staff Regulation, which regulated employee pension benefits. Mr. D, a Swedish national, was an official of the European Communities, as an employee of the Council.⁵⁸ Mr. D entered into a registered same-sex partnership with another Swedish national on June 23, 1995.⁵⁹ The allowances were available to married officials, among others.⁶⁰ Mr. D applied for the allowance and requested that his same-sex partnership be treated equivalently to marriage for purposes of qualifying for the allowance.⁶¹ The Council denied his request.⁶² The Council reasoned that the same-sex partnerships could not be treated as equivalent to marriage for the purpose of obtaining the allowance.

Mr. D subsequently filed a complaint with the Secretary General of the Council. The Secretary General denied his request, and cited the same reasons given by the Council.⁶³ Mr. D then filed a complaint to the Court of First Instance.⁶⁴ His complaint requested—among other things⁶⁵—for the Court of First Instance

c. By special reasoned decision of the appointing authority based on supporting documents, an official who, while not fulfilling the conditions laid down in (a) and (b), nevertheless actually assumes family responsibilities.

58. *Sweden*, 2001 E.C.R. I-4319, para. 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (“The Council rejected the application, by note of 29 November 1996, on the ground that the provisions of the Staff Regulations could not be construed as allowing a ‘registered partnership’ to be treated equivalent to marriage”).

63. *Id.* at para. 6.

64. *Id.*

65. *Id.* at para 7. Mr. D also pleaded:

1. Entitlement to other general provisions “applicable to officials of the European Communities”.

2. An infringement on non-discrimination based on EU law—including the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. “Infringement of the principle of equal pay for men and women contained in Article 119 of the EC Treaty—Article 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.” *Id.*

As to first plea, the court acknowledged only the household allowance under the Staff Regulations, and no other general provisions that are applicable to officials

to annul the refusal of the Secretary General to allow his same-sex partnership to be considered equivalent to marriage for the purposes of obtaining the household allowance.

Although Mr. D raised other grounds on appeal,⁶⁶ the Court of First Instance limited its ruling to the household allowances under the Staff Regulation.⁶⁷ The court cited *Arouxo v. Commission*⁶⁸ in concluding that for purposes of the Staff Regulation “the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term.”⁶⁹ The court further ruled that the Council was under “no obligation to regard as equivalent to marriage, for the purposes of the Staff Regulation, the situation of a person who had a stable relationship with a partner of the same sex, even if the relationship was recognized by national authority.”⁷⁰ Lastly, the court held that the reference to the Member State’s law on marriage was inapplicable as the Staff Regulation was susceptible of an independent interpretation.⁷¹ Thus, the court rejected his claim.

of the European Communities. In regards to the second plea, the court held that since the Convention of Human Rights does “not cover long-term homosexual relationships” no infringement could have occurred. Finally, the court held that as to the plea of equal pay, the Staff Regulations applied equally to both sexes, and thus do not lead to discrimination.

66. *See Id.*

67. *Id.* at para. 8. The court held that:

[the plea of non-discrimination was under] Council Regulation (EC, ECSCM Euratom) No 781/91 of 7 April 1988 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment (O.J. 1998 L. 113, p. 4), which introduced Article 1a into the Staff Regulations giving officials entitlement to equal treatment irrespective of their sexual orientation, without prejudice to the provision of the Staff Regulations requiring a particular marital status, did not enter into force until after the adoption of the contested decision and so it was not appropriate to take the regulation into consideration. *Id.*

68. *Id.* at para. 11. Case T-65/92, 1993 E.C.R. II-593.

69. Case T-65/92, *Arouxo-Dumay*, 1993 E.C.R., para. 28.

70. *Id.* at para. 12.

71. *Id.* at para. 11.

Mr. D appealed to the ECJ, and the Government of Sweden (hereinafter “Government”) intervened on his behalf.⁷² The Government argued that since civil status is a matter which comes within the exclusive competence of the Member States, terms such as married official or spouse should be interpreted by reference to law of the Member States and not given an independent interpretation (as defined in the Staff Regulation).⁷³ The issue before the Court was whether married spouses and same-sex couples in a registered partnership should be treated as equivalent for the purposes of the allowance, and if so, whether Mr. D was discriminated against because of his sexual orientation. Furthermore, the Court was asked which definition of marriage—the Member States or the Staff Regulation—should control in regards to the household allowance under the Staff Regulation.

The Court held that the Court of First Instance did not err when it rejected the petition because “even in the law of those Member States which recognize the concept of registered partnership, that concept is distinct from marriage”⁷⁴ The Court stated that the issue in this case (“the question whether the concepts of marriage and registered partnership should be treated as distinct or equivalent”⁷⁵) was an issue of first impression. Nevertheless, the Court held that refusal to grant the allowance was not discriminatory based on sex, as it was applicable to both men and women.⁷⁶ Furthermore, the Court held that the sex of the partners is not determinative, but rather it is the tie between the partners that counts.⁷⁷ Next, the Court held that the “principle of equal treatment can apply only to persons in comparable situations,”⁷⁸

72. *Id.* at para 17.

73. *Id.* at para. 29.

74. *Id.* (The court further stated that it was for the EU legislature to decide the equivalency and not the role of the judiciary, as the EU legislature dealt with budgetary and financial impact of the Staff Regulation).

75. *Id.* at para. 33.

76. *Id.* at para. 46.

77. *Id.* at para. 47.

78. *Id.* at para. 48.

thus it was necessary to consider whether a married official could be comparable to registered partnership between same-sex couples.⁷⁹ The Court first assessed the prominent view of the “Community” in its entirety—and stated that there was an “absence of any general assimilation of marriage and other forms of statutory union.”⁸⁰ As such, and in light of the Court’s observations, the appeal was rejected.⁸¹ Nevertheless, the Court stated that it is for the Community legislature to amend the Staff Regulation language to encompass same-sex partnership for the purpose of qualifying for the allowance under the Staff Regulation.

2. Maruko v. Versorgungsanstalt der deutschen Bühnen

In 2008, *Maruko v. Versorgungsanstalt der deutschen Bühnen* was decided. In 2001, Mr. Maruko entered into a registered same-sex partnership with another German national.⁸² His partner, Hans Hettinger, was a theatrical costume designer.⁸³ Their partnership was formed under the Lebenspartnerschaftsgesetz (LParG),⁸⁴ a German law that provides legal protection for partnerships that resembled marriage. In 2005, Mr. Maruko’s partner died.⁸⁵

79. *Id.*

80. *Id.* at para. 50.

81. Mr. D, for the first time (in front of the Court of Justice) raised an issue of a plea relating to discrimination based on nationality and restriction of freedom of movement. The Court rejected these pleas because they were not asserted in the lower court. The Court also rejected Mr. D’s plea relating to Article 8 of the European Convention on Human Rights.

82. *Maruko*, 2008 E.C.R. I-01757, para. 19.

83. *Id.*

84. See paragraph 1 of the Law on registered life partnerships (*Gesetz über die Eingetragene Lebenspartnerschaft*) of 16 February 2001 (BGBl. 2001, I, p. 266), as amended by the Law of 15 Dec 2004 (BGBl. 2004 I, p. 3396, the “LPartG”):

(1) Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority.

85. *Maruko*, 2008 E.C.R. I-01757, para. 21.

A month after his partner's death, Mr. Maruko petitioned the Versorgungsanstalt der deutschen Bühnen (Vddb),⁸⁶ the insurance company that provided his partner's survivor pension for artists, to receive the widowers or surviving spouse pension.⁸⁷ Maruko's partner, as a costume designer, qualified for the pension. Furthermore, Maruko's partner voluntarily contributed to the insurance plan, even though he was under no obligation to do so.⁸⁸ The Vddb denied Mr. Maruko's petition.⁸⁹

The Vddb's interpretation of a widow or widower pension included married spouses only, and did not include partners in a registered partnership.⁹⁰ Mr. Maruko brought a claim before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court) in Munich.⁹¹ Mr. Maruko asserted that Vddb's refusal to grant the pension infringed "the principle of equal treatment" since registered partnerships have been placed on the same footing as marriage, specifically, because paragraph 46(4) was introduced in the Social Security Code.⁹² Mr. Maruko further asserted that to deny the pension would constitute discrimination based on sexual orientation since married spouses were in a comparable situation with registered partners.⁹³ Lastly, Mr. Maruko claimed that because German law prescribed the same

86. *Id.* at para. 22.

87. Paragraphs 32 and 34 of the Vddb Regulations defined Widow(er's) pension as follows:

Para. 32 (widow's pension): (1) "The spouse of the insured man or retired man, if the marriage subsists on the day of the latter's death, shall be entitled to a widow's pension."

Para. 34 (widower's pension): (1) "The spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter's death, shall be entitled to a widower's pension."

88. *Maruko*, 2008 E.C.R. I-01757, para. 20.

89. *Id.* at para. 22 (the Vddb rejected Mr. Maruko's application "on the ground that its regulations did not provide for such entitlement for surviving life partners").

90. *Id.*

91. *Id.* at para. 23 (the Bavarian Administrative Court, Munich, is the referring court).

92. *Id.*

93. *Id.*

rules relating to property to both life partnerships and marriages, by extension, the Vddb could not withhold the pension.⁹⁴ The Vddb considered⁹⁵ their insurance scheme as a state social security⁹⁶ and, as such, argued that it should not be defined as “pay” within the meaning of Article 3(1)(c)⁹⁷ of the Directive. Consequently, if the insurance scheme was not within the scope and reach of the Directive, the Vddb was not obligated to grant Mr. Maruko’s request.

The Bavarian Administrative Court stated that “in view of the structure of the Vddb and the decisive influence exercised by the theatre companies and insured persons over its operations, we are inclined to think that the Vddb does not manage a scheme equivalent to a state social security scheme, within the meaning of Article 3(3) of Directive 2000/78.”⁹⁸ The court further stated that unlike heterosexual couples, it was impossible for Mr. Maruko and his partner to satisfy the terms of marriage set forth in the Vddb survivors’ insurance benefit because of their sexual orientation.⁹⁹ Furthermore, satisfying the terms of marriage was dependent upon receiving the pension.¹⁰⁰ The court, in its referral to the ECJ, asked whether the “combined provisions of Article 1 and Article 2(2)(a) of the Directive precludes provisions in regulations such as those of the Vddb,”¹⁰¹ under which a person whose life partner has died

94. *Id.*

95. *Id.* at para. 35.

96. *See* Directive, *supra* note 25, art. 3(3): “This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.”

97. Directive, *supra* note 25, art. 3(1)(c): “[T]his Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to . . . employment and working conditions, including . . . pay.”

98. *Maruko*, 2008 E.C.R. I-01757, at para. 25.

99. *Id.* at para. 29.

100. *Id.*

101. *Id.* at para. 27. *See also* Directive, *supra* note 25, art. 1 (“The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”) & art. 2(2)(a) (“[D]irect discrimination shall be taken to occur where one person is treated less favorably

does not receive survivor's benefits equivalent to those offered to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which was constituted for life.

The court stated that the Vddb provision was contrary to the Directive, which "precludes provisions such as those of the Vddb regulation,"¹⁰² under which entitlement to those benefit was restricted to surviving spouses. The court concluded that there was discrimination based on sexual orientation against Mr. Maruko because his claim fell within the Directive.¹⁰³

Nevertheless, the Bavarian Court suspended its proceedings and sought a preliminary ruling from the ECJ.¹⁰⁴ The issue presented to the Court was whether Vddb's insurance scheme was a state scheme under article 3(3),¹⁰⁵ or, more specifically, whether the insurance scheme for widow and widower's pension qualified as "pay" under Article 3(1)(c)¹⁰⁶ of the Directive. The Bavarian Court also presented the issue of whether article 1, in conjunction with article 2(2)(a) precludes regulations such as those by the Vddb in which a registered partnership is not treated equivalent to married spouses in obtaining pension benefits.¹⁰⁷ Lastly, the court questioned (if the above issues were answered in the affirmative) whether Mr. Maruko was discriminated based on his sexual orientation.¹⁰⁸ The Bavarian Court feared that they would interpret the Directive broadly if they answered the above issues in the affirmative without first obtaining a preliminary reference from the ECJ.

than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1").

102. *Maruko*, 2008 E.C.R. I-01757, para. 30.

103. *Id.* at para. 28.

104. *Id.* at para. 33.

105. *See supra* note 96 and accompanying text.

106. *See supra* note 97 and accompanying text.

107. *Maruko*, 2008 E.C.R. I-01757, para 33.

108. *Id.*

The ECJ deduced that first; the survivors' pension was the result of the employment relationship between Maruko's partner and the Vddb, and "therefore, must be classified as 'pay' within the meaning of the Directive."¹⁰⁹ Next, the Court ruled that articles 1 and 2 of the Directive forbid both direct and indirect sexual orientation discrimination.¹¹⁰ As such, the Vddb's requirement that the recipient of the survivor benefit be married constituted indirect discrimination under the Directive since gays and lesbians are unable to marry in Germany, but are afforded equal protection as married spouses and considered to be in comparable situations.¹¹¹ The national law recognized a movement in the equivalency of marriage and partnerships, and likewise, that:

[T]he combined provisions of Articles 1 and 2 of [the Directive] preclude provisions such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit.¹¹²

The Court referred the case back to the Bavarian Administrative Court to determine whether spouses and partnerships are equivalent or compatible¹¹³ under German law. If they were, then Maruko would be entitled to the insurance benefit held by Vddb.

3. Römer v. Freie und Hansestadt Hamburg

Römer v. Freie und Hansestadt Hamburg was decided in 2011. Römer worked for Freie (employer) as an administrative employee

109. *Id.* at para. 56.

110. *Id.* at para. 66.

111. *Id.*

112. *Id.* at para. 73.

113. *Id.* The Court also stated "it is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit under the occupational pension scheme managed by the Vddb."

from 1950 until May 1990, when he ceased working due to incapacity.¹¹⁴ On October 15, 2001, Mr. Römer and his partner, Mr. U entered into a registered partnership pursuant to the LPartG.¹¹⁵ Before their registered partnership, Mr. Römer and Mr. U resided together continuously since 1969.¹¹⁶ Shortly after the couple entered the registered partnership, Mr. Römer wrote a letter to inform his [former] employer of the registered partnership.¹¹⁷ A month after the first letter—and on November 28, 2001—Mr. Römer wrote a second letter and “requested a recalculation of his ongoing pension entitlement on the basis of the more advantageous deduction of income tax”¹¹⁸ under the First RGG.¹¹⁹ The employer refused and stated that, according to the First RGG, only married pensioners were entitled to the tax calculations, and since Römer was in a partnership, he would not qualify for the calculation under the First RGG pension plan.¹²⁰ The calculations showed that Römer’s retirement pension would have been higher if Römer was in tax category 111/0 as opposed to tax category I.¹²¹ After the employer refused to re-calculate his pension, Römer brought suit in the Arbeitsgericht Hamburg, a national labor court

114. *Römer*, 2010 E.C.R. I-3595, at para 22.

115. *See supra* note 84 and accompanying text.

116. *Id.*

117. *Id.*

118. *Id.*

119. Erstes Ruhegeldgesetz, (the First RGG—Additional Supplementary Retirement and Survivors’ Pensions Act), May 30, 1995, [GVBl.] at 108 (Ger.) [hereinafter the First RGG].

120. *Id.* The employer cited paragraph 10(6)(1) of the First RGG, which states, in pertinent part:

[I]n a day of commencement of the retirement benefits . . . is not permanently separated married pensioners, as well as a pension recipient who is entitled to child allowance or a corresponding power to this day, the amount of that day as a wage tax . . . would be paid by tax class 111/0.

121. *Id.* at para. 24:

Mr. Römer’s monthly pension, from September 2001, determined on the basis of tax category I, amounted to DEM 1204.55 (EUR 615.88). According to Mr. Römer’s calculations, which are not disputed by his ex-employer, that monthly retirement pension would have been, in September 2001, DEM 590.87 (EUR 302.11) higher if tax category III had been applied.

in Germany.¹²² He argued that under the Directive his calculations for the tax in his pension should be viewed as equal with married pensioners, and argued that “the criterion of ‘married pensioners,’ laid down by the provision must be interpreted as meaning that it includes pensioners who have entered into a civil partnership in accordance with the LPartG.”¹²³ Römer further contended that, under the Directive, he had a cause of action to claim an equal calculation as a married pensioner.¹²⁴

Römer’s employer rejected the above-mentioned contentions and claimed that the pension calculation system applies only to “families under the special protection of the state,”¹²⁵ and marriage is “usually a prerequisite to forming a family, because it is the most usual form of relationship between men and women [recognized] by law and it constitutes a framework for the birth of children, and therefore the transformation of the married couple into a family.”¹²⁶ Thus, the employer continued, the advantage of the calculation system was designed to compensate for the extra financial burden involved in having a family.¹²⁷ The Arbeitsgericht Hamburg acknowledged that the LPartG—the law, under which Römer and his partner registered their partnership, as amended in 2004—was geared towards a gradual harmonization of registered partnerships and marriage. Furthermore, the court stated that under German law there are no significant differences between partnerships and marriage, except that marriage is between people of opposite sex.

However, the court decided to suspend its proceedings and refer the case to the ECJ.¹²⁸ The question to be decided was whether the supplementary retirement pensions such as those given

122. *Id.*

123. *Id.* at para. 25.

124. *Id.* at para. 26.

125. *Id.* at para. 27.

126. *Id.*

127. *Id.*

128. *Id.* at para. 34.

to former employees of Freie fall within the scope of the Directive.¹²⁹ If so, whether article 2¹³⁰ of the Directive prohibits a scheme that favors married pensioners over partners in a registered same-sex partnership, resulting in either direct or indirect discrimination.¹³¹

First, the Court held that the supplementary retirement pension qualified as “pay” within the Directive, and further held that the state social security scheme exception under article 3(3) was inapplicable.¹³² The Court also held that under the national law of Germany, registered partnerships and marriage have no legally significant differences, and “the main remaining difference is the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender.”¹³³ Thus, no sufficient difference exists which would justify the unequal treatment of Römer and as such, provisions such as that in the First RGG that grants lower supplemental retirement pension to registered partnerships based solely on sexual orientation constitutes direct discrimination.¹³⁴ Furthermore, after the Court’s finding of direct discrimination, it held that it is for the “referring court to assess the comparability” of spouses and individuals in a registered partnership.¹³⁵ Accordingly, the Court stated that in making this assessment, the referring court should focus on the rights and obligations of

129. *Id.*

130. *See* Directive, *supra* note 25, art. 2, which provides, in pertinent parts: For purposes of paragraph 1:

(a) [D]irect discrimination shall be taken to occur where one person is treated less [favorably] than another is, has been or would be treated in a comparable situation, on any of the grounds referred to

(b) [I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular . . . sexual orientation at a particular disadvantage compared with others

131. *Id.*

132. *Id.* at para. 35-36.

133. *Id.* at para 45.

134. *Id.* at para. 52.

135. *Id.*

married spouses and persons in partnerships, which are relevant inquiries considering “the purpose of and the conditions for the grant of the benefit in question.”¹³⁶ Nevertheless, the Court, citing *Maruko*, noted that German law “. . . made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension.”¹³⁷

IV. CRITICAL ANALYSIS

A. *The Supranational Nature of EU Law*

The EU operates on a supranational level and on limited sovereign powers that have been conceded by the Member States.¹³⁸ A constitutional treaty which some argue might have resulted in a federalist structure was proposed, but never ratified.¹³⁹ Accordingly, the Member States participate in a cooperative manner in exercising their sovereignty.¹⁴⁰ Therefore, the EU can only act “within the limits of the areas of competence conferred on the Community.”¹⁴¹ Thus, in accepting a case that has been referred to it, the Court must first decide whether the issue initially presented before the national court (referring court) deals with interpretation of EU law, as the Court cannot interpret national law.¹⁴² Furthermore, the Court is also limited in granting an opinion to the issue referred to it.¹⁴³ The Court must find a balance between enforcing EU law and refraining from enforcing areas of law that are within the exclusive competence of Member States.¹⁴⁴

136. *Id.*

137. *Id.* at para. 42.

138. KLAUS-DIETER BURCHARDT, *THE ABC OF EUROPEAN UNION LAW* 23-88 (Publication office of the European Union 2010).

139. See Draft Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1 (never ratified) [hereinafter Draft Constitutional Treaty].

140. *Id.* at 98.

141. See Directive, *supra* note 25, art. 3.

142. See *supra* Part III.A.

143. *Id.*

144. *Römer*, 2010 E.C.R. I-3595, para. 38.

The “marital status of persons falls exclusively within the competence of the Member States.”¹⁴⁵ As such, an important hurdle in the applicability of the Directive in the above cases was to determine whether the national court (referring court) would make the compatibility determination—that is, whether marriage is treated equivalently as a registered same-sex partnership.¹⁴⁶ The Court cannot decide the validity of a Member States’ restriction on same-sex partnerships, marriages or unions. However, once a Member State has decided to confer a status on same-sex partnerships that is comparable to married spouses—as in the *Maruko* and *Römer* decisions—the denial of benefits on the basis of a claimant’s sexual orientation would then be within the purview of the Court’s jurisdiction.¹⁴⁷

The *Makuo* decision was the first time the Court ruled “in favor of same-sex couples.”¹⁴⁸ Thus, the *Maruko* and *Römer* decisions were progressive milestones in the right of sexual orientation minority in EU in general, and in the employment benefit context, in particular. These cases were in stark contrast to the ruling in *Sweden*. The *Sweden* decision was distinguishable from the latter two cases for several reasons. First, in the *Sweden* decision, the issue of comparability determination between same-sex partnerships and marriage was an issue of first impression before the Court.¹⁴⁹ Second, the *Sweden* decision dealt with a Community Staff Regulation, which was susceptible to its own independent interpretation. According to the Court, the independent interpretation correlated with the Community practices at the time

145. *Id.*

146. *See* discussion *supra* Part III.B.

147. *Id.* In both the *Maruko* and *Römer* decisions, the Court stated that if the national court were to find that the status conferred to same-sex partnership is comparable to that of married spouses in regard to the respective pension plans, then the claimants would be entitled to receive the pension benefits, notwithstanding the classification of the relationships.

148. *EU backs gay man’s pension rights*, BBC NEWS (Apr. 1, 2008, 15:44 GMT), <http://news.bbc.co.uk/2/hi/europe/7324824.stm>.

149. *See supra* Part III.B.1.

Sweden was decided.¹⁵⁰ As such, the decision in *Sweden* derived from the Court's determination that in implementing the Staff Regulation, the Community legislature had the traditional meaning of marriage in mind. That is, the Staff Regulation did not anticipate coverage of same-sex partnerships, marriages or unions because there was an "absence of any general assimilation of marriage and other forms of statutory union," for same-sex couples within the Community.¹⁵¹ Thus, although there was clear discrimination in *Sweden*, the Court was limited in its ruling, as the Staff Regulation interpretation forbade further scrutiny by the Court. Third, unlike *Maruko* and *Römer*, the Staff Regulations' ability of independent interpretation hindered the comparability analysis in *Sweden*.

The Court went on to rule, however, in the later cases, that the Member States should determine the compatibility of partnerships and marriages, and if such compatibility were founded, the plaintiffs would be entitled to their pensions and insurance, respectively. Thus, even though the Swedish Government granted a comparative situation to same-sex registered partnerships as married couples, the ability of the Staff Regulations independent interpretation made such determination irrelevant. Ironically, the latter cases hinged upon such determination. The Court, for its part, called for the EU legislature to amend the language of the Staff Regulation.¹⁵² It remains to be seen whether the result of the Court in *Sweden* would have been different if the case dealt instead with an insurance company such as the Vddb in *Maruko*, and not a Staff Regulation sponsored by the Community.¹⁵³ Lastly, *Sweden* is distinguishable from *Maruko* and *Römer*, as the *Sweden*

150. See, e.g., Ian Curry-Sumner, *Same-sex Relationships in Europe: Trends Toward Tolerance?* 3 AMSTERDAM L. FORUM 44, 51 (2011) (When *Sweden* was decided in 2001, Germany and Finland allowed registered-partnership, and only the Netherlands allowed same-sex marriage. This suggests that the court took into account the "Community practice," which indicated a reluctance to grant marital and partnership status to same-sex couples).

151. See *supra* Part III.B.1.

152. *Id.*

153. Note, however, that both public and private entities are covered under the Directive.

decision, although factually similar to the latter cases, could not have been analyzed under the Directive. It would have been interesting whether *Sweden* would have been decided differently if the Directive would have been applicable.

An essential part of the applicability of the Directive was whether the employment benefit sought qualified as “pay.” If the benefit did not qualify as “pay” it would fall outside the scope of the Directive.¹⁵⁴ The relevant articles of the Directive are articles 1, 2 and 3.¹⁵⁵ Article 1 established the protected grounds.¹⁵⁶ Article 2 defines direct and indirect discrimination, both of which are covered under the Directive.¹⁵⁷ Article 3(1)(c) covers “pay” within the confines of the Directive,¹⁵⁸ while article 3(3) removes state social security schemes from the Directive’s coverage.¹⁵⁹

The Court’s recognition that the calculation scheme in *Römer* and the insurance scheme in *Maruko* qualified as “pay” within article 3, was the first step in order for appellant’s to assert their claim under the Directive.¹⁶⁰ Had the Court ruled differently (that these benefits were not considered “pay” for the purposes of the Directive) the Court would not have reached the question of whether the respective provisions were discriminatory. The next step was the Court’s ruling that—pursuant to article 2—the appellants were either directly or indirectly discriminated against because they were not treated comparably with married couples with whom they were similarly situated.¹⁶¹ Without such finding, the Court would not have had a reason to request the compatibility analysis from the national courts so as to determine whether partnerships where comparable to marriage in order for the

154. See *supra* note 96 and accompanying text.

155. See Directive, *supra* note 25, arts. 1, 2 & 3.

156. See *supra* Part I.

157. See *supra* note 130.

158. See *supra* note 97.

159. See *supra* note 96.

160. See *supra* Part III.B.2 & Part III.B.3.

161. See *supra* Part III.B.

appellants to claim entitlement of such benefits.¹⁶² Thus, the Court was right to find that the rejection of a survivor pension by a partner should be deemed less favorable treatment, because a married spouse would be automatically entitled to the pension, while a partner would not. Furthermore, it was important that the Court not only concluded that the treatment was less favorable, but that the provisions in both *Römer* and *Maruko* were unacceptable because they attempted to restrict benefits for same-sex partners, who otherwise qualified for the benefits under national law.

Although the Directive is not as strong as it could be due to the nature of the EU,¹⁶³ the Member States are entitled to grant greater protection than the Directive provides.¹⁶⁴ As such, the Member States and their judicial branch should be at the forefront in providing for higher protection than the Directive calls for. This request at first glance seems feasible. However, while heightened protection from Germany made all the difference in the latter two cases, the *Sweden* case showed how a different level of protection failed to accomplish the task.¹⁶⁵ As a consequence, the question becomes whether the protection for same-sex partnership rests upon the type of benefit that is challenged, as opposed to the Member State's grant to same-sex partners of comparable status to married spouses. Furthermore, in *Sweden* the Court stated that the sexual orientation of the partners did not matter, but that it was the tie between the partners that mattered.¹⁶⁶ However, in *Maruko* and *Römer*, the Court ruled that it was discrimination based on sexual orientation because the tie between the partners could never be one of marriage due to their sexual orientation.¹⁶⁷ The rulings in both *Maruko* and *Römer* have proven to be big steps forward for EU

162. *Id.*

163. *Id.* See also Part II.

164. See *supra* Part III.B.

165. See Part III.B.1 through 3.

166. See Part III.B.1.

167. See *supra* Part III.B.2 & Part III.B.3.

citizens in registered same-sex partnerships in providing the opportunity to recover employment benefits.

Currently, sixteen of the EU Member States recognize some form of registered partnership, with nearly ten of the Member States recognizing same-sex marriage.¹⁶⁸ However, since the definition of comparability is within the Member States competence, it is possible that provisions such as the VdB, and those in *Freie*¹⁶⁹ would be considered non-discriminatory, if same-sex partnerships and marriage are not considered comparable to married spouses. Accordingly, if a Member State allows same sex partnerships, but does not confer comparable benefits to the partners as those of married spouses, the citizen would undoubtedly be treated as second class solely because the Member State does not accord comparability status. Thus, in essence, “this means that the Member States frame the comparability between homosexual and heterosexual situations and thereby indirectly decide upon the applicability of EU law,”¹⁷⁰ by granting a benefit to a same-sex partner, but failing to uphold such benefit like in the case of married spouses, thereby removing the matter from the confines of the Directive, and from the Court’s jurisdiction.

Furthermore, it would also be legal to refuse same-sex partners from benefitting from the same employment benefits as those enjoyed by married spouses. In the *Maruko* case, the “results would have been very different if Germany would [not have

168. See Emmanuelle Bribosia, Isabelle Rorive & Laura Van den Eynde, *Same-Sex Marriage—Building an Argument before the European Court of Human Rights in Light of the U.S. Experience*, 32 BERKELEY INT’L L. J. (2013). The Netherlands was the first to do so in 2001, since then, Belgium, Spain, Sweden, Portugal, Denmark, France, and the United Kingdom have legalized same-sex marriage. Germany, Finland, Luxembourg, Hungary, Czech Republic, Slovenia, Austria, Ireland and Spain recognize some form of same-sex partnership, while Croatia recognizes unregistered cohabitation. Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Bulgaria do not recognize any form of same-sex partnership or marriage.

169. *Römer*, 2010 E.C.R. I-3595.

170. Gabriel N. Toggenburg, *LGBT go Luxembourg: Lesbian, Gay, Bisexual and Transgender Rights before the European Court of Justice*, 5 EUR. L. REP. 174 (2008).

provided] life partners with a ‘comparable situation so far as it concerns survivors benefit’¹⁷¹ Even though, concededly, the structure of the EU lends itself to this form of governance, the goal of equal application of the Directive to all Member States would be hampered. Articles 1 and 2 call for combating unfavorable treatment based on sexual orientation. The cases presented above show that a Member State could allow same-sex partnerships, but with none of the benefits that married couples would have, if the Member State decides that partnerships and marriage are not comparable. In such a case, essentially, the partnership would be in name only.

B. A Survey of Sexual Orientation Rights Before and After the Directive

The Directive itself—having been implemented—is an important step towards equal treatment of sexual minorities, of same-sex partners in regard to employment benefits, in particular, and EU sexual minorities citizens in general. Even though the case law on the Directive has been based on granting pensions and insurance benefit for same-sex partners, the Directive has provided relief in other areas as well. For instance, before the Directive, sexual minorities in the workplace did not have a cause of action or remedy against those who discriminated against them. The Directive offers explicit judicial and administrative remedy for victims, reinforced by the stipulations that the sanctions chosen must be “effective, proportionate and dissuasive in case of breaches of the obligation”¹⁷²

The Directive, in effect, stands for a proposition that sexual orientation discrimination ought to be taken seriously, and remedied accordingly. This tough stance on discrimination is further apparent under the Directive as the defendant has the burden of proving the absence of discrimination.

171. *Id.* at 180.

172. *See* Directive, *supra* note 25, art. 3.

Under the Directive, it is easier to “challenge legally the conduct of persons responsible for carrying out homophobic harassment in the workplace.”¹⁷³ In turn, as stated before, the Directive grants a direct remedy to those who have been discriminated against.¹⁷⁴ As such, those discriminated against would no longer have to rely on weaker law and weaker theories of recovery, such as harassment, assault or battery.

As a result of the Directive, labor organizations in the EU have mobilized in an effort to promote the Directive’s objectives and goals. The European Trade Union Confederation (hereinafter “ETUC”) is one such organization. One aim of the ETUC is to promote and defend human and civil rights, while demanding equality in the workplace for sexual orientation minorities.¹⁷⁵ In the wake of the Directive, the ETUC has partnered with other national governmental organizations and trade unions in furthering their commitment to equal treatment, respect and dignity for lesbians, gays, bisexuals, and transgendered (hereinafter “LGBT”) citizens in the workplace.¹⁷⁶ As part of its commitment to eliminate sexual orientation discrimination, the ETUC has set up a four-year action plan.¹⁷⁷ This plan is aimed at raising awareness of LGBT discrimination in the workplace, and promoting diversity, non-discrimination, as well as raising awareness to sexual orientation discrimination among trade union members.¹⁷⁸

173. *Id.*

174. *See e.g., supra* Part I, discussing the judicial unenforceability of earlier provisions by EU citizens against those who discriminated against them.

175. Jane Pillinger, *Extending Equality: Trade Unions Actions to Organise and Promote Equal Rights, Respect and Dignity for Workers Regardless of their Sexual Orientation and Gender Identity* 9-45 (European Trade Union Confederation 2008), available at http://www.etuc.org/sites/www.etuc.org/files/ETUC_inside-2.pdf (last visited March 31, 2014).

176. *Id.*

177. *Id.*

178. *Id.*

In the EU, sexual orientation minorities are sometimes referred to as invisible citizens¹⁷⁹ because they have to hide their sexual orientation to prevent harassment. Another labor organization, the European Commission EQUAL Community Initiative (hereinafter “EQUAL”), has the objective of ending the *invisibility* of sexual minorities in the workplace.¹⁸⁰ The EQUAL initiative was co-founded by the Member States after the adoption of the Directive.¹⁸¹ The aim of EQUAL resembles that of the ETUC.¹⁸² EQUAL’s objective is to create a working environment in the EU where homosexuals feel safe in the workplace.¹⁸³ It is safe to say that without the Directive the above-mentioned organizations would not have been created. Furthermore, absent the Directive, such organizations could not effectively promote and raise awareness of discrimination of sexual minorities in the workplace.

As such, the Directive has had notable accomplishments. First, the Directive provided labor organizations with a law to rely on in implementing change. Second, EU Member States sexual orientation minority citizens can rely on the Directive in court. Third, in connection with the applicability of the Directive in court, sexual minority citizens are able to seek remedies against violators

179. See, e.g., *Homosexuals. The Invisible Citizens of Lithuania*, BALTIC WORLDS, <http://balticworlds.com/homosexuals-the-invisible-citizens-of-lithuania> (last visited Jan. 14, 2014). These “invisible citizens”—as they are termed by the sociologists who authored a large-scale survey on homophobia in Lithuania—are subject to several forms of discrimination, most notably in the workplace. In Lithuania, they do not benefit from any legal recognition or organized communal life.

180. See European Commission, *Communication from the Commission to the Member States of 14.04.2000 Establishing the Guidelines for the Community Initiative EQUAL Concerning Transnational Cooperation to Promote New Means of Combating Discrimination and Inequalities in Connection with the Labour Market*, C (2000) 853, 2000 O.J. (C 127).

181. *Id.* The European Social Funds initially funded EQUAL.

182. *Id.* EQUAL also relies on the impact of media coverage to raise awareness of the rights of sexual minorities in the workplace. In addition, EQUAL takes it a step further and addresses LGBT issues in organizations such as churches, the police and the military. Furthermore, the EQUAL partnership has succeeded in educating and training management groups, trade union and work personnel.

183. *Id.*

of the Directive. In light of the above, the Directive has been successful.

C. By the Numbers: Sexual Orientation Discrimination Prevalence Before and After the Directive

In comparing the prevalence of sexual orientation discrimination in the workplace, it is important to view both pre-Directive and post-Directive numbers. Unfortunately, there is no system for assessing adverse impact of discrimination in the EU. This makes tracking the progress made after the implementation of the Directive difficult. However, “an action plan on statistics and a forthcoming EU Regulation are geared towards achieving comparable data of sexual orientation discrimination in the workplace at the EU level.”¹⁸⁴

Nevertheless, statistics are taken from independent sources to gauge the progress of the Directive’s anti-discrimination measures. Before the Directive was implemented, anti-gay discrimination was considered prevalent.¹⁸⁵ A 1994 survey revealed that almost sixteen percent of respondents agreed that they had been discriminated against at work, while half answered that they were harassed.¹⁸⁶ Eight percent of respondents reported that they were fired from their jobs due to their sexual orientation.¹⁸⁷ Twenty-five percent said that they were “too afraid to apply for certain jobs or to specific employers.”¹⁸⁸ There is support for such fear. For example, up until recently, Italy considered homosexuals as being “unfit” to serve in the military.¹⁸⁹

184. JAMES OUTTZ, *ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION* (Psychology Press 2010).

185. See, e.g., Gill Valentine, *An Equal Place to Work? Anti-Lesbian Discrimination and Sexual Citizenship in the European Union* in *Women of the European Union: The Politics of Work and Daily Life* 111, 112 (Maria Dolors García-Ramon & Janice J. Monk eds., Routledge 1996).

186. *Id.* at 112.

187. *Id.*

188. *Id.*

189. *Id.* at 113.

Since the implementation of the Directive, Member State citizens have taken advantage of its legal provisions. In 2007, official statistics by the European Union Agency for Fundamental Rights were released.¹⁹⁰ The following countries' courts made findings of discrimination based on the "total number of complaints in each country."¹⁹¹ In Sweden, sixty-two cases of sexual orientation discrimination in the workplace were filed, with a result in six instances of proven discrimination.¹⁹² In Latvia, there were twelve cases filed and only one case resulted in a finding of sexual orientation discrimination. In the Czech Republic, there was only one case of sexual orientation discrimination filed, and discrimination was found in that sole case.¹⁹³ It is important to point out that in Great Britain, the highest monetary remedy for a victim of sexual orientation discrimination in the workplace was £120,000.¹⁹⁴ Unfortunately, these statistics also revealed the prevalence of discrimination post-Directive. For instance, France reported sixteen percent of individuals were discriminated against in the workplace. In the United Kingdom, that number is fifty two percent (more than triple in comparison to France). In Sweden, thirty percent reported such instances of discrimination.¹⁹⁵

Respondents replied to a survey conducted by the European Commission.¹⁹⁶ The respondents stated that if a "company can

190. European Union Agency for Fundamental Rights, *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU member states: part II—the social situation (updated version)* 56 (2009), http://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf (last visited March 31, 2014).

191. *Id.* at 60.

192. *Id.*

193. *Id.*

194. STEFAN GRÖSCHL, *DIVERSITY IN THE WORKPLACE: MULTI-DISCIPLINARY AND INTERNATIONAL PERSPECTIVES* (Gower Pub. 2011).

195. *Id.* at 64.

196. Special Eurobarometer 263, *Discrimination in the European Union 3*, 18-20 (European Commission, 2007), available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_en.pdf (last visited March 31, 2013).

choose between two candidates with equal skills and qualifications,” a sexual orientation minority would be at a nineteen percent hiring disadvantage.¹⁹⁷ Forty-three percent responded that they would be either as likely or more likely to grant a promotion to a sexual orientation minority.¹⁹⁸ Furthermore, sixty-six percent responded that they are in favor of adopting “measures that provide equal opportunities” to sexual orientation minorities in the “field of employment.”¹⁹⁹ The above statistics indicate that, while sexual orientation discrimination is not as prevalent and blatant as before the implementation of the Directive, there is still work to be done.

V. RECOMMENDATIONS

Not all discrimination is based on a refusal to grant a surviving same-sex partner a pension or insurance benefit. Most discrimination in the workplace deals with a hostile environment from either co-workers or superiors. Studies have shown that LGBT experience harassment and discrimination—direct and indirect—in the workplace.²⁰⁰ This impacts an individual’s decision to be either openly gay in the workplace or become an invisible citizen.²⁰¹ Sexual minorities should not be forced to accept such a choice.²⁰² Based on the above analysis and discussion, the following are practical and feasible recommendations.

First, with any aspect of life, education should be in the forefront of a successful implementation of this Directive.

197. *Id.* at 18.

198. *Id.* at 19.

199. *Id.* at 20.

200. See European Union Agency for Fundamental Rights, *supra* note 190, at 63.

201. *Id.* at 67.

202. *Id.* (“Many workplaces are currently not considered ‘safe havens’ for LGBT staff. Although data varies according to national context, studies and interviews with National Equality Bodies and LGBT NGOs demonstrate that the majority of LGBT persons are generally reluctant, or somewhat reluctant, to being ‘out’ and open in the workplace”).

Currently, only Sweden has a body specifically authorized to deal with discrimination on grounds of sexual orientation.²⁰³ That body is the *HomO*, one of four Equality Ombudspersons in Sweden.²⁰⁴ More Member States should raise awareness and educate their citizenry about this issue. Furthermore, it is essential that employers develop training programs focused on educating workplace personnel from the very top management to the employees.

Next, it is recommended that the Member States offer incentives to employers who take action in the effort to combat sexual orientation discrimination. This will provide sexual orientation minorities with hiring and promotional opportunities that would not have otherwise been available. As noted above, the European Commission has conducted surveys and studies into the prevalence of sexual orientation discrimination. The European Commission should work on developing a system that focuses on creating a mandatory reporting system for statistical data in order to gauge the progress of the Directive.

Lastly, it seems that the national courts and the ECJ are interpreting the Directive in a way that is favorable towards same-sex partnerships. Looking onward, this trend should continue, as the Member States and individual companies, such as the Vddb, would be less inclined to implement provisions that would have a discriminatory effect on sexual orientation minorities in the EU. While recognizing that this is a brave recommendation, Member States that want to grant same-sex partnerships should be mandated to create such a scheme, whereby same-sex partnerships would be recognized as comparable to marriage for the purpose of securing employment benefits, among other things. It could be possible, however, that mandating Member States to provide comparability status would generate resistance to granting any recognition of same-sex partnership rights. While this might be the

203. *Id.* at 58.

204. *Id.*

case, Member States who do intend to recognize such status but refuse to confer the benefits of such status create comparability in name only, thereby rendering it ineffective. This contradicts the essence of the recognition of same-sex partnerships, unions, or marriages.

VI. CONCLUSION

It is true that laws aimed at combating sexual orientation discrimination in the workplace are a fairly new concept. However, the EU has come a long way since the non-binding provisions of the Parliamentary Resolution. Perhaps a comprehensive Directive that focuses on sexual orientation minorities' rights in *all* aspects of life (subject to the competence limitations of EU institutions) would be the next step. There is not much an EU Directive can do in regards to the recommendations made above, except that the Member States would have to raise their standards, while also granting a comparable situation to married spouses. Another option would be for the EU to move towards a model of federalism, which will allow the EU more discretion in implementing anti-discriminatory laws. Concededly, this is an ambitious goal, since there have been debates about a federal EU, but the model was rejected.²⁰⁵ Until further reconsideration, the progress of the EU in implementing Directive 2000/78/EC should be commended.

205. *See supra* Part IV.