


EQUALITY

A photograph of two hands clasped together, one appearing to be of a darker skin tone and the other of a lighter skin tone, symbolizing unity and support. The image is set against a background of overlapping geometric shapes in shades of beige and white.

# Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU

Comparative legal analysis  
Update 2015



EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



The report addresses matters relating to the right to life (Article 2), freedom from degrading treatment (Article 4), respect for private and family life (Article 7), the right to marry and found a family (Article 9), freedom of expression and information (Article 11), freedom of assembly (Article 12), the right to asylum (Article 18), the principle of non-discrimination (Article 21), and freedom of movement and residence (Article 45) falling under Chapters I 'Dignity', II 'Freedom', III 'Equality' and V 'Citizens' rights' of the Charter of Fundamental Rights of the European Union.

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# **Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU**

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# Foreword

Protecting and promoting the fundamental rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is an important component of the European Union's agenda. Following a European Parliament request for comprehensive research on homophobia and discrimination on grounds of sexual orientation, FRA has regularly provided reports on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the European Union (EU). In the present legal update, FRA for the first time also explores in-depth the fundamental rights situation of intersex people in the EU, focusing on concerns relating to registration of children's sex at birth and to medical treatments aiming to 'normalise' the sex characteristics of intersex children – issues that FRA's research has revealed as being particularly vital for their protection.

Numerous examples across the EU illustrate that progress has been made in the protection against discrimination on the bases of sexual orientation, gender identity and sex characteristics since 2010. EU legislation has clearly had a positive impact in the field of employment: effective implementation of the Employment Equality Directive in national legislation and case law has resulted in rulings that promote fairer working environments and increasingly equal access to employment-related partner benefits by LGBTI persons.

The present report, however, also identifies developments that prompt concern. Important issues relating to LGBTI people's enjoyment of their fundamental rights have not yet been addressed at EU level. For example, discrimination in areas other than employment – such as in relation to access to goods and services, housing, social protection and education – remains unregulated at Union level, often leading to divergent approaches among Member States. Similarly, developments in legislation and practice detrimental to the enjoyment of fundamental rights by LGBTI people in some Member States have become a source of concern. As a result, LGBTI persons are still unable to enjoy their rights and freedoms under EU law on an equal footing with other EU citizens or third-country nationals. As is detailed in this report, incomplete or unclear implementation of the freedom of movement has also created difficulties for LGBTI families in some Member States.

While action by the European Commission, the European Parliament and the Council of the EU can help resolve some of the issues raised in this report, efforts by Member States are particularly crucial, both in terms of cooperating within the Council and when implementing EU legislation and policies at national level. Support from regional and local authorities, as well as cooperation with civil society, are also vital to keep pushing towards making discrimination against LGBTI people a thing of the past. We hope this report encourages all actors to contribute to that process.

**Constantinos Manolopoulos**

*Director a.i.*



# Contents

FOREWORD .....	3
EXECUTIVE SUMMARY AND FRA OPINIONS .....	7
INTRODUCTION .....	13
<b>1 ACCESS TO AND LEGAL RECOGNITION OF THE PREFERRED GENDER .....</b>	<b>15</b>
1.1. ‘De-pathologisation’ of gender nonconformity .....	16
1.2. Access to sex reassignment .....	17
1.3. Legal recognition of a person’s gender identity .....	18
<b>2 NON-DISCRIMINATION AND PROMOTING EQUALITY IN EMPLOYMENT .....</b>	<b>25</b>
2.1. Substantive issues .....	25
2.2. Implementation and enforcement .....	35
<b>3 LGBTI PEOPLE AND PUBLIC SPACES: FREEDOM OF EXPRESSION, ASSEMBLY AND PROTECTION FROM ABUSE AND VIOLENCE .....</b>	<b>47</b>
3.1. Background .....	47
3.2. LGBTI pride marches and freedom of assembly .....	48
3.3. Bans on disseminating information on homosexuality or on LGBTI expression in the public sphere .....	53
3.4. Protection from homophobic and transphobic expression and violence through criminal law .....	54
<b>4 THE FUNDAMENTAL RIGHTS SITUATION OF INTERSEX PEOPLE .....</b>	<b>69</b>
4.1. Background .....	69
4.2. Grounds for protection from discrimination .....	70
4.3. Registration of sex at birth .....	72
4.4. Medical treatment of intersex children .....	74
<b>5 ‘FAMILY MEMBERS’ IN FREE MOVEMENT, FAMILY REUNIFICATION AND ASYLUM .....</b>	<b>79</b>
5.1. Development of a basic legal framework .....	80
5.2. Freedom of movement .....	81
5.3. Family reunification under EU migration law .....	87
5.4. Family members of LGBTI people seeking asylum .....	92
5.5. Children of same-sex couples .....	94
<b>6 INTERNATIONAL PROTECTION AND ASYLUM FOR LGBTI PEOPLE .....</b>	<b>97</b>
6.1. Legal and institutional context .....	97
6.2. Sexual orientation and gender identity as grounds for the recognition of refugee status .....	100
6.3. Sexual orientation and gender identity in European courts’ case law .....	101
6.4. Specific issues relating to the international protection of LGBT people .....	104
6.5. Issue of concealment .....	105
6.6. Credibility assessment .....	106
<b>CONCLUSIONS .....</b>	<b>109</b>





# Executive summary and FRA opinions

This report updates FRA's comparative analysis of homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity published in 2010. It is based on information collected in the 28 EU Member States up to mid-2014, and therefore incorporates data on Croatia. More recent information – up to October 2015 – has been taken into account where possible.

In this report, FRA for the first time presents a detailed account of key fundamental rights concerns of intersex people in the EU, as in-depth FRA research has shown this issue's key importance. In addition, after comparing the situation of LGBT people reflected in the 2010 legal update with their present situation, the report identifies several noteworthy trends.

These trends show that policymakers and relevant stakeholders should further concentrate their efforts to ensure that the fundamental rights of LGBTI people are fully respected in respect to equality and non-discrimination and to effectively protect them from abuse, hatred and violence across the EU.

## Getting access to and legally recognising the preferred gender

Access to and legal recognition of gender reassignment remains a challenge in a large number of EU Member States, affecting trans people in particular. Nonetheless, at the international level, the trend to stop treating gender non-conformity as 'a pathology' continues, including within the World Health Organisation, which has proposed replacing previously used terms – such as 'disorder' – with new concepts, such as gender 'incongruence'.

Many EU Member States, however, still require the diagnosis of a gender identity 'disorder' to grant access to sex reassignment surgery and/or legal gender recognition. Only a few Member States allow for self-determination of gender identity without further requirements. There is evidence that sex reassignment surgery is available for trans people in at least 23 EU Member States. One Member State does not provide for such treatment, and with respect to four Member States no information is available on how many – or whether any – surgical or medical interventions have been performed on trans people. Ensuring proper funding so that trans persons can access quality healthcare that meets their needs and providing adequate support to trans people who are in prison and require treatments relating to

sex reassignment remain major challenges in several EU Member States.

Discussions on the age required for legal gender recognition have started in some Member States. There is also a slow trend towards making legal gender recognition available to children (starting at age 16). Similarly, some EU Member States have started standardising the legal gender recognition procedure, while others have simplified it. The majority of EU Member States, nevertheless, still require trans persons to be single (or to divorce) to have their gender legally recognised. The introduction of marriage for same-sex couples has actually rendered this requirement irrelevant in some Member States.

### FRA opinions

*According to FRA's 2012 EU LGBT survey, respondents whose gender expression did not 'match' their sex assigned at birth (10%) were twice as likely as those whose sex assigned at birth and gender expression (5%) 'matched' to have experienced, in the 12 months preceding the survey, violence or threats of violence because of being LGBT. EU Member States should take measures to ensure respect for gender non-conformity and facilitate access to gender reassignment surgery when requested.*

*Regarding the legal recognition of gender identity, Member States should review their procedures for gender identity recognition with a view to making them clear and easy to fulfil, avoiding prerequisites such as genital surgery – which can lead to sterilisation – and/or forced or automatic divorces. EU Member States should consider following the example of countries in which gender recognition is based on self-determination of gender identity.*

## Promoting equality and addressing discrimination in employment and other areas

The adoption of the Equal Treatment Directive proposed by the European Commission in 2008 is still under negotiation. Importantly, the number of EU Member States that extended the prohibition of discrimination based on sexual orientation to all areas of life covered by the Racial Equality Directive grew from 10 in 2010 to 13 in 2014. Seven EU Member States still limit protection against discrimination based on sexual orientation to the employment field (in 2010, 10 still did so).

The Court of Justice of the European Union (CJEU) has ruled that employees who enter into registered partnerships with same-sex partners in a Member State in which same-sex marriage is not possible must be granted the same benefits as those granted to colleagues who marry. In some Member States, the scope of the exceptions to the prohibition of discrimination in employment still raises questions concerning compliance with EU law. The case law of the European Court of Human Rights (ECtHR) has helped clarify how to strike a balance between the right to manifest religious beliefs in the context of employment and the rights of individuals not to be discriminated against on grounds of sexual orientation (see, for example, *Eweida and Others v. the UK*).

Discrimination based on sexual orientation is still widely underreported, hampering assessments of the efficiency of national laws implementing Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive) in this field. An analysis of existing jurisprudence in Member States shows that the most thorny remaining issues concerning such discrimination and the interpretation of national measures implementing the directive include shifting the burden of proof, using statistical evidence, and interpreting what constitutes harassment in the workplace.

Trans people remain insufficiently protected against discrimination. The EU treaties do not explicitly provide protection from discrimination based on gender identity, and only six EU Member States explicitly protect trans people from such discrimination. Ten other Member States protect trans people from discrimination on the ground of sex, while the ground of protection against discrimination of trans people is uncertain in nine EU Member States.

Two EU Member States have not yet assigned equality bodies the competence to deal with discrimination against LGBTI people. The other EU Member States have established single equality bodies that cover the range of discrimination grounds protected under EU law, including those concerning LGBTI. Equality bodies also play an important role in raising awareness of the fundamental rights of LGBTI people.

#### FRA opinions

*EU Member States should pursue efforts to effectively implement relevant legislation prohibiting discrimination based on sexual orientation or gender identity in employment. This includes ensuring that LGBTI people, in particular, are fully informed of their rights, that discrimination victims are encouraged to lodge formal complaints, and that they are supported in doing so. It could also include supporting and encouraging trade unions and employers' organisations to raise awareness about LGBTI people's right to equal treatment in employment, as this largely remains unaddressed across EU Member States.*

*Most EU Member States already ban discrimination based on sexual orientation beyond the employment sphere, including some or all areas covered by the Racial Equality Directive. The remaining Member States should consider following this approach. Moreover, various grounds of discrimination are still not equally addressed within the EU. Adopting the European Commission's proposal for an 'Equal Treatment' Directive to address the existing 'hierarchy of grounds' in EU law would help equalize protection against discrimination on all grounds across the EU.*

*One in five respondents to the 2012 survey who were employed during the year preceding the survey felt discriminated against at work or when looking for a job. The figure was significantly higher for trans persons. Although around half of respondents stated that they were aware of the legal prohibition of discrimination in this area, non-reporting rates were very high. To address the pervasive problem of underreporting of discrimination and encourage LGBTI victims of discrimination in employment to report their cases, EU Member States should ensure the full and effective implementation of Article 9(2) of the Employment Equality Directive, according to which associations, organisations and other legal entities may support LGBTI victims of discrimination in all judicial and/or administrative procedures.*

*The scope of the protection from discrimination available to trans people remains uncertain in many EU Member States. Therefore, they are still encouraged to ensure that measures are in place to implement effectively national legislation transposing the Gender Equality Directive (recast). This could include improved legal definitions and extending protection for trans people beyond those who are undergoing or have undergone gender reassignment.*



## Securing LGBTI people's freedom of assembly and expression

Regarding the treatment of LGBTI people in public spaces, non-discrimination in their exercise of the right to freedom of expression and assembly, and especially their protection from abuse and violence, it is important to note that pride marches and public events in support of LGBTI rights were organised in all EU Member States at least once between 2010 and 2014. These events are increasingly also organised outside of capital cities. Still, attempts to limit LGBTI peoples' exercise of these freedoms – aimed at banning so-called 'homosexual propaganda' – were identified in at least four Member States. Legislative initiatives and proposals to this effect were rejected in three EU Member States. Only one EU Member State has legislation in force that may be interpreted as imposing limitations on the exercise of these freedoms. In parallel, demonstrations involving explicitly homophobic and/or transphobic hate speech continued to take place in EU Member States during the same reporting period.

### FRA opinion

*Member States should take measures to ensure that LGBTI people can effectively exercise their rights to freedom of assembly and of expression, including outside of the Member States' capitals. They should guarantee the safety of LGBTI people during "pride" marches or similar events across their territory.*

## Protecting LGBTI people from abuse, hatred and violence

At the legislative level, Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law does not include sexual orientation or gender identity among the grounds covered. However, in implementing this Framework Decision, many Member States broadened its scope of protection to also include these grounds. By contrast, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the Victims' Rights Directive), adopted in 2012, explicitly prohibits discrimination based on sexual orientation, gender identity and gender expression.

The European Court of Human Rights' judgments in *Vejdeland and Others v. Sweden*, *Mladina D.D. Ljubljana v. Slovenia* and *Identoba and Others v. Georgia* establish that homophobic hate speech deserves no protection under Article 10 of the European Convention on Human

Rights. Conversely, Article 10 does oblige states parties to protect LGBTI people against incitement to hatred.

As of mid-2015, 20 EU Member States have made hate speech on the ground of sexual orientation a criminal offence (seven more than in 2010). Eight Member States have also added the ground of gender identity. As of mid-2015, 15 EU Member States treat homophobic intent as an aggravating circumstance of crime. Transphobic intent is explicitly considered an aggravating circumstance in eight EU Member States. However, underreporting and a lack of statistics on hate speech and hate crimes on the grounds of sexual orientation and gender identity remain problems across the EU Member States.

### FRA opinions

*The majority of EU Member States provide legal protection against hate crimes and hate speech motivated by a person's perceived sexual orientation or gender identity. However, one-fifth (19%) of all respondents to FRA's 2012 EU LGBT survey (hereinafter the 2012 survey) were victims of harassment that they believed occurred partly or completely because they were perceived to be LGBT. Member States should effectively implement the Victims' Rights Directive in connection with sexual orientation, gender identity and gender expression by ensuring, among others, access to justice as well as compensation and restoration for these victims, thereby contributing to combating all forms of violence against LGBTI people.*

*One in five (22%) of the most serious incidents of violence experienced by respondents to the 2012 survey in the preceding 12 months because they were LGBT were brought to the attention of the police. Only 6% of equivalent incidents of harassment were brought to the police's attention. One reason for the lack of data on these types of incidents is that victims of discrimination or violence based on sexual orientation, gender identity or sex characteristics are unwilling to report cases because they doubt anything will change. EU Member State efforts should include building trust between LGBTI people and law enforcement, for example, by providing training and developing guidelines/handbooks for the police, prosecutors and judges on how to assist/support individuals who become victims of hate crime because of perceptions of their sexual orientation and/or gender identity.*

*There is still no uniform approach to collecting data concerning discrimination and victimisation based on sexual orientation, gender identity and sex characteristics. Member States are therefore encouraged to ensure that relevant quantitative data, in the form of regular surveys and official data recorded by authorities, are gathered and analysed in order to monitor such discrimination and criminal victimisation.*

## Respecting the fundamental rights of intersex people

The lack of relevant data is also a key issue in the analysis of the fundamental rights situation of intersex people. This situation is strongly marked by the fact that a large number of EU Member States require newborn children to be certified and legally registered as either 'male' or 'female'. In at least 21 Member States, sex 'normalising' surgery is carried out on intersex children so that their sex characteristics conform to one of these two options. In eight Member States, a legal representative can consent to sex-'normalising' medical interventions independently of the child's ability to decide. Eighteen Member States require patient consent, provided the child is capable of deciding.

Legal and medical professionals are often insufficiently informed about important aspects of the fundamental rights of intersex people, and of children in particular, relating to their work. Gender markers in identity documents and birth registries largely do not respond to the needs of intersex people and may actually support the practice of performing 'sex-normalising' medical treatments on intersex people without their informed consent. Given that being intersex concerns a person's physical (sex) characteristics, under current EU law, intersex people are better protected by prohibitions against discrimination based on sex than on sexual orientation and/or gender identity.

### FRA opinions

*Alternatives to gender markers in identity documents should be considered to protect intersex people. The possibility of including a gender-neutral marker could also be considered. This is particularly important for birth registration/certificates in situations where a new-born child's sex is unclear.*

*EU Member States should avoid 'sex-normalising' medical treatments on intersex people without their free and informed consent. This would help prevent violations of the fundamental rights of intersex people, especially through practices with irreversible consequences.*

*Legal and medical professionals should be better informed of the fundamental rights of intersex people, particularly children.*

## Treating LGBTI equally in the context of free movement, family reunification and asylum

With regard to the treatment of LGBTI people in the contexts of free movement, family reunification and asylum, it is important to recall that EU law regulates the free movement of EU citizens and their family members, family reunification for third-country nationals in EU Member States, and asylum and temporary protection for those in need of international protection.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive) does not distinguish between different and same-sex spouses, meaning all EU Member States are obliged to treat them equally for the purposes of entry and residence.

Whether LGBTI people are treated as 'family members' in these contexts is affected by the directives that define who can be considered a 'family member' for their purposes. All of the directives include registered partners and spouses in their definitions of 'family member' – this includes same-sex couples in Member States that recognise such couples in their national legislation. Not all EU Member States, however, do so, which has negative consequences for their enjoyment of EU citizens' freedom of movement.

As of October 2015, 11 EU Member States permit same-sex couples to marry (six more than in 2010). 12 EU Member States do not distinguish between same-sex and different-sex spouses of foreign EU citizens for purposes of entry and residence rights. Seven other Member States that do not allow same-sex marriage treat same-sex spouses married abroad as registered partners for the above purposes. Nineteen EU Member States grant entry and residence rights to same-sex registered partners. In others, the situation is still unclear due to either a lack of legislation or to contradictory provisions.

All EU Member States are obliged to facilitate entry and residence of *de facto* partners of EU citizens, provided a 'durable relationship' between them is 'duly attested'. Since this provision is vague, its implementation at national level varies.

Eleven EU Member States treat same-sex and different-sex spouses equally for purposes of family reunification. Seventeen Member States grant family reunification rights to same-sex partners of third country nationals. Eleven Member States appear not to



extend family reunification rights to unmarried partners of sponsors, either of the same or of a different sex. Finally, 11 EU Member States treat same-sex spouses of asylum-seekers equally to different-sex spouses. Same-sex registered partners appear to enjoy the right to residence in 16 Member States.

#### FRA opinions

*The majority of EU Member States officially recognise same-sex relationships as family relationships and attach legal consequences to them. To ensure the equal protection of rights of LGBTI people in relevant areas of EU law, in particular employment-related partner benefits, free movement of EU citizens and family reunification of refugees and third-country nationals, EU institutions and Member States should consider explicitly incorporating same-sex partners – whether married, registered, or in a de facto union – into the definition of ‘family member’. Specifically, in the context of free movement, this could be achieved by explicitly adopting the ‘country of origin’ principle already established in other areas of EU law.*

*In areas of EU action concerning mutual recognition of the effects of certain civil status documents and on dispensing with formalities for legalising documents between Member States, EU institutions and Member States should ensure that practical problems faced by same-sex couples and trans people are addressed, for instance, by considering the conflicts of laws principle of the law of the place in which the act was formed, in combination with the prohibition of ‘double regulation’.*

*EU Member States should ensure that the effects of civil status documents are mutually recognised, so that same-sex couples and trans people can exercise their freedom of movement and right to family reunification on an equal basis with others. This could be facilitated by adopting the European Commission’s Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.*

## Ensuring international protection and asylum for LGBTI people

Regarding LGBTI people who themselves arrive in the EU in search of international protection, it is important to note that the inclusion of gender identity and sexual orientation in the definition of ‘particular social group’ under Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary

protection, and for the content of the protection granted (Qualification Directive (recast)) has also resulted in their inclusion as grounds of persecution warranting international protection. Only one EU Member State does not explicitly treat persecution based on sexual orientation as a ground for such protection.

Less information is available on gender identity as a ground for granting international protection. Of the 22 EU Member States that have implemented the Qualification Directive (recast), at least five explicitly included gender identity as such a ground in their legislation.

The CJEU has ruled on key aspects of assessing asylum claims based on the protected ground of sexual orientation. The court has established the following principles:

- when a person who applies for international protection because of his or her sexual orientation flees from a country that criminalises consensual same-sex acts, that person must be considered a member of a ‘particular social group’ for purposes of granting international protection;
- when the criminal sanction for same-sex acts is imprisonment and such sanction is applied in the country of origin, the sanction itself can constitute an ‘act of persecution’;
- asylum authorities cannot expect an applicant to conceal his or her sexual orientation in his or her country of origin, nor can they expect the applicant to exercise reserve in the expression of his or her sexual orientation;
- during asylum procedures, an applicant’s individual situation and personal circumstances should be taken into account;
- detailed questioning about sexual practices is not allowed;
- an applicant’s failure to answer stereotypical questions in itself cannot be used to conclude that the applicant’s statements about his or her sexual orientation are not credible;
- asylum authorities cannot allow evidence such as performance by applicants of acts demonstrating their sexual orientation;
- asylum authorities cannot subject applicants to ‘tests’ to demonstrate their sexual orientation, or accept from applicants evidence such as films of their intimate acts;
- the late disclosure of sexual orientation cannot in itself lead to the conclusion that an applicant’s statements about his or her sexual orientation lack credibility.

Asylum authorities in EU Member States are under a duty to implement the CJEU’s rulings. In national asylum cases decided before the last relevant CJEU judgment was issued (December 2014), asylum authorities and courts frequently required applicants to, for

instance, hide their sexual orientation or move to other parts of their countries of origin instead of granting international protection.

#### FRA opinions

*EU Member States, institutions and agencies should implement the standards set by CJEU judgments to adequately protect the rights of LGBTI people applying for international protection. When processing asylum applications, asylum authorities should not use stereotypical questions or 'test' the sexual orientation of individuals. Late disclosure of sexual orientation cannot in itself be considered as evidence of lack of credibility. Applicants cannot be required to have concealed their sexual orientation in their country of origin.*

*Given the reference to gender identity in the Qualification Directive (recast), EU Member States should treat persecution on the ground of gender identity as a reason for granting international protection.*

## Fostering a comprehensive action framework

In view of the above findings, a harmonised and comprehensive action framework with clear milestones would go a long way to coordinating future activities at EU level to fulfil the rights of LGBTI people.

#### FRA opinion

*Coordinating future activities at EU level should be based on a synergetic approach that mobilises legislative, financial and policy coordination tools not just in the short-term, but also with a long-term perspective. The European Commission's High Level Group on Non-Discrimination, Equality and Diversity, which brings together Commission services and representatives of all EU Member States, could serve as the centre point for such coordination. A mutually agreed action plan on LGBTI issues of the high-level group would help streamline the work and build a shared sense of commitment among the EU and national levels.*



# Introduction

This report is based on a comparative analysis of the legal situation concerning the fundamental rights of lesbian, gay, bisexual, transgender and intersex people in the European Union (EU), as it relates to EU competence. It provides an overview of legal developments and trends across the EU from 2010 onwards, updating two earlier agency reports: *Homophobia and discrimination on grounds of sexual orientation in the EU Member States: Part I – Legal Analysis*, published in June 2008 (the 2008 report); and *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 Update (Comparative Legal Analysis)*, published in 2010 (the 2010 report).

This legal analysis should be read alongside FRA's report on the *EU LGBT survey – Main results*, published in October 2014, and the report entitled *Being Trans in the EU – Comparative analysis of the EU LGBT survey data*, published in December of the same year. The survey was the first to provide comparative EU-level data on the daily experiences and views of LGBT people.

The report begins by discussing access to and legal recognition of gender reassignment of trans people, including aspects relating to the recorded sex in official documents and the right to marry and change of name. The report then discusses the principle of non-discrimination and the promotion of equality in employment, particularly discrimination and gender identity as well as access to employment-related partner benefits. The report also analyses the implementation and enforcement of the Employment Equality Directive and the position of churches or other ethos or religion-based organisations under the regime established by the directive. This is followed by a discussion of national and CJEU case law on discrimination and of the mandate of equality bodies, as well as of the role of LGBTI NGOs and trade unions under the directive.

The report also discusses the fundamental rights of LGBTI people in public spaces across the EU, their enjoyment without discrimination of their right to freedom of expression and assembly, and their protection from abuse and violence. This includes pride marches and freedom of assembly, bans on disseminating information on homosexuality or on LGBTI expression in the public sphere, and the protection from homophobic and transphobic expression and violence through criminal law.

The report then explores the fundamental rights situation of intersex people. Although a number of developments at EU level have in recent years contributed to a better understanding of some of the problems faced by intersex people, these are still largely treated as medical issues that fall outside of the scope of public scrutiny. Therefore,

this report provides initial comparative evidence of the discrimination faced by intersex people across the EU, with a special emphasis on the sex recorded in official documents and the medical interventions practised on children to 'normalise' their sex. This chapter was initially published in May 2015 as a focus paper in conjunction with the Council of Europe Commissioner on Human Rights' Issue Paper on Human Rights and Intersex People,<sup>1</sup> which also relied on data collected for this report.

It also examines LGBTI people's status as 'family members' in the contexts of free movement, family reunification and asylum, devoting specific attention to children of same-sex couples.

Finally, the report devotes attention to the fundamental rights situation of LGBTI people seeking international protection/asylum in the EU, addressing, among others, sexual orientation and gender identity as grounds for recognising refugee status in the EU, relevant case law, and issues relating to the international protection of LGBTI people, such as the validity of requirements for assessing the credibility of asylum claims.

This report is based on information collected by FRA in the 28 EU Member States through Franet, FRA's multidisciplinary research network. This network is composed of contractors in EU Member States who provide relevant data and analyses to FRA on fundamental rights issues. Following a meeting of experts at FRA's premises, the research also received valuable input from the European Commission, EASO, the Council of Europe, UNHCR, civil society organisations, and legal experts and practitioners.

Since 2010, FRA has also twice per year engaged in structured dialogue on LGBTI issues with a number of key partners, including a network of LGBT governmental focal points and civil society organisations. Most recently, in October 2014, the Italian Presidency of the Council of the EU hosted – in cooperation with FRA – a high-level conference on 'Tackling sexual orientation and gender identity discrimination: Next steps in EU and Member State policy making', reflecting a renewed drive by EU institutions to tackle the problems still faced by many LGBT people across Europe.

To complement this report, FRA will publish in 2016 a report on public officials' and professionals' views on, and experiences with, the respect, protection, promotion and fulfilment of the fundamental rights of LGBT people, based on sociological research carried out in 19 EU Member States.

<sup>1</sup> Council of Europe, Commissioner for Human Rights (2015), *Human rights and intersex people*, April 2015.





# 1

## Access to and legal recognition of the preferred gender



This chapter examines the main developments since 2010 on two central legal issues relating to sex reassignment. The first concerns access to sex reassignment treatment and its legal recognition. The second concerns the possibility to rectify one's recorded sex and name on official documents, which has legal consequences regarding the ability to enter into or maintain a marriage. These issues have important consequences for the protection of trans people under EU law. Trans people who have undergone or are undergoing gender reassignment surgery are protected under EU law, regardless of whether their recorded sex has been rectified (see [Section 2.1.2](#)).<sup>2</sup>

A preliminary note on terminology: The term 'trans person' refers here to persons who perceive themselves as different from the expectations of the gender (man or woman) that is socially presumed to correspond to their sex (male or female). This umbrella term includes, among many others, transgender persons, transsexuals, transvestites and cross-dressers. The term 'transsexual' is used more specifically to refer to individuals who have undergone, intend to undergo or are in the process of undergoing sex reassignment surgery (SRS). However, terms and concepts surrounding these issues vary in different national contexts, and are continuously debated.<sup>3</sup> Finally, according to the Yogyakarta Princi-

ples, used as an authoritative source by, among others, the European Court of Human Rights, the term 'gender identity' refers to:

*"each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*<sup>4</sup>

Discrimination on the basis of 'gender identity' can therefore derive from traditional social perceptions and legal settings linked to being a trans person. This report refers to 'sex' for any matter relating to an individual's biological identity, and to 'gender' for a person's psychological or social identity.

As shown below, progress in better understanding gender identity issues has slowly been made across the EU since publication of the 2010 report. However, as the 2012 survey shows, this has not necessarily translated into improvements in the lives of trans people, many of whom are often marginalised and victimised, and face social stigma, exclusion and even violence.<sup>5</sup>

<sup>2</sup> CJEU, C-13/94, *P. v. S. and Cornwall City Council*, 1996; CJEU, C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, 2004; CJEU, C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, 2004; see also: European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, COM(2015) 190 final, Brussels, 5 May 2015, p. 4.

<sup>3</sup> See, for example, the mission statement of Transgender Europe ([www.tgeu.org/node/15](http://www.tgeu.org/node/15)). The position of intersex people is separately addressed in Chapter 4.

<sup>4</sup> The Yogyakarta Principles (2007) are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity, see *Yogyakarta principles on the application of human rights law in relation to sexual orientation and gender identity* (2007), [www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

<sup>5</sup> FRA (2014), *European Union lesbian, gay, bisexual and transgender survey: Main results*, Luxembourg, Publications Office of the European Union, p. 104, <http://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main>.

## 1.1. 'De-pathologisation' of gender nonconformity

### Key development

- There is growing awareness that trans people should stop being treated as if they suffer a pathology and that legal gender recognition should not require the diagnosis of a gender-identity disorder.

Since publication of the 2010 report, legal and scientific bodies have taken significant steps to depathologise transexualism and transgenderism. Historically, diagnostic terms facilitated clinical care and access to insurance coverage of healthcare costs in many Member States. However, these terms can also have a stigmatising effect. Therefore, as early as 2009, the Council of Europe's Commissioner for Human Rights published an Issue Paper maintaining that "from a human rights and health care perspective no mental disorder needs to be diagnosed in order to give access to treatment for a condition in need of medical care".<sup>6</sup> This position was subsequently adopted by the European Parliament in its Resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations.<sup>7</sup>

Since then, the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* released by the American Psychiatric Association replaced the term 'gender identity disorder' with 'gender dysphoria'.<sup>8</sup> In the DSM-5, gender non-conformity is not in itself considered to be a mental disorder. Instead, the presence of clinically significant distress associated with the condition is the critical element of a gender dysphoria diagnosis.

The European Parliament, in its Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (the Lunacek Report), reiterated that:

*"The Commission should continue working within the World Health Organisation to withdraw gender identity disorders from the list of mental and behavioural disorders and to ensure a non-pathologising reclassification in the negotiations on the 11th version of the International Classification of Diseases (ICD-11)."*<sup>9</sup>

In the ICD-11 beta draft prepared by the World Health Organisation (WHO) – under discussion at the time of preparing this report – section 7 on mental and behavioural disorders does not include the category 'gender identity disorders'.<sup>10</sup> Instead, the WHO now proposes a 'gender incongruence' category, under the new section 6, 'Conditions related to sexual health'.

Despite these developments, the National Institute of Legal Medicine (*Institutul Național de Medicină Legală*, NILM) in Romania adopted a new methodology for evaluating cases of 'gender identity disorder (transsexualism)' in 2013.<sup>11</sup> The methodology presupposes the need for a detailed and lengthy assessment by a forensic psychiatric commission. In a communication with FRA, the NILM stated that "transsexualism, as opposed to sexual orientation, [is] a mental disorder".<sup>12</sup> It therefore stated that, in Romania, transsexual(s) will always be assessed from a psychopathological perspective.

According to the NGO Transgender Europe, as of 2014, at least 24 EU Member States required diagnosis of a gender identity disorder in order to access SRS and/or legal recognition of a person's gender.<sup>13</sup> These were Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and the United Kingdom. It should be noted that shortly after the Transgender Europe report was published, Denmark adopted legislation allowing legal gender recognition for trans people based solely on

6 Hammarberg, T. (2009), Council of Europe Commissioner for Human Rights, Human Rights and Gender Identity, *Issue Paper*, CommDH/IssuePaper 2, 29 July 2009, p. 26.

7 European Parliament (2011), Resolution of 28 September 2011 on sexual orientation and gender identity at the UN Human Rights Council, P7\_TA(2011)0427, Brussels, point 16.

8 Coleman E. et al. (2012), *Standards of care for the health of transsexual, transgender, and gender-nonconforming people: Version 7*, World Professional Association for Transgender Health. For information on the DSM-5, see [www.dsm5.org/](http://www.dsm5.org/).

9 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (*Lunacek Report*), P7\_TA(2014) 0062, Brussels, 4 February 2014, p. 8, para. E.ii.

10 The beta version of the ICD-11 can be accessed at <http://apps.who.int/classifications/icd11/browse/l-m/en>.

11 Romania, Institutul Național de Medicină Legală (2013), *Scrisoarea metodologică privind desfășurarea expertizelor medico-legale psihiatrice Revizuită 2*, Bucharest. The document is available upon request only.

12 Letter No. A8/172/2010/2014 of the NILM to the FRANET national expert.

13 Transgender Europe (2014a), *Trans Rights Europe Map*, 2014, 15 April, [www.tgeu.org/sites/default/files/Trans\\_Map\\_Index\\_2014.pdf](http://www.tgeu.org/sites/default/files/Trans_Map_Index_2014.pdf).

their self-determination, thus removing the requirement of a medical diagnosis.<sup>14</sup> In Malta, the Gender Identity, Gender Expression and Sex Characteristics Act adopted in April 2015 does not require a medical diagnosis. Instead, changing the recorded gender has become a right that every person can exercise on the basis of gender identity self-determination.<sup>15</sup>

A small trend towards depathologising gender nonconformity was already documented in the 2010 report with regard to Sweden, which depathologised gender nonconformity in 2009, and France, which removed transsexuality from the list of long-term psychiatric conditions in 2010.<sup>16</sup> Since then, at least two other Member States have been moving away from approaching gender variance as a psychiatric disorder. In Germany, in 2011 a working group composed of more than 30 organisations and individuals drafted a list of demanded changes to the Law on Transsexuals (*Transsexuellengesetz*, TSG).<sup>17</sup> The group criticised the TSG for requiring a medical diagnosis of transsexuality, and recommended abolishing requiring two expert opinions attesting to a person's transsexuality as prerequisite for changing a name or sex on official documents. The Federal Anti-Discrimination Agency welcomed and supported these recommendations.<sup>18</sup> In 2013, the Hungarian government asked its advisory body, the Psychiatry and Psychotherapy Section and Council of the Professional College for Health, to deliver an opinion on the pathologisation of transsexualism. The body issued an

opinion asserting that transsexualism cannot be considered a mental disorder.<sup>19</sup>

In Poland, the draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*)<sup>20</sup> was introduced in parliament in January 2013, aimed at creating a formal procedure for gender recognition in that country. However, after the parliament adopted the legislation, Poland's president vetoed it.<sup>21</sup>

## 1.2. Access to sex reassignment

### Key development

- Sex reassignment surgery remains unavailable, or access thereto problematic, in some EU Member States.

Concerning actual access to sex reassignment treatment, there is no information on how many – or if any – surgical or medical interventions have recently been performed on trans or intersex people in Cyprus, Croatia, Luxembourg or Slovakia. It remains unclear whether there are enough (or any) medical experts capable of performing complex surgical treatments relating to sex reassignment in these countries. In Lithuania, trans persons can only undergo SRS abroad and then obtain rulings from the national courts, ordering registry services to change their personal identification documents and birth certificates.<sup>22</sup> Several individuals who followed these procedures later sued the Lithuanian state for moral damages incurred as a result of the lengthy national procedures and the absence of legal regulations on gender reassignment. Since publication of the 2010 report, moral (non-pecuniary) damages have been awarded in at least 2 cases.<sup>23</sup>

14 Denmark, Draft for Bill amending the Act on the Civil Registration System (allocating civil registration numbers to persons identifying as the opposite gender) (*Udkast til forslag om lov om ændring af lov om Det Centrale Personregister (Tildeling af nyt personnummer til personer, der oplever sig som tilhørende det andet køn)*). Text of the changes to the Act on the Civil Registration System [www.ft.dk/samling/20131/lovforslag/1182/html\\_som\\_vedtaget.htm](http://www.ft.dk/samling/20131/lovforslag/1182/html_som_vedtaget.htm).

15 Malta, Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person (*Att għar-rikonoxximent u registrazzjoni tal-generu ta' persuna u sabiex jirregola l-effetti ta' dik il-bidla, kif ukoll għarrikonoxximent u l-protezzjoni tal-karatteristiċi tas-sess ta' persuna*), 2 April 2015, Articles 3 and 4.

16 Gender identity issues are now placed in the category of 'long-term affections', relating to 'severe' or 'invalidating pathologies' (ALD 31), as proposed by the French National Authority for Health (Haute Autorité de santé, HAS).

17 Germany, Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*, ADS) (2010), Discrimination against trans\* persons in working life (*Benachteiligung von Trans\*Personen im Arbeitsleben*), [www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/benachteiligung\\_von\\_trans\\_personen\\_insbesondere\\_im\\_arbeitsleben.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/benachteiligung_von_trans_personen_insbesondere_im_arbeitsleben.pdf?__blob=publicationFile).

18 Germany, ADS (2012), Press release, 24 September 2012, [www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2012/20120924\\_Trans\\_Intergeschlecht.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Aktuelles/DE/2012/20120924_Trans_Intergeschlecht.html).

19 Hungary, Ministry of Human Resources (2014), Letter No. 12460-7/2014/NEUF in response to an information request by the Hungarian Helsinki Committee, 12 March 2014.

20 Poland, Draft Gender Accordance Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*), 3 January 2013.

21 Poland, President of the Republic of Poland (2015), *Ustawa o uzgodnieniu płci – do ponownego rozpatrzenia*, <http://www.prezydent.pl/prawo/ustawy/zawetowane/art,1,ustawa--o-uzgodnieniu-plci---do-ponownego-rozpatrzenia.html>.

22 Lithuania, Vilnius City Second Regional Court (*Vilniaus miesto 2 apylinkės teismas*) (2008), No. 2-1450-553/2008, 20 March 2008.

23 Lithuania, Lithuanian Supreme Administrative Court (*Lietuvos vyriausybės administracinis teismas*) (2010), No. A858-1452/2010, 29 November 2010; Lithuania, Lithuanian Supreme Administrative Court (2012), No. A502-1255/2012, 26 April 2012.

In the Netherlands, no problems with access to SRS have so far been reported. However, the Free University Medical Centre (VUmc) in Amsterdam, the main centre performing operations on trans people (85 %), announced in 2014 that it did not have enough funding to treat new patients.<sup>24</sup>

Access to medical treatments relating to sex reassignment by trans people who are detained or in custody appears to be a special problem. For example, in Italy, SRS is performed free of charge in public hospitals, if authorised by the judicial authorities. However, in 2011 access to the related therapies was initially denied to a trans person while detained, because the regional administration (responsible for providing healthcare) and the prison services administration had not agreed on a protocol. In the ruling, the Surveillance Judge (*Giudice di Sorveglianza*) of Spoleto clarified that, even in the absence of a formal bilateral agreement with prison services, regional administrations are obliged to provide these health services free of charge.<sup>25</sup> In the United Kingdom, a 2013 case involved a prisoner in a male prison who began to identify as female.<sup>26</sup> She was not able to obtain a gender recognition certificate (GRC) since she had not been openly living as female for at least two years. The prisoner complained of discrimination, since she was denied access to certain items she considered essential to expressing her gender identity, such as a wig or hair removal products, for security reasons. The court reasoned that, until a GRC was actually granted, the prisoner could not be regarded as a woman. Therefore, to determine whether discrimination occurred, the situation of this prisoner should be compared to that of a male prisoner who did not intend to change gender. Using this criterion, the court ruled that the prisoner was not being discriminated against.

### 1.3. Legal recognition of a person's gender identity

#### Key developments

- There is a trend towards standardising and simplifying legal gender recognition procedures in EU Member States.
- Three EU Member States require only self-determination to legally recognise gender identity.
- Access to legal gender recognition for children remains difficult.

In EU Member State legislation, sex reassignment and the legal recognition of gender are often dealt with in parallel. However, from a legal perspective they remain two different steps in a trans person's life. For example, in a 2013 ruling the Tribunal of Reggio Emilia in Italy clarified that, as long as a trans person does not request a change of personal data to reflect his/her gender identity, his/her marriage will remain valid in the country, despite same-sex couples not having access to marriage, because in their specific case the marriage involves two persons of formally different gender. As a consequence, so long as they live together and share a family life, the competent authority (*Questura*) cannot investigate their private life.<sup>27</sup>

Since publication of the 2010 report, at least five Member States have been moving towards simplifying and standardising procedures required for (access to and) legal recognition of sex reassignment. The reform in Ireland and attempted reform in Poland are examples of standardisation (described below). Concerning simplification, in the Netherlands a law was approved in 2013 providing that anyone who is 16 years or older can apply to the municipal registry office to have their registered sex altered.<sup>28</sup> The only requirement is an expert statement declaring that the person requesting a change of sex is convinced that he/she belongs to the opposite

24 Netherlands, NOS (2014), 'VUmc: Tijdelijke stop transgenders', Press release, 4 January 2014, <http://nos.nl/artikel/593422-vumc-tijdelijke-stop-transgenders.html>.  
 25 Italy, Surveillance Judge of Spoleto (*Giudice di Sorveglianza di Spoleto*) (2011), Ruling of 13 July 2011, [www.articolo29.it/decisioni/ufficio-di-sorveglianza-di-spoleto-ordinanza-del-13-luglio-2011/](http://www.articolo29.it/decisioni/ufficio-di-sorveglianza-di-spoleto-ordinanza-del-13-luglio-2011/).  
 26 United Kingdom, High Court of Justice, Queen's Bench Division (2013), *Green, R (on the application of) v. Secretary of State for Justice*.

27 Italy, Tribunal of Reggio Emilia (*Tribunale di Reggio Emilia*) (2013), decision 9 February 2013, [www.asgi.it/public/parser\\_download/save/tribunale\\_reggio\\_emilia\\_ordinanza\\_09022013.pdf](http://www.asgi.it/public/parser_download/save/tribunale_reggio_emilia_ordinanza_09022013.pdf).  
 28 Netherlands, Law of 18 December 2013 for the amendment of Book 1 of the Civil Code and the Municipal Registration Act relating to the amendment of the conditions for an authority to change the registration of sex in the birth certificate (*Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte*), 18 December 2013.

sex and has shown the expert that he/she understands the scope and implications of this situation.

In 2014, Denmark passed legislation allowing legal gender recognition for trans people based on their self-determination.<sup>29</sup> According to this legislation, which was welcomed by fundamental rights activists,<sup>30</sup> the requirements for legal gender recognition are a minimum age of 18 and a six-month waiting period. The process requires applicants to request a change of legal gender and to confirm the application six months later, but does not require any medical intervention or opinion or diagnosis by an external expert. Denmark's law has been ranked second in the world (after Argentina) when it comes to the relevant procedures' level of simplification, and can be considered a promising practice in the EU regarding respect for the Recommendation of the Committee of Ministers of the Council of Europe to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity (paras. 20 and 21).<sup>31</sup> However, the Gender Identity, Gender Expression and Sex Characteristics Act adopted in 2015 in Malta has simplified legal gender recognition requirements even further. Changing the official gender merely requires declaring before a notary that one's gender identity does not correspond to the sex assigned in the birth registry.<sup>32</sup> In Ireland, following adoption of the Gender Recognition Act 2015, the gender-recognition process is also based entirely on the self-determination of the person concerned.<sup>33</sup>

Another positive trend that has emerged since publication of the 2010 report is the slow – but steady – movement towards better access to legal gender recognition for trans children. In Ireland, the Gender

Recognition Act allows access to gender recognition for children over 16.<sup>34</sup> Similarly, according to the Maltese Gender Identity, Gender Expression and Sex Characteristics Act, children can access legal gender recognition through a court decision.<sup>35</sup> In Sweden, the Minister of Integration appointed a panel from the Department of Social Affairs (*Socialdepartementet*) to examine whether people in Sweden whose sex and gender identities do not match should be able to change their gender in official documents after they turn 16. The inquiry looked into, for example, what authorities should do if a teenager and her or his parents disagree on the matter.<sup>36</sup> The Polish parliament adopted a bill that included, among other provisions, the possibility of starting a formal procedure of gender recognition for children over 16.<sup>37</sup> However, as mentioned, the president vetoed the bill, preventing progress in this domain.

The Commissioner for Human Rights of the Council of Europe has noted the existing difficulties in this field:

*“Trans and intersex children encounter specific obstacles to self-determination. Trans adolescents can find it difficult to access trans-specific health and support services [...] before they reach the age of majority. The legal recognition of trans and intersex children’s sex or gender remains a huge hurdle in most countries. Children are rights-holders and they must be listened to in decision-making that concerns them. Sex or gender assigning treatment should be based on fully informed consent.”<sup>38</sup>*

The following subsections present the main changes that occurred during the period 2010–2014 regarding rectifying the recorded sex in official documents and changing one's name; it notes developments in 2015 where possible.

29 Denmark, Draft for Bill amending the Act on the Civil Registration System (allocating civil registration numbers to persons identifying as the opposite gender).

30 See for example Transgender Europe (2014b), 'Denmark goes Argentina!', TGEU statement, 11 June 2014, [www.tgeu.org/sites/default/files/2014-06-11\\_TGEU\\_Denmark-final.pdf](http://www.tgeu.org/sites/default/files/2014-06-11_TGEU_Denmark-final.pdf); Amnesty International (2014), 'World must follow Denmark's example after landmark transgender law', 12 June 2014, [www.amnesty.org/en/en/news/denmark-transgender-law-2014-06-12](http://www.amnesty.org/en/en/news/denmark-transgender-law-2014-06-12). However, TGEU criticised the requirement of a minimum age of 18 years.

31 Council of Europe, Committee of Ministers (2010a), Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

32 Malta, Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person (*Att għar-rikonoxximent u registrazzjoni tal-generu ta' persuna u sabiex jirregola l-effetti ta' dik il-bidla, kif ukoll għarrikonoxximent u l-protezzjoni tal-karatteristiċi tas-sess ta' persuna*), 2 April 2015, Articles 4 and 5.

33 Ireland, Gender Recognition Act 2015, Number 25 of 2015, 22 July 2015 <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>.

34 *Ibid.*, p. 10.

35 Malta, Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, 2 April 2015, Article 8.

36 Sweden, The National Board of Health and Welfare (*Socialstyrelsen*) (2010), *Transsexuals and other people with gender identity disorder: Legal conditions for determination of sex as well as care and support (Transsexuella och övriga personer med könsidentitetsstörningar: Rättsliga villkor för fastställelse av könstillhörighet samt vård och stöd)* 30 June 2010, [www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18087/2010-6-31.pdf](http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18087/2010-6-31.pdf), p. 10.

37 Poland, Draft Gender Recognition Act (*Projekt ustawy z dnia 3 stycznia 2013 o uzgodnieniu płci*), 3 January 2013. The corresponding Bill was adopted by parliament on 10 September 2015.

38 Council of Europe, Commissioner for Human Rights of the Council of Europe (2014a), 'LGBT children have the right to safety and equality', *Human Rights Comment*, Strasbourg.

### 1.3.1. Rectifying the recorded sex on official documents and the right to marry

#### Key developments

- In many EU Member States, it remains difficult to rectify the recorded sex in official documents. This presents an obstacle to full legal gender recognition.
- Forced divorce or marriage annulment is still required for legal gender recognition in EU Member States that do not allow same-sex marriage.

With respect to rectifying the recorded sex on birth certificates and other official documents, there have been positive developments in three Member States in terms of preserving trans people's right to privacy. In Bulgaria, since 2011, when a new birth certificate is issued, the old one is nullified, so that information on the former sex does not remain visible.<sup>39</sup> In Portugal, the Civil Registration Code, as amended by Law 7/2011, establishes that, where a certificate has been registered after gender reassignment treatment only the interested parties themselves, their rightful heirs and court or police authorities may request complete certificates or copies thereof.<sup>40</sup> In Malta, following adoption of the Gender Identity, Gender Expression and Sex Characteristics Act, birth certificates of persons who request a change of recorded sex are marked 'rectified gender'. Access to the full records is limited to the person concerned, although it may also be granted to others following a court order.<sup>41</sup>

After their gender is legally recognised, trans people are usually allowed to marry an individual of a different sex (as recently implemented in Malta,<sup>42</sup> for example).

The case law of the European Court of Human Rights (ECtHR) clearly recognises this right.<sup>43</sup>

However, since publication of the 2010 report legal issues have surfaced across Member States concerning the role of interested third parties in the process, such as spouses or family members whose ties with the trans person precede the latter's gender reassignment. At least four Member States strive to avoid these issues by limiting trans people's right to have their gender identity and/or acquired sex fully recognised in all official documents. For example, in Poland, a trans person who is married must divorce if he or she wishes to undergo gender reassignment, and, if he or she is the sole guardian of children, must wait with the gender reassignment until the children are of age. If there is another parent, the court will transfer custody to that other parent. In its most recent judgment concerning legal gender recognition, the Polish Supreme Court confirmed that the gender reassignment of a trans woman could not be legally recognised because the person had accessed sex reassignment without previously informing the authorities that she was married.<sup>44</sup> The court noted that, if her gender were legally recognised, the existence of her marriage would violate Article 18 of the Constitution, according to which "[m]arriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland".<sup>45</sup> In Hungary, the decree on registries states that "[t]he change of the name of the parent shall not be registered in the birth registry of the child if the change of name has been registered in relation to the change of gender."<sup>46</sup> In Portugal, Law 7/2011<sup>47</sup> changed the Civil Registration Code,<sup>48</sup> which now provides that sex changes and changes in given names shall be registered in the birth certificates of persons who undergo SRS, but not necessarily in the birth certificates of their adult offspring or their respective spouse or partner. A parent's or spouse/partner's sex reassignment shall only be registered upon request. In the Netherlands, a different solution was developed within a case relating to the full recognition of a trans person's gender, including in relation to

39 Bulgaria, Citizen Registration Act (*Закон за гражданската регистрация*), 27 July 1999 (adopted on 20 May 2011), [www.lex.bg/bg/laws/ldoc/2134673409](http://www.lex.bg/bg/laws/ldoc/2134673409), Art. 81 a.

40 Portugal, Law 7/2011, which sets in place the procedures for undergoing a sex change and for taking on a new name at the Registry Office (*Lei n.º 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração do Código de Registo Civil*), 15 March 2011, <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

41 Malta, Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, 2 April 2015, Articles 6(4) and 12(1).

42 Malta, An Act to further amend the Civil Code (*Att tal-2013 biex jemenda l-Kodiċi Ċivili*), 12 July 2013. The Act amends Article 257B by introducing a provision stating that the annotations shall contain a reference to the judgment or court decree without giving details of the annotations and also amends Article 257C so that the capacity of the person to exercise the right to marry is that of the acquired sex.

43 ECtHR, *Christine Goodwin v. the United Kingdom*, No. 28957/95, 11 July 2002, para. 103.

44 Poland, Supreme Court (*Sąd Najwyższy*), I CSK 146/13, 6 December 2013.

45 *Ibid.*, p. 17.

46 Hungary, Law Decree No. 17 of 1982 on registries, marriage procedure and bearing names (1982. évi 17. törvényerejű rendelet az anyakönyvekről, a házasságkötési eljárásról és a névviselésről), available in Hungarian at: [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=5276.242620](http://njt.hu/cgi_bin/njt_doc.cgi?docid=5276.242620), Art. 32 (4).

47 Portugal, Law 7/2011, which sets in place the procedures for making a sex change and for taking on a new name at the Registry Office, 15 March 2011, <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

48 Portugal, Decree-Law 131/95 approving the Civil Registration Code (*Decreto-Lei n.º 131/95 que aprova o Código do Registo Civil*), 6 June 1995, <https://dre.pt/pdf1sdip/1995/06/131A00/35963638.pdf>.

her child. A trans woman wanted to be recognised as the father of her child; while her request was rejected, she was nonetheless regarded as both a 'parent' and the birth mother of the child.<sup>49</sup>

The UN Human Rights Committee issued its concluding observations as part of its 2014 review of Ireland, expressing concern that the Gender Recognition Bill approved by the cabinet in June 2014 retained the requirement for married trans people to dissolve existing marriages or civil partnerships as a precondition to having their preferred gender formally recognised.<sup>50</sup> However, in light of the results of the same-sex marriage referendum, the requirement of 'forced divorce' will be dropped.<sup>51</sup>

Forced divorce or marriage annulment is especially common in Member States that do not allow same-sex couples to marry. This brings hardship to trans people and their families, as divorce imposes an emotional and financial burden. This is evidenced, for example, by the case of *Hämäläinen v. Finland*,<sup>52</sup> in which the plaintiffs did not want to dissolve their marriage and convert it into a registered partnership on religious grounds. The ECtHR ruled that the differences between marriage and registered partnership are so minor in Finland that these do not render the Finnish system deficient from the perspective of the state's positive obligation under Article 8 of the ECHR. The court considered three elements in particular. First, in Finland converting a marriage into a registered partnership is not akin to a divorce. The plaintiffs do not lose any rights as a result of the conversion, since Finnish law states that all rights are preserved.<sup>53</sup> Second, the conversion does not adversely affect the rights of the plaintiffs' children, nor does it modify the plaintiffs' rights and obligations arising from either paternity or parenthood.<sup>54</sup> Third, the effects of the conversion on the applicant's family life are minimal or non-existent. The court noted that Article 8 of the ECHR protects the family life of same-sex partners and their children. In terms of the protection afforded to family life, it therefore does not matter whether the applicant's relationship with her family is based on marriage or a registered partnership.<sup>55</sup>

It is worth pointing out that this case was not interpreted as implicating Article 12 of the ECHR, which protects the right to marry. The case was examined under Article 8 (right to respect for private and family life) because the plaintiffs were already married.<sup>56</sup> Although the plaintiffs declared that dissolving their marriage was against their religious beliefs, the ECtHR did not consider whether converting the marriage to a civil partnership would conflict with the plaintiffs' beliefs. In its decision, the ECtHR identified at least two elements that create a wide margin of appreciation for Member States: the lack of European consensus on same-sex marriage,<sup>57</sup> and that the case at stake "undoubtedly raise[d] sensitive moral or ethical issues".<sup>58</sup>

From a comparative perspective, it should be highlighted that, in Member States where same-sex unions do not enjoy the same (or comparable) rights as different-sex married couples (see Chapter 4), following forced divorces, spouses and children of trans people lose the rights that are protected through marriage.

At least seven Member States are increasingly acknowledging that the requirements of being single and/or undergoing forced divorce conflict with the fundamental rights of trans people. In France, a lower court refused to recognise the right of a married trans woman with three children to change her sex in civil status records, based on the then existing prohibition of marriage for same-sex couples.<sup>59</sup> In 2012, the Court of Appeal reversed that decision, concluding that the judgment on the sex change in civil status records had no impact on the marriage certificate and on the children's birth certificates. However, given that same-sex marriage was introduced in 2013, the issue should probably be considered resolved.<sup>60</sup>

In 2014, the Italian Constitutional Court declared unconstitutional provisions on forced divorce in so far as these provided no alternatives to couples who wished their union to be recognised after gender reassignment of one of its members.<sup>61</sup> The court reiterated that parliament has a duty to regulate same-sex unions in accordance with the Italian Constitution. In Sweden, the requirements of being a Swedish citizen and unmarried to undergo gender reassignment were abolished in 2013.<sup>62</sup> Before a new law to that effect came into force,

49 Netherlands, Leeuwarden Court of Appeal (*Gerechtshof Leeuwarden*) (2010), Case No. 200.058.760/01, ECLI:NL:GHLEE:2010:BO8039, 23 December 2010.

50 United Nations (UN), Human Rights Committee (2014), *Concluding observations on the fourth periodic report of Ireland*, No. CCPR/C/IRL/CO/4, Geneva.

51 The Irish Times (2015), *Gender recognition Bill will drop 'forced divorce' clause*, 3 June 2015.

52 ECtHR, *Hämäläinen v. Finland*, No. 37359/09, Grand Chamber, 16 July 2014.

53 Para. 84.

54 Para. 40.

55 Para. 85.

56 Para. 92.

57 Para. 53.

58 Para. 75.

59 France, Court of Appeal of Rennes, Decision No. 11/08743, 16 October 2012.

60 France, Law No. 2013-404 opening marriage to same sex couples, 17 May 2013.

61 Italy, Constitutional Court (2014), *Ruling 170/2014*, Rome, [www.cortecostituzionale.it/action/SchedaPronuncia.do?anno=2014&numero=170](http://www.cortecostituzionale.it/action/SchedaPronuncia.do?anno=2014&numero=170).

62 Sweden, Legal Gender Recognition Act 1972:119 (Lag (1972:119) om fastställande av könstillhörighet i vissa fall), 22 May 2013.

and also in 2013, a Stockholm Administrative Court of Appeal judgment also abolished the sterilisation requirement,<sup>63</sup> setting a legal precedent. In Finland, the Ministry of Social Affairs and Health (*Sosiaali- ja terveystieteiden ministeriö/Social- och hälsovårdsministeriet*) set up a working group on updating the Act on legal recognition of the gender of transsexuals (*Laki transseksuaalin sukupuolen vahvistamisesta/Lag om fastställande av transsexuella personers könstillhörighet*, Act No. 563/2002).<sup>64</sup> The working group was assigned the task of preparing legislative changes necessary to abolish the law's requirements on sterility and being unmarried.

In the UK, since the Marriage (Same Sex Couples) Act<sup>65</sup> came into force in March 2014, a married trans person in England and Wales can receive a full gender recognition certificate without divorcing his or her spouse, provided that the spouse consents to the process. However, the spousal consent requirement is coupled with the requirement that the applicant must have been living as the gender with which they identify for at least two years before applying for gender recognition. This means their marriage will in practice already have been a same-sex marriage for two years. By contrast, in Scotland the Marriage and Civil Partnership (Scotland) Act 2014 provides the possibility of obtaining gender recognition without the spouse's consent.<sup>66</sup> However, the most far-reaching changes were adopted in Denmark and Malta in 2014 and 2015, respectively. By allowing self-determination, both countries lifted all other requirements for legal gender recognition, including that of being single.

### 1.3.2. Change of name

#### Key developments

- An increasing number of EU Member States make it possible to change one's name so that it reflects one's preferred gender.
- Rectifying certain documents, such as educational diplomas, remains difficult for trans people.

Changing one's name – specifically, acquiring a name indicative of a gender other than that assigned at birth – is generally possible in exceptional circumstances only. As shown in Table 1, it is often conditional upon medical testimony indicating that sex reassignment has taken place, or upon a legal recognition of gender reassignment (whether or not medical treatment has taken place).

Since 2010, there have been positive developments in at least three Member States. In Spain, the Act on the Civil Registry of 2011 simplified the administrative procedures for changing a person's name (and the order of surnames).<sup>67</sup> In Croatia, the Act on Personal Names (*Zakon o osobnom imenu*),<sup>68</sup> adopted in 2012, allows citizens to autonomously choose their first and/or last name. No approval by an administrative body is required, and the name-change procedure falls under data protection rules. In Sweden, the Administrative Court<sup>69</sup> ruled that persons over 18 years have the right to determine their first name, regardless of biological sex or legal gender. Moreover, the Patent and Registration Office (*Patent- och Registreringsverket*) has produced a list of gender-neutral names that could be useful when a name change is desired.

In Cyprus, the population archives department of the Interior Ministry has been issuing new birth certificates with the new names (and the new sex) after name changes since 2002, although old certificates are neither cancelled nor repealed and are retained on file.<sup>70</sup>

Issues concerning name changes arise in a number of contexts, and not just with respect to birth certificates. For example, education and training certificates are particularly relevant. Presenting such diplomas can be a requirement when applying for a job. In 2010, the Netherlands Institute for Human Rights released an opinion asserting that the first names of trans people should be changed on university diplomas. In that case, a university, relying on the applicable law, originally declined to issue a new diploma to a trans man, with the aim of combating fraud. The institute believed that the legal stipulation permitted issuing new diplomas in special circumstances, and that this qualified as one.<sup>71</sup> In Estonia, a 2012 report shows that, because the relevant

63 Sweden, The Administrative Court of Appeals (*Kammarrätten*) in Stockholm, Judgment 2012-12-19, Court case No. 1968-12, 19 December 2012, [http://duz.pentagonvillan.se/images/stories/Kammarrattens\\_dom\\_-\\_121219.pdf](http://duz.pentagonvillan.se/images/stories/Kammarrattens_dom_-_121219.pdf).

64 Information retrieved from the website of the Ministry of Social Affairs and Health, [www.stm.fi/vireilla/tyoryhmat/sukupuolen\\_vahvistaminen](http://www.stm.fi/vireilla/tyoryhmat/sukupuolen_vahvistaminen).

65 United Kingdom, Parliament (2014), The Marriage (Same Sex Couples) Act 2013 (Commencement No. 2 and Transitional Provision) Order 2014, [www.legislation.gov.uk/uksi/2014/93/made](http://www.legislation.gov.uk/uksi/2014/93/made).

66 United Kingdom, Scottish Parliament (2013), Marriage and Civil Partnership (Scotland) Bill.

67 Spain, Act 20/2011 on the Civil Registry (*Ley 20/2011, de 21 de julio, del Registro Civil*), 21 July 2011.

68 Croatia, Act on Personal Names (*Zakon o osobnom imenu*) (2012), *Official Gazette (Narodne novine)* 118/12, [http://narodne-novine.nn.hr/clanci/sluzbeni/2012\\_10\\_118\\_2550.html](http://narodne-novine.nn.hr/clanci/sluzbeni/2012_10_118_2550.html).

69 Sweden, The Administrative Court of Appeals (*Kammarrätten*) in Stockholm, Court case No. 2893-0928, September 2009.

70 Cyprus, Population-data Archives Law No. 141(I)/2002 (26 July 2002), Article 40.

71 Netherlands, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) (2010), Opinion 2010-175, 30 November 2010, available at <http://www.mensenrechten.nl/publicaties/oordelen/2010-175>.



provisions are ambiguous, the practice has been inconsistent and dependant on the individual institution.<sup>72</sup> In Hungary, issues concerning data protection and the right to privacy emerged in a case concerning a pharmacy licence. The Office of Health Authorisation and Administrative Procedures (*Egészségügyi Engedélyezési és Közigazgatási Hivatal*) recognised that using the general procedure – which involves amending the old license rather than issuing a new one – violates the human dignity of trans people because it exposes their gender history.<sup>73</sup>

However, in some contexts, continuity in legal identity is in trans people’s interest. For example, in the Czech Republic, gender-specific birth numbers are often used for loans and mortgages or by some institutions to identify an individual. Accordingly, while the Act on Inhabitancies and Social Security Numbers<sup>74</sup> allows for a change in the birth number, it has been debated whether introducing gender-neutral resident identifiers would be a better solution.<sup>75</sup>

Table 1 summarises the requirements for rectifying a recorded sex or name in official documents.

Table 1: Requirements for rectifying a recorded sex or name in official documents

Country code	Intention to live as the opposite gender	Real-life test	Gender dysphoria diagnosis	Hormonal treatment/physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓				
BE	✓			✓		✓	✓			Change of name possible without SRS
BG				?	✓	✓	?	✓		Only changes in identity documents are possible (gap in legislation)
CY						✓	✓	✓		Automatic divorce is issued after four years of living separately
CZ	✓	✓	✓	✓		✓	✓	✓		
DE	✓	✓	✓	✓ / x	✓	✓	x	x		A person can change only the name (so-called small solution) or the recorded sex (big solution). In both cases, legislation must be revised to implement court decisions
DK							x	x		The only requirements are waiting six months and being over 18 years old
EE	✓	✓			✓	✓	✓	✓		
EL					✓	✓	✓	x Court decision		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, before legal recognition of gender reassignment. Once belonging to a gender is legally recognised, marriage will be converted, without any separate measures, into a registered partnership, and registered partnership into marriage
FR			✓	✓	✓	✓	✓	x		Requirements set by case law; legal and medical procedures uneven throughout the country

72 Estonia, Grossthal, K. and Meior, M. (2012), *Implementation of the Council of Europe Recommendation to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity: Compliance documentation report*. Estonia, Estonian Human Rights Centre, p. 48.

73 Hungary, Office of Health Authorisation and Administrative Procedures (2011), Decision No. 28326-004/2011/ELN, 8 August 2011. For a detailed summary, see *Trans pharmacist* case in Annex I.

74 Czech Republic, Act on Inhabitancies and Social Security Numbers (*Zákon o evidenci občanů a rodných číslech*), 12 April 2000, <http://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=49303&fulltext=&nr=133-2F2000&part=&name=&rp=15#local-content>.

75 Czech Republic (2005), Government Decision No. 340 of 23 March 2005.

Country code	Intention to live as the opposite gender	Real-life test	Gender dysphoria diagnosis	Hormonal treatment/physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/automatic divorce	Unchangeable	Notes
HR	✓	✓	✓	✓	×	✓	×	?		Croatian law allows rectification on two separate grounds: (a) life with different gender identity and (b) sex change. Accordingly, hormonal treatment or physical adaptation would be required only in case of sex change
HU						✓		✓		No explicit rules in place. Except for the divorce requirement, requirements derive from the consistent practice of the ministries responsible for health and registry affairs
IE								✓		Ireland, Gender Recognition Act 2015, Number 25 of 2015, 22 July 2015.
IT			✓	✓	✓	✓	✓	?		Forced/automatic divorce declared unconstitutional. Parliament must enact new legislation
LT			✓	✓	✓	✓ (Court may require medical examination)	✓	✓		No regulation in force. Domestic jurisprudence has changed in the light of the <i>L. v. Lithuania</i> case. All personal entries, including name, sex and personal code, can be changed pursuant to a court order
LU	✓	?			✓					Specific requirements are left to case law. The Marriage Act of 2014 made the requirement to divorce obsolete by early 2015.* In practice, interested individuals undergo GRS in Germany, Belgium or France.
LV						✓	✓ Change of name is possible after gender reassignment			Medical opinion is based on an intention to live as the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, the Ministry of Health decides on a case-by-case basis (parameters not specified)
MT	✓							×		
NL	✓	×	×	×	×	✓	×			
PL				✓	✓	✓		✓		The Gender Recognition Bill adopted by parliament on 10 September 2015 was vetoed by the President on 2 October 2015.
PT	✓		✓			✓				
RO	✓	✓	✓	✓	✓	✓	✓			
SE	✓	✓				✓	×	×		Decision issued not by court but rather by forensic board ( <i>Rättsliga rådet</i> ). Change of name possible via the Tax Office ( <i>Skatteverket</i> ) after gender reassignment
SI						✓				No formalities for name changes. The legislation only states that gender change is entered in the registry upon a decision by the competent authority, issued on the basis of a medical notification showing that a person has changed their gender. Accordingly, different requirements may apply throughout the country.
SK							✓	?		The relevant state authority (county bureau) shall permit change of name upon an application accompanied by a confirmation from a medical facility.
UK	✓	✓	✓			✓		×		Change of name requires no formalities.
	14		12	12	10	24	12	8	0	

Notes: This table does not address the requirements for accessing gender reassignment treatment. Specifically, this means that gender dysphoria diagnosis by medical specialists may in practice be required as a precondition to a positive opinion. This table does not capture this situation. Instead, this table illustrates the conditions for legal recognition of gender reassignment.

✓ = applies; ? = doubt; × = removed

\* Luxembourg (2012), Pressedossier European LGBT survey, available at: <http://cet.lu/wp-content/uploads/2012/04/Pressedossier-LGBT-Survey-FRA.pdf>.

Source: FRA, 2015

# 2

## Non-discrimination and promoting equality in employment



This chapter is divided into two sections. The first focuses on substantive developments in the drafting and interpretation of equality legislation. It first examines progress in addressing the existing ‘hierarchy of grounds’ at both the national and EU levels. It then discusses the extent to which gender identity is protected within the legal systems of the Member States and under EU law. This is followed by an analysis of the extent to which employment-related benefits are equally available to same-sex couples. The section then describes developments in Member State legislation on combating discrimination on grounds of sexual orientation and gender identity in school and education – which could form the basis for efforts to create inclusive employment environments. Finally, the section analyses practice and case law relating to exceptions to the principle of equal treatment in employment available to religious and ethos-based organisations.

The second section of the chapter focuses on implementation and enforcement of the Employment Equality Directive. First, it analyses changes that have occurred in Member State legislation since 2010. Second, it considers the relevant national and European case law on non-discrimination and the promotion of equality in employment. Third, it discusses the mandates equality bodies have to deal with sexual orientation. Finally, it examines the role of LGBT NGOs and trade unions.

### 2.1. Substantive issues

#### 2.1.1. Progress in addressing the ‘hierarchy of grounds’

##### Key developments

- 13 EU Member States have extended the prohibition of discrimination based on sexual orientation to all areas covered by the Racial Equality Directive (RED).
- 8 EU Member States extended this protection to at least some areas covered by RED.
- 7 EU Member States still limit protection against discrimination based on sexual orientation to the area of employment.
- At EU level, efforts to address the ‘hierarchy of protected grounds’ through adoption of an Equal Treatment Directive continue.

Under current EU law, the prohibition of discrimination on grounds of racial and ethnic origin applies to a wider range of areas than the prohibition of discrimination on any of the other grounds specified in Article 19 of the Treaty on the Functioning of the European Union (TFEU), including sexual orientation. This has come to be known as the ‘hierarchy of grounds’. However, Article 21 of the EU Charter of Fundamental Rights makes no distinction in the level or scope of protection afforded to the various grounds mentioned in that article. Unsurprisingly, therefore, in a majority of EU Member States the idea that all discrimination grounds should benefit from equivalent scopes and degrees of protection has influenced the transposition of the Equality Directives.

Member States have taken different approaches to non-discrimination legislation, including in terms of what areas are protected. The 2010 report divided the EU Member States into three groups according to the number of areas covered by non-discrimination legislation:

- Member States where equal treatment legislation on ground of sexual orientation extends to all the areas mentioned in the Racial Equality Directive;<sup>76</sup>
- Member States where prohibition of sexual orientation discrimination extends to at least some of those areas;
- Member States where prohibition of sexual orientation discrimination extends only to the area of employment.

According to the same scheme, as of 2014, the prohibition of discrimination on the ground of sexual orientation covers all areas mentioned in the Racial Equality Directive in 13 Member States (Belgium, Bulgaria, Croatia, the Czech Republic, Germany, Hungary, Lithuania, Romania, Sweden, Slovakia, Slovenia, Spain and the United Kingdom), up from 10 in 2010.<sup>77</sup> In eight other Member States (Denmark, Finland, France, Ireland, Luxembourg, Malta, the Netherlands and Portugal), equal treatment legislation on the ground of sexual orientation extends to at least some of those areas. Finally, as of 2014, seven Member States (Austria,<sup>78</sup> Cyprus, Estonia, Greece, Italy, Latvia and Poland) maintain the 'hierarchy' that affords racial and ethnic origin distinct protection from other grounds, down from 10 in 2010.<sup>79</sup>

In Latvia, a Law on Prohibition of Discrimination against Natural Persons Engaged in Economic Activity (*Likumprojekts 'Fiziskopersonu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums'*),<sup>80</sup> which replaced a law adopted in 2009, introduced changes in 2012. The new law broadened the list of prohibited

discrimination grounds, which now includes sexual orientation.

Equal treatment legislation on the ground of sexual orientation already covered at least some areas other than employment in Latvia. However, sexual orientation was mentioned explicitly only in labour law, and was considered to be implicitly included in the definition of "other grounds" in legislation applying to other areas.

Finally, it should be noted that anti-discrimination legislation is currently subject to comprehensive review in Finland and Poland. In Finland, a government bill<sup>81</sup> to revise the Equal Treatment Act (*Yhdenvertaisuuslaki/Lag om likabehandling*) was presented to parliament in April 2014. In Poland, the legislation has recently repeatedly been changed, and parliament has been debating a new bill. In December 2010, the Polish parliament approved a law on equal treatment, which guarantees protection on sexual orientation grounds only to the extent of the Employment Equality Directive.<sup>82</sup> Then, in 2011, parliament banned the broadcasting of commercials that include content considered discriminatory on the ground of sexual orientation.<sup>83</sup> Finally, in June 2013, parliament started to discuss a bill that extends the prohibition of sexual orientation discrimination to all areas mentioned in the Racial Equality Directive.<sup>84</sup> The bill was approved by the majority of the Lower House of the Parliament (*Sejm*) in its first reading on October 2013 and was referred to the Parliamentary Committee for Justice and Human Rights (*Komisja Sprawiedliwości i Praw Człowieka*) for further legislative work.<sup>85</sup> The proposed legislation also aimed to prohibit any form of harassment in the media.

The legal developments in the Member States could be viewed as a continuing trend towards extending equal protection against discrimination on the ground of sexual orientation to all areas to which the Racial Equality Directive applies. However, the protection

76 The Racial Equality Directive applies within the employment area and in relation to social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services, including housing.

77 Belgium, Bulgaria, the Czech Republic, Germany, Romania, Sweden, Slovakia, Slovenia, Spain and the United Kingdom

78 Due to Austria's federal structure, the Employment Equality Directive had to be implemented at both federal and provincial levels. While implementation of the Employment Equality Directive regarding sexual orientation does not go beyond the minimum requirements regarding private labour contracts and the federal civil service regulated by federal law, provincial legislation in eight of the nine provinces covers employment and occupation, as well as access to and supply of goods and services.

79 Austria, Cyprus, Denmark, Estonia, France, Greece, Italy, Malta, Poland and Portugal.

80 Latvia, Law on Prohibition of Discrimination of Natural Persons Engaged in Economic Activity (*Fiziskopersonu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), 29 November 2012.

81 Finland, Government Bill on the revision of the Act on Equal Treatment and other laws relating to it (*Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi*, HE 19/2014 vp), 3 April 2014, [www.finlex.fi/fi/esitykset/he/2014/20140019.pdf](http://www.finlex.fi/fi/esitykset/he/2014/20140019.pdf).

82 Poland, Act on the implementation of certain European Union provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.

83 Poland, Act amending the Act on broadcasting and television (*Ustawa z dnia 25 marca 2011 o zmianie ustawy o radiofonii i telewizji*), 25 March 2011.

84 Poland, Draft bill amending the Act on the implementation of certain European Union provisions concerning equal treatment (*Poselski projekt ustawy o zmianie ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania oraz niektórych innych ustaw*), 9 November 2012.

85 For information on subsequent developments, see: <http://www.sejm.gov.pl/SQL2.nsf/poskomprocal?OpenAgent&751051>.

afforded to the various grounds of discrimination, including sexual orientation, is still far from aligned. In 2008, the European Commission adopted a proposal for a directive applying the principle of equal treatment to areas other than employment, thereby granting better protection against discrimination on the grounds of disability, age, sexual orientation, religion and belief. Progress in the adoption of this 'horizontal' directive (Equal Treatment Directive), which requires unanimity in the Council, has been slow.<sup>86</sup> During the Employment, Social Policy, Health and Consumer Affairs meeting of the Council (EPSCO Council) on 11 December 2014, most Member States supported the draft directive, but expressed the need for further work on its text. Outstanding issues included the directive's overall scope, the provisions relating to the division of competences between the EU and its Member States, and the implementation calendar.<sup>87</sup> The incoming Commission highlighted the importance of ensuring equal protection against discrimination, and therefore of supporting the Equal Treatment Directive, declaring its commitment to 'convinc[ing] national governments to give up their current resistance in the Council'.<sup>88</sup>

The European Parliament has also expressed its position on the 'hierarchy' of grounds. In February 2014, it approved a resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.<sup>89</sup> The European Parliament called on Member States to consolidate the existing EU legal framework by working to adopt the proposed 'horizontal' directive, including by clarifying the scope and associated costs of its provisions.<sup>90</sup> In November 2014, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (LIBE Committee) held a debate on the status of preparations of the 'horizontal directive' and identified among the obstacles prejudice towards LGBT people's rights.<sup>91</sup>

## 2.1.2. Discrimination and gender identity

### Key developments

- At EU level, trans people are protected against discrimination on the ground of sex and gender reassignment.
- Trans people are protected against discrimination on different grounds in EU Member States. Some protect trans people explicitly on the ground of gender identity (or sexual identity/transsexualism/transgenderism), while others protect trans people on the ground of sex. Finally, in some Member States, the discrimination ground for the protection of trans people is not clearly established.

The 2009 FRA report *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II – the social situation* painted a bleak picture of the situation of trans people in the labour market.<sup>92</sup> Even though Member States are increasingly aware of the problem of discrimination based on gender identity, the situation today appears unchanged. FRA's 2012 EU LGBT survey<sup>93</sup> showed that trans respondents indicate the highest levels of experience with discrimination, harassment and violence amongst the different LGBT groups.

This prompted FRA to further analyse the survey results, focusing on trans persons. The FRA's 2014 report *Being Trans in the European Union – Comparative analysis of EU LGBT survey data* revealed that of all trans respondents, trans women are the most likely to indicate that they have felt discriminated against in the field of employment.<sup>94</sup> EU non-discrimination law currently does not specifically prohibit discrimination on grounds of a person's gender identity and gender expression. Only the Victims' Rights Directive<sup>95</sup> explicitly prohibits discrimination on the ground of gender

86 European Commission (2008), *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426 final, 2 July 2008.

87 Council of the European Union (2015) Presidency Discussion Paper 6081/15, Brussels, 13 February 2015.

88 Jean-Claude Juncker, Candidate for President of the European Commission (2014) *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*. Political Guidelines for the next European Commission. Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014, p. 9.

89 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.

90 *Ibid.*, para. 4 (b).

91 European Parliament (2014), Presentation of the state of negotiations in the presence of the Italian Presidency, LIBE (2014)1105\_1, 5 November 2014.

92 FRA (2009), *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II – the social situation*, Luxembourg, Publications Office of the European Union (Publications Office), p. 117.

93 FRA (2013), *European Union survey of discrimination and victimization of lesbian, gay, bisexual and transgender persons*, Luxembourg, Publications Office, <http://fra.europa.eu/en/survey/2012/eu-lgbt-survey>.

94 FRA (2014), *Being Trans in the EU – Comparative analysis of EU LGBT survey data*, Luxembourg: Publications Office of the European Union, 2014, p. 28.

95 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57–73, recital 9.

identity, although the Qualification Directive (recast) also refers to gender identity.<sup>96</sup>

At EU level, trans people receive protection against discrimination on the ground of sex. Framing discrimination on the ground of gender reassignment as a form of sex discrimination has substantial consequences. At minimum, it means that EU instruments prohibiting sex discrimination in work and employment and in the access to and supply of goods and services apply to discrimination arising from the gender reassignment. The Court of Justice of the European Union (CJEU) has established that the instruments implementing the principle of equal treatment between men and women should be interpreted broadly to cover discrimination on grounds of intended or actual reassignment of gender.<sup>97</sup> This approach has also been embraced by the Gender Equality Directive (recast).<sup>98</sup> Its recital 3 includes a reference to discrimination arising from a person's gender reassignment. This is the first explicit mention of gender reassignment in an EU directive. The Commission has stated that discrimination arising from a person's gender reassignment is one of the substantive changes in the Gender Equality Directive (recast) that Member States are obliged to transpose into national law.<sup>99</sup> However, the Commission noted that, as of 2013, very few Member States have explicitly transposed it.<sup>100</sup>

In February 2014, in the Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, the European Parliament called on the Commission to issue, together with the relevant agencies, guidelines specifying that transgender persons are covered under 'sex' in the Gender Equality Directive (recast). The resolution also called on the Commission to include a specific focus on access to goods and services by trans persons when monitoring the implementation of Council

Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.<sup>101</sup>

The European Parliament also asserted the need to include "gender identity" among the protected grounds of discrimination in the 2014 resolution mentioned above, calling on the Commission to ensure that gender identity is included in future legislation, including recasts.<sup>102</sup>

In the international context, the United Nations High Commissioner for Human Rights already recommended in November 2011 that Member States enact comprehensive anti-discrimination legislation that includes discrimination on the ground of gender identity among prohibited grounds and recognises intersecting forms of discrimination.<sup>103</sup>

In the Council of Europe context, trans people may be protected on the ground of 'gender identity'. In the *P.V.* case,<sup>104</sup> in November 2010, the ECtHR emphasised that transsexualism is a standalone ground covered by Article 14 of the ECHR, which contains a non-exhaustive list of prohibited grounds for discrimination.<sup>105</sup> The protection of gender identity under Article 14 would have a considerable impact given the convention's very broad ambit. Above all, it could help improve the protection of trans people until EU non-discrimination law fully incorporates gender identity as a protected ground.

At national level, as of 2014, ten EU Member States (Austria, Denmark, Finland, Ireland, Italy, the Netherlands, Poland, Slovakia, Spain and Sweden) treat discrimination on the ground of gender identity as a form of sex discrimination. As remarked in the 2010 report, this is generally a matter of practice by the anti-discrimination bodies or courts rather than an explicit stipulation in the legislation.

In nine other Member States (Bulgaria, Cyprus, Estonia,<sup>106</sup> Greece, Latvia, Lithuania, Luxembourg, Romania and

96 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20 December 2011, Article 10(1)(d).

97 CJEU, C-13/94, *P. v. S. and Cornwall City Council*, 1996; CJEU, C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, 2004; CJEU, C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, 2004.

98 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 5 July 2006.

99 European Commission (2013a), *Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, COM(2013) 861 final, 6 December 2013, para. 3.

100 *Ibid.*, para. 3.4.

101 European Parliament (2014), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, para. 4 (f).

102 *Ibid.*, para. 4 (g).

103 UN General Assembly (2011), *Report of the United Nations High Commissioner for Human Rights on Human Rights Council, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, 17 November 2011, para. 84 (e).

104 ECtHR, *P.V. v. Spain*, No. 35159/09, 30 November 2010.

105 *Ibid.*, para. 30.

106 In Estonia, the Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) adopted Opinion No. 11 on 11 September 2008. In the opinion, the Commission declared that any discrimination against a transgender person would be interpreted as gender discrimination. However, that interpretation has never been tested by a court.



Slovenia), the lack of legislation or case law addressing discrimination based on gender identity results in legal uncertainty about the precise protection against discrimination available to trans persons.

In the Czech Republic, the concept of “sexual identification” in the Anti-Discrimination Act possibly covers gender identity and expression. In Germany, trans persons are protected under the ground ‘sexual identity’, which covers transsexuals.<sup>107</sup> A similar solution was introduced in France, where Law 2012-954 adopted on 6 August 2012, added a new criterion of discrimination alongside that of sexual orientation: sexual identity (*identité sexuelle*).<sup>108</sup> In Sweden, discrimination on the ground of gender reassignment is still considered sex discrimination. The new ground ‘transgender identity or expression’ now covers other forms of gender variance, regardless of gender reassignment.

In Belgium, Croatia, Hungary, Malta, Portugal and the UK, ‘gender identity’ is an autonomous ground of prohibited discrimination.

In Belgium, the federal law aiming to combat discrimination between women and men was amended in 2014, and the new Article 4 paragraph 3 explicitly mentions ‘gender identity’ and ‘gender expression’. Before this amendment, only ‘change of gender’ was protected by law.<sup>109</sup>

In Croatia, the Anti-Discrimination Act, which came into force in 2009, explicitly prohibits discrimination on the grounds of gender identity or gender expression. Cases of discrimination based on these grounds are dealt with by the Ombudsperson for Gender Equality, in accordance with the opinion issued by this institution.<sup>110</sup>

Equality legislation in Malta was amended in 2012<sup>111</sup> to include the protection of trans people from discrimination based on gender identity, but other important legislative changes have since occurred. Act No. X of 2014 amended the Constitution of Malta to include gender identity (and sexual orientation) among the grounds on the basis of which discrimination generally is prohibited. This means that acts of discrimination on the ground of gender identity are forbidden in any law or

in the conduct of any public entity.<sup>112</sup> Malta was the first EU Member State to introduce a reference to gender identity in its constitution.

In Portugal, ‘gender identity’ is one of the factors on the basis of which a student has the right not to be discriminated against and the duty to not discriminate.<sup>113</sup> Gender identity is also listed as a discrimination ground in Article 240 of the Penal Code,<sup>114</sup> and under the Asylum Law.<sup>115</sup>

Finally, as already reported by FRA in 2010, gender reassignment is treated as a separate ground of prohibited discrimination in the United Kingdom.

The legislative changes in Belgium, Malta and Portugal show that some Member States are broadening protection to cover gender identity, but no clear trend can be identified across EU Member States. Only ten Member States (Belgium, the Czech Republic, Croatia, Germany, Hungary, France, Malta, Portugal, Sweden and the United Kingdom) have enforced laws protecting gender identity and/or gender expression – in addition to gender reassignment – from discrimination, although sometimes they have made use of the concept of ‘sexual identity’ to this effect. On a positive note, in three other Member States (Finland, Ireland and Poland), parliaments have discussed proposals to more visibly include trans people in the scope of non-discrimination law.

In Finland, the Equal Treatment Act does not specifically mention discrimination based on gender identity. It considers discrimination against a trans person to be sex discrimination. However, a government bill on amending the Act on Equality between Women and Men, presented to parliament in April 2014,<sup>116</sup> included gender identity and gender expression as new grounds of prohibited discrimination, as well as new obligations for authorities,

107 Germany, Federal Parliament (*Bundestag*), BT-Drs. 16/1780, 8 June 2006, p. 31, <http://dip21.bundestag.de/dip21/btd/16/017/1601780.pdf>.

108 France, Law No. 2012-954 on sexual harassment (*Loi n° 2012-954 relative au harcèlement sexuel*), 6 August 2012.

109 Belgium, The Law of 10 May 2007 aiming at fighting against discrimination between women and men (*Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*), as amended on 24 July 2014, Article 4 § 3.

110 Croatia, Ombudsperson for Gender Equality (*Pravobraniteljici*), *A.S. v. Ministry of Administration*, PRS POV 03-03/11-01, 2011.

111 Malta, Act No. IX of 2012 amending the Equality for men and women Act, 2012.

112 Malta, Constitution of Malta (Amendment) Act, Act No. X of 2014, 17 April 2014.

113 Portugal, Law 51/2012, which approves the Statute of Student and School Ethics (*Lei que aprova o Estatuto do Aluno e a Ética Escolar*), 5 September 2012.

114 Portugal, Law 19/2013, 29th amendment to the Penal Code (*Lei No. 19/2013, 29.ª alteração ao Código Penal*), 21 February 2013.

115 Portugal, Law 26/2014, first amendment to Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directives 2011/95/UE, 2013/32/UE and 2013/33/UE (*Lei No. 26/2014 que procede à primeira alteração à Lei n.º 27/2008, de 30 de junho, que estabelece as condições e procedimentos de concessão de asilo ou proteção subsidiária e os estatutos de requerente de asilo, de refugiado e de proteção subsidiária, transpondo as Diretivas n.os 2011/95/UE, 2013/32/EU e 2013/33/EU*), 5 May 2014.

116 Finland, Government Bill on the renewal of Act 609/1986 on Equality between Women and Men (*Laki naisten ja miesten välisestä tasa-arvosta/Lag om jämställdhet mellan kvinnor och män*, Act No 609/1986), 2014.

employers and educational institutions to promote equal treatment irrespective of gender identity.<sup>117</sup>

In June 2013, the Polish parliament started discussing a draft law introducing a catalogue of discriminatory grounds, including gender identity and gender expression (see [Section 2.1.1](#)).

In June 2014, the Irish government published the Revised General Scheme of Gender Recognition Bill.<sup>118</sup> However, it appears that discrimination on the ground of gender identity will continue to be treated as a form of sex discrimination.

In conclusion, there is still a long way to go before trans people are guaranteed equal treatment in the EU. EU anti-discrimination law protects trans people only regarding gender reassignment, and in form of prohibitions on discrimination on the ground of sex.

However, the number of Member States combating discrimination on grounds of 'gender identity' and/or 'gender expression' is slowly increasing. Although this does not automatically translate into awareness of the many forms of discrimination experienced by trans people, it is an important first step.

### 2.1.3. Access to employment-related partner benefits

#### Key development

- The CJEU and some national courts have ruled that Member States must ensure access to employment-related partner benefits without discrimination based on sexual orientation.

The Employment Equality Directive does not clearly specify whether, where same-sex couples are not allowed to marry, and employment-related benefits are contingent upon marriage, the resulting differences in treatment should be considered a form of (direct or

indirect) discrimination based on sexual orientation.<sup>119</sup> The CJEU clearly rejects the possibility that Recital 22 of the Employment Equality Directive justifies any differences in the treatment of spouses and registered partners who are in situations comparable to spouses.<sup>120</sup> To the contrary - the CJEU has noted that Member States' exercise of their competence to regulate matters relating to civil status and the benefits flowing therefrom "must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination".<sup>121</sup>

In 2013, in *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*,<sup>122</sup> the CJEU ruled on same-sex registered partners' access to employment-related partner benefits. A French national collective agreement grants special leave and a salary bonus to employees when they marry, but these were denied to an employee in a *pacte civil de solidarité* (PACS) with a person of the same sex. According to the CJEU, determining whether there was discrimination does not require examining whether or not national law generally and comprehensively treats registered life partnerships as legally equivalent to marriage.<sup>123</sup> Instead, it is necessary to compare the situations of the spouses and registered life partners as they result from the relevant applicable domestic provisions, taking account of the purpose and conditions for granting the benefits at issue. The CJEU found that persons of the same sex who cannot legally marry and therefore instead conclude a PACS are in a situation comparable to that of couples who marry in terms of benefits relating to terms of pay or working conditions, such as days of special leave and salary bonuses, granted at the time of an employee's marriage - which is a form of civil union.<sup>124</sup>

As homosexual employees were not entitled to marry in France at the time, they were unable to meet the condition required to obtain the benefit claimed.<sup>125</sup> In such a situation, the CJEU found, "the difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct dis-

117 Finland, Government Bill on the revision of the Act on Equal Treatment and other laws relating to it (*Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi*, HE 19/2014 vp), 3 April 2014, [www.finlex.fi/fi/esitykset/he/2014/20140019.pdf](http://www.finlex.fi/fi/esitykset/he/2014/20140019.pdf).

118 Ireland, (Revised) General Scheme of Gender Recognition Bill 2014, June 2014, [www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf](http://www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf).

119 See Littler, A. (2004), *Report of the European Group of Experts on Combating Sexual Orientation Discrimination about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, <https://openaccess.leidenuniv.nl/dspace/bitstream/1887/12587/23/DiscriminatoryPartnerBenefits-Appendix1-12Nov2004.PDF>.

120 CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013; C-147/08, *Romer v. City of Hamburg*, 11 May 2011; C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008.

121 CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, para. 59.

122 CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.

123 *Ibid.*, para. 34.

124 *Ibid.*, para. 37.

125 *Ibid.*, para. 44.



crimination [...]” as defined by the Employment Equality Directive.

In *Hay*, the CJEU followed similar reasoning to that in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*.<sup>126</sup> In *Maruko*, the CJEU dealt with widower pensions based on the deceased partner’s previous employment, which were not granted to same-sex partners. In both cases, the court ruled that, when people in a similar situation are treated differently because of their sexual orientation, there is direct discrimination. However, the CJEU avoided a general comparison between marriage and same-sex registered partnerships. Therefore, equal treatment of same-sex registered partners and spouses in employment, as provided for by EU law, does not translate into an obligation for Member States to set up a legal scheme equivalent to marriage, or to open up marriage to same-sex couples.

More developments on the issue come from the case law of the ECtHR,<sup>127</sup> which has held that, where Member State legislation or practice treats different-sex unmarried couples comparably to married couples, it is not permissible to treat same-sex partners less favourably. Doing so would constitute discrimination on the ground of sexual orientation.

In *Schalk and Kopf*, the ECtHR noted that, in view of the rapid evolution towards granting legal recognition to same-sex couples in a considerable number of Member States, “it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy ‘family life’ for the purposes of Article 8”.<sup>128</sup> Accordingly, as remarked in *X and others v. Austria*<sup>129</sup> and reiterated in *Vallianatos and others v. Greece*,<sup>130</sup> the ECtHR held that same-sex relationships fall within the notions of ‘private life’ and ‘family life’, as relationships of different-sex couples in the same situation would.

The courts of some Member States have also dealt with access to employment-related partner benefits by same-sex couples.

In Germany, for example, differences between same-sex civil partnerships and marriage persist in very few areas. Several Federal Constitutional Court

(*Bundesverfassungsgericht*, BVerfG) decisions deemed differences in treatment between marriage and same-sex civil partnerships to breach the general principle of equality (Article 3 (1) of the Constitution (*Grundgesetz*, GG)). The decisions concerned pensions for surviving dependants of public employees in the civil service,<sup>131</sup> gift and inheritance taxes,<sup>132</sup> payments of family benefits to a civil servant<sup>133</sup> and income splitting for spouses.<sup>134</sup> Article 3 (1) of the Constitution demands equal treatment for all persons; preferential treatment of some to the detriment of others is allowed only under strict application of the proportionality rule. The differences between marriage and same-sex civil partnerships do not justify unequal treatment.

The German parliament adopted new laws to comply with the BVerfG rulings. These include the Act on transferring regulations regarding marriage to same-sex civil partnerships,<sup>135</sup> which states that all of the law’s provisions relating to marriage apply equally to same-sex civil partnerships. The amendment of the Income Tax Act equalised the income tax rate imposed on married couples and same-sex civil partnerships.<sup>136</sup>

Similarly, in France in 2012, the Defender of Rights (*Défenseur des droits*)<sup>137</sup> examined whether or not Article L. 3142-1 of the Labour Code (*Code du Travail*) discriminated on the ground of sexual orientation. The provision allowed employees to be absent for four days in case of marriage, but did not extend this right to employees bound by a PACS. This established a difference in treatment based solely on the basis of marital status. The criterion was neutral in that it applied to all employees bound by a PACS, regardless of their sexual orientation. However, it resulted in a particular disadvantage for homosexual employees given that they were not legally able to marry at the time. The provision was therefore likely to constitute discrimination on grounds of sexual orientation unless including this criterion would have been objectively justified by a legitimate aim, and the means of achieving that aim would have been appropriate and necessary. The

126 CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008.

127 Among others: ECtHR, *Vallianatos and Others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013; *X and others v. Austria*, No. 19010/07, 19 February 2013; *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010.

128 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, para. 94.

129 ECtHR, *X and others v. Austria*, No. 19010/07, 19 February 2013, para. 95.

130 ECtHR, *Vallianatos and others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013, para. 73.

131 Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 1164/07, 7 July 2009.

132 Germany, Federal Constitutional Court, 1 BvR 611/07; 1 BvR 2464/07, 21 July 2010.

133 Germany, Federal Constitutional Court, 2 BvR 1397/09, 19 June 2012.

134 Germany, Federal Constitutional Court, 2 BvR 909/06, 7 May 2013.

135 Germany, The Act on transferring regulations regarding marriage to same-sex civil partnerships (*Gesetz zur Übertragung ehebezogener Regelungen im öffentlichen Dienstrecht auf Lebenspartnerschaften*), 14 November 2011.

136 Germany, Act amending the Income Tax Act to implement the Federal Constitutional Court Decision of 7 May 2013 (*Gesetz zur Änderung des Einkommensteuergesetzes in Umsetzung der Entscheidung des Bundesverfassungsgerichtes vom 7. Mai 2013*), 27 June 2013.

137 France, Defender of Rights (*Défenseur des droits*), Case No. 110, 1 January 2012.

Defender of Rights stated that the justifications for absence under Article L. 3142-1 of the Labour Code fall within the scope of the Employment Equality Directive and must therefore comply with the principle of non-discrimination based on sexual orientation. The provision was therefore amended and now also allows for exceptional absences of up to four days when a PACS is concluded.<sup>138</sup>

In 2013, the Spanish Constitutional Court<sup>139</sup> deemed discriminatory and thus unconstitutional a provision<sup>140</sup> requiring a couple to have children in common in order to receive a widow's allowance based on the deceased partner's previous employment, given that this requirement is almost impossible to fulfil for same-sex couples. Based on this decision, the Spanish Constitutional Court<sup>141</sup> ruled that denying an allowance to a transsexual widow for not having children in common with his late spouse was discriminatory and counter to the equal treatment principle.

In Italy, in 2012, the Court of Appeal of Milan, Labour Section (*Corte di appello di Milano – sez. lavoro*),<sup>142</sup> decided a case concerning same-sex couple benefits relating to work contracts. The applicant was a bank employee who benefited from a health insurance scheme for himself and for his wife or cohabiting partner on payment of a given amount. When the applicant submitted a formal request to include his male partner in the scheme, the bank refused it because it interpreted 'cohabiting partners' as including different-sex partners only. The Court of Appeal noted that the notion of cohabiting partners has evolved and is not limited to its traditional interpretation, which excluded two persons of the same sex who live together. The court stated that the term must be interpreted in light of current social reality, and in the light of both Italian Constitutional Court Decision No. 138/2010 and the ECtHR's *Schalk and Kopf* case, which treat same-sex couples as having the same fundamental right to family life as unmarried different-sex couples. The Court of Appeal therefore concluded that the applicant's same-sex partner should be allowed to register with the employer's health assurance scheme. However, contrary to the applicant's suggestion, the court did not refer to the Employment Equality Directive.

## 2.1.4. School and education of LGBTI children and students

### Key development

- Ensuring equal opportunity in education is essential for everyone, including LGBTI children and young people. Schools and educational institutions have a key role to play in protecting LGBTI children from discrimination and harassment and in ensuring that, like every child, they are empowered to reach their full potential.

There have been significant developments since 2010 in Portugal, Spain and Sweden regarding protection from discrimination in the context of education and/or professional training.

For example, in 2012, Portugal passed a law<sup>143</sup> that enshrines the rights and duties of students, including the right to be treated with respect and civility by any member of the school community and the duty to treat others in the same manner. Under no circumstances may students suffer discrimination on the basis of their sexual orientation or gender identity.

In Spain, the Organic Law for improving the quality of education (*Ley Orgánica para la mejora de la calidad educativa*)<sup>144</sup> modified the Organic Law on Education (*Ley Orgánica de Educación*)<sup>145</sup> and introduced explicit sanctions for discrimination based on sexual orientation or gender identity. The corrective measures must be educational and restorative and must ensure respect for the rights of other students and improve relations with all the members of the educational community. Corrective measures should be proportionate to the act committed. Behaviours that violate the personal dignity of other members of the educational community, arising from or resulting in discrimination or harassment based on gender, sexual orientation or identity, among other grounds, or carried out against the most vulnerable students in their personal, social or educational qualification characteristics, are considered very serious offences. Decisions about corrective action regarding the commitment of minor offences are immediately enforceable.

<sup>138</sup> France (2014), Law 2014-873 (*Loi 2014-873*), 4 August 2014, art. 21.

<sup>139</sup> Spain, Constitutional Court (*Tribunal Constitucional*), Decision No. 41, 14 February 2013.

<sup>140</sup> Spain, Act 40/2007, 4 December 2007, Additional provision 3.

<sup>141</sup> Spain, Constitutional Court (*Tribunal Constitucional*), Decision No. 77, 8 April 2013.

<sup>142</sup> Italy, Court of Appeal of Milan, Labour Section (*Corte di appello di Milano – sez. lavoro*), No. 7176, 31 August 2012.

<sup>143</sup> Portugal, Law 51/2012, which approves the Statute of Student and School Ethics (*Lei que aprova o Estatuto do Aluno e a Ética Escolar*), 5 September 2012.

<sup>144</sup> Spain, Organic Law for improving education quality (*Ley Orgánica para la mejora de la calidad educativa*), No. 8, 9 December 2013.

<sup>145</sup> Spain, Organic Law on Education (*Ley Orgánica de Educación*), No. 2, 3 May 2006.

In Sweden, since 2008, the Discrimination Act<sup>146</sup> has required schools to adopt equal treatment plans comprising specific measures for promoting equal rights for children and pupils, including LGBTI people. In addition, schools must prevent children and pupils from being exposed to harassment and other demeaning treatment. As part of the LGBT strategy (2014–2016), the Authority for Youth and Civil Society Affairs (*Myn-digheten för ungdoms- och civilsamhällesfrågor*) was tasked by the government, in consultation with the National Agency for School Affairs (*Statensskolverk*), to take action to increase the school's capacity to deal with LGBTI issues to create an open and inclusive school environment.<sup>147</sup> The mission also requires special attention to intolerance and violence in close relationships and families as contexts that can reinforce young LGBTI people's vulnerability and insecurity. In 2014, the cost of carrying out the assignment was SEK 1,000,000.

At least four other Member States have, since 2010, implemented anti-bullying plans in schools to create a supportive environment for LGBTI children and students: Cyprus,<sup>148</sup> Ireland,<sup>149</sup> the Netherlands<sup>150</sup> and the United Kingdom.<sup>151</sup>

## 2.1.5. The position of churches or other ethos- or religion-based organisations under the regime of the Employment Equality Directive

### Key development

- In some EU Member States, exemptions from the principle of non-discrimination afforded to churches and other ethos- or religion-based organisations remain too broad or require clarification.

Article 4 (2) of the Employment Equality Directive provides that, under certain conditions, differences of treatment on grounds of religion or belief may be allowed in the context of occupational activities within churches and other public or private organisations, the ethos of which is based on religion or belief. The exact scope of these exceptions remains to be clarified.<sup>152</sup>

In its *Report on the application of the Anti-Discrimination Directives*,<sup>153</sup> issued in January 2014, the European Commission noted that specific occupational requirements that are imposed on employees and derogate from the equal treatment principle must be genuine, legitimate and justified. The Commission stated that such requirements must be interpreted narrowly because they involve an exception. At the same time, the Commission stated that all infringement proceedings for incorrect implementation of the derogation had been closed.

However, in Croatia, Germany, Ireland and the Netherlands – where some of the infringement proceedings were brought – legislation has not been changed and the issue remains controversial.

146 Sweden, Discrimination Act (*Diskrimineringslag, 2008:567*), 2008, [www.regeringen.se/content/1/c6/11/19/86/4a2b4634.pdf](http://www.regeringen.se/content/1/c6/11/19/86/4a2b4634.pdf).

147 Sweden, Government Bill 2013/14: 191 Focusing on young people: A policy of good living conditions, power and influence (*Med fokus på unga – en politik för goda levnadsvillkor, makt och inflytande*), p. 113.

148 Cyprus (2012), 'Mapping of the phenomenon of homophobia in education: Shield against Homophobia in Education' (*Σκιαγράφηση του φαινομένου της ομοφοβίας στην εκπαίδευση – Ασπίδα κατά της ομοφοβίας στην εκπαίδευση*), Cyprus Family Planning Association and Cyprus Youth Council, [www.cyfamplan.org/famplan/userfiles/documents/Report\\_Shield%20against%20Homophobia%20in%20education%281%29.pdf](http://www.cyfamplan.org/famplan/userfiles/documents/Report_Shield%20against%20Homophobia%20in%20education%281%29.pdf).

149 Ireland, Department of Children and Youth Affairs (2013), 'Ministers Quinn and Fitzgerald launch Action Plan on Bullying', Press release, 29 January 2013, [www.dcy.gov.ie/viewdoc.asp?Docid=2572&CatID=11&mn](http://www.dcy.gov.ie/viewdoc.asp?Docid=2572&CatID=11&mn).

150 Netherlands, Decision of 21 September 2012 amending five Decisions (the Decision on renewed key objectives for primary education, the Decision on key objectives for lower secondary education, the Decision on key objectives regarding the law on expertise centres, the Decision on key objectives of primary education in [the three Caribbean] BES islands, and the Decision on the lower secondary education in BES islands), as regards the adjustment of the key objectives in the area of sexuality and sexual diversity (*Besluit van 21 september 2012 tot wijziging van het Besluit vernieuwde kerndoelen WPO, het Besluit kerndoelen onderbouw VO, het Besluit kerndoelen WEC, het Besluit kerndoelen WPO BES en het Besluit kerndoelen onderbouw VO BES in verband met aanpassing van de kerndoelen op het gebied van seksualiteit en seksuele diversiteit*), *Law Gazette (Staatsblad)* (2012), No. 470; in force since 1 December 2012, *Law Gazette (Staatsblad)* (2012), No. 594.

151 United Kingdom, Government Equalities Office (2013), *Tackling homophobic bullying in schools*, [www.gov.uk/government/news/tackling-homophobic-bullying-in-schools](http://www.gov.uk/government/news/tackling-homophobic-bullying-in-schools).

152 See Waaldijk, K. and Bonini Baraldi, M. (2006), *Sexual orientation discrimination in the European Union: National laws and the Employment Equality Directive*, The Hague, T.M.C. Asser Press, p. 50.

153 European Commission (2014a), *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the 'Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the 'Employment Equality Directive')*, COM (2014) 2 final, 17 January 2014.

In Croatia, anti-discrimination protection<sup>154</sup> goes beyond that required by the Employment Equality Directive. However, Article 9(2)(5) of the Anti-Discrimination Act (ADA) allows unfavourable treatment on grounds of sexual orientation if the ethics and values of a particular public or private organisation are founded on religious beliefs that require such unfavourable treatment. In addition, the ADA allows unfavourable treatment on grounds of sexual orientation in the regulation of family law rights and obligations, especially if necessary for the protection of children, public morality or marriage (Article 9(2)(10)). Such a broad formulation not only implies that equal treatment of LGBTI citizens is considered problematic from a 'public morality' point of view, but can also be used to justify unfavourable treatment in employment. In addition, the provision's wording can be interpreted as allowing some establishments operating in the market to refuse to provide services to LGBTI citizens if their "lifestyle" conflicts with the owners' religious beliefs.

In September 2010, the ECtHR decided two cases on dismissals of church employees for adultery in Germany. The ECtHR confirmed churches' right to self-determination in Germany. However, it also stressed that domestic courts must balance the rights of employers and employees and take into account the specific nature of the post concerned.<sup>155</sup> Notwithstanding the ECtHR's ruling, in Germany, civil partnerships and homosexuality can still be considered incompatible with loyalty to the ethos of an employer's organisation.

In Ireland, Section 37 of the Equality Act<sup>156</sup> contains a broad exemption that raises questions regarding sexual orientation discrimination. The exemption allows institutions with a religious ethos to override the prohibition of discrimination in order to protect that ethos. Notwithstanding the Commission's decision not to pursue infringement proceedings against Ireland,<sup>157</sup> the exemption for religious bodies has continued to spur debate. In October 2013, the Equality Authority of Ireland issued a call for submissions on a proposed amendment of Section 37.<sup>158</sup> In April 2014, the new (designate) Irish Human Rights and Equality Commis-

sion<sup>159</sup> published a Recommendation Paper<sup>160</sup> in which it examined the public submissions received. It proposed changing the wording of Section 37 to balance the interests of religious or ethos-based organisations and the right of employees to a workplace free from discrimination. In paragraph 44, the commission referred to the balancing of such interests as approached in the ECtHR case of *Eweida and others v. the United Kingdom*,<sup>161</sup> discussed next.

In the United Kingdom, the Equality Act of 2010 introduced a general exception applicable to charities. Section 193 provides that restricting the provision of benefits to persons who share a particular protected characteristic is not discriminatory if that restriction (a) pursues a charitable aim and (b) is a proportionate means of achieving a legitimate aim or (c) is for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.<sup>162</sup> *Eweida and others v. the United Kingdom* is a landmark decision adopted by the ECtHR in January 2013.<sup>163</sup> The case addressed, among others, the legality of employers' refusals to recognise objections of conscience concerning the rights of same-sex couples. Some of the applicants complained specifically about sanctions imposed on them by their employers in reaction to their refusal to perform services that the applicants viewed as condoning homosexual union.<sup>164</sup> Specifically, their employers initiated disciplinary proceedings in response to refusals to be designated as a registrar of civil partnerships and to provide counselling to homosexual couples. The applicants ultimately lost their jobs. For the ECtHR, the applicants' objections fell within the ambit of Article 9 and Article 14 of the ECHR because they were motivated by their religious beliefs.<sup>165</sup> The ECtHR took into account that losing a job is a severe sanction that had grave consequences for the applicants.<sup>166</sup> However, for the ECtHR, the employers' actions were legitimate because they aimed to support a public authority's promotion of equal opportunities and a private employer's implementation of a policy of providing a service without discrimination, respectively.<sup>167</sup>

154 Croatia, Sex Equality Act (*Zakon o ravnopravnostipolova*), *Official Gazette (Narodnenovine)*, No. 82, 2008, available at [http://narodne-novine.nn.hr/clanci/sluzbeni/2008\\_07\\_82\\_2663.html](http://narodne-novine.nn.hr/clanci/sluzbeni/2008_07_82_2663.html) and Anti-discrimination Act (*Zakon o suzbijanjudiskriminacije*), *Official Gazette (Narodnenovine)* 85/08, 112/12, <http://narodne-novine.nn.hr/clanci/sluzbeni/340327.html> and [http://narodne-novine.nn.hr/clanci/sluzbeni/2012\\_10\\_112\\_2430.html](http://narodne-novine.nn.hr/clanci/sluzbeni/2012_10_112_2430.html).

155 ECtHR, *Obst v. Germany*, No. 425/03, 23 September 2010; *Schüth v. Germany*, No. 1620/03, 23 September 2010.

156 Ireland, Equality Act, 18 July 2004.

157 European Commission *Closure of the infringement procedure on the transposition in Ireland of Directive 2000/78/EC* (IP/08/703, 6 May 2008) available at [http://europa.eu/rapid/press-release\\_IP-08-703\\_en.htm](http://europa.eu/rapid/press-release_IP-08-703_en.htm).

158 Ireland, Equality Authority of Ireland, *Call for submissions: Proposed amendment to Section 37 of the Employment Equality Acts 1998-2011*, 24 October 2013.

159 In 2014, the Equality Authority merged with the Irish Human Rights Commission to become the Irish Human Rights and Equality Commission. The new commission was established in law on 1 November 2014.

160 Ireland, Irish Human Rights and Equality Commission, Recommendation Paper, 14 April 2014, [www.equality.ie/Files/Recommendation-Paper-re-section-37-amendment.pdf](http://www.equality.ie/Files/Recommendation-Paper-re-section-37-amendment.pdf).

161 ECtHR, *Eweida and others v. the United Kingdom*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

162 United Kingdom (2010), Equality Act, 8 April 2010.

163 ECtHR, *Eweida and others v. the United Kingdom*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013.

164 *Ibid.*, paras. 27, 37.

165 *Ibid.*, paras. 70, 103.

166 *Ibid.*, para. 109.

167 *Ibid.*, paras. 105, 109.



In the Netherlands, the General Equal Treatment Act (*Algemene wet gelijkebehandeling*)<sup>168</sup> contains an exception for institutions founded on religious principles, stating that they may impose “requirements which, having regard to the institution’s purpose, are necessary for the fulfilment of the duties attached to a post” – unless these requirements lead to a distinction based on “the sole fact of” (for example) homosexual orientation (Article 5(2)). The European Commission has criticised the law’s failure to specify that these requirements must be legitimate and proportional.<sup>169</sup> In May 2014, the Lower House of Parliament of the Netherlands approved a bill that proposes rephrasing this exception and limiting its scope by removing “the sole fact of”, but the Senate has not yet passed the bill.

## 2.2. Implementation and enforcement

### 2.2.1. Implementing the Employment Equality Directive and strengthening legislation at the national level

#### Key development

- EU Member States have taken measures to fully implement the Employment Equality Directive, such as including sexual orientation in the list of protected grounds and shifting the burden of proof in discrimination cases.

In January 2014, the Commission presented a Joint Report on the application of the Anti-Discrimination Directives.<sup>170</sup> According to the report, all 28 Member States have implemented the directives into national law, and the Commission has checked that the laws conform with the directives. Therefore, all infringement procedures for incorrect transposition have been closed. The Commission continues to monitor developments in

the Member States and to bring infringement proceedings when necessary.

Since 2010, laws have been changed in some Member States (Latvia, the Netherlands, Poland, Portugal, Romania, Slovenia and Spain). The changes involved diverse efforts to improve or strengthen the implementation of the Employment Equality Directive.

Latvia<sup>171</sup> broadened the list of prohibited discrimination grounds, and included sexual orientation. The Netherlands<sup>172</sup> aligned the wording of the General Equal Treatment Act with that of the Employment Equality Directive in terms of defining direct and indirect discrimination. Poland<sup>173</sup> approved a new law on equal treatment, which, as already mentioned, still guarantees protection against discrimination on grounds of sexual orientation only in the area of employment. Portugal passed two new pieces of legislation referring to the protection of independent workers<sup>174</sup> and the protection of workers in public functions.<sup>175</sup> Slovenia<sup>176</sup> introduced compensation for non-pecuniary damages for job candidates or workers who suffer mental distress as victims of unequal treatment or discriminatory conduct by an employer or because the employer fails to provide protection against sexual or other forms of

171 Latvia, Law on prohibition of discrimination against natural persons engaged in economic activity (*Fizisk opersonu – saimnieciskās darbības veicēju – diskriminācijas aizlieguma likums*), 29 November 2012.

172 Netherlands, Act of 7 November 2011 to amend the General Equal Treatment Act, the Civil Code, the Act on Equal Treatment on the ground of Handicap or Chronic Illness, the Act on Equal Treatment on the ground of Age in Employment and the Act on Equal Treatment of Men and Women – adaptation of definitions of direct and indirect distinction and of some other provisions to bring them in line with terminology used in EU directives (*Wet van 7 november 2011 tot wijziging van de Algemene wet gelijke behandeling, het Burgerlijk Wetboek, de Wet gelijke behandeling op grond van handicap of chronische ziekte, de Wet gelijke behandeling op grond van leeftijd bij de arbeid en de Wet gelijke behandeling van mannen en vrouwen (aanpassing van definities van direct en indirect onderscheid en enkele andere bepalingen aan richtlijnterminologie)*, *Law Gazette (Staatsblad)* (2011), No. 554; in force since 3 December 2011.

173 Poland, Act on the implementation of certain European Union provisions concerning equal treatment (*Ustawa z dnia 3 grudnia 2010 o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania.*), 3 December 2010.

174 Portugal, Law 3/2011, which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June 2000, Council Directive 2000/78/EC of 27 November 2000 and Directive 2006/54/EC of the European Parliament of 5 July 2006 (*Lei que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011.

175 Portugal, Law No. 35/2014 General Labor Law in the Public Function (*Lei n.º 35/2014 Lei Geral do Trabalho em Funções Públicas*), 20 June 2014.

176 Slovenia, Employment Relationships Act (*Zakon o delovnih razmerjih*), 5 March 2013.

168 Netherlands, General Equal Treatment Act (*Algemene wet gelijke behandeling*), *Law Gazette (Staatsblad)* (2004), No. 230..

169 European Commission (2008), *Reasoned Opinion of the European Commission*, 2006/2444, C(2008) 0115, 31.01.2008, pp. 6-7.

170 European Commission (2014a), *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')*, COM (2014) 2 final, 17 January 2014.

harassment. The law also specifies that compensation for non-pecuniary damages should be effective and proportional to the damage suffered by the job candidates or workers, and that it should discourage employers from repeating violations. Spain enacted a new Act on Labour Proceedings,<sup>177</sup> which shifts the burden of proof when a plaintiff's allegations establish facts from which it may be presumed that discrimination has occurred.<sup>178</sup> This means that, once workers have shown facts indicating discrimination, employers must provide proof that they have not discriminated, as opposed to the victims having to prove that they have been discriminated against. In addition, the Act states that a judge or court may seek the opinion of relevant government agencies when discrimination is based on sexual orientation.<sup>179</sup> Finally, in cases of discrimination based on the grounds listed in the law, including sexual orientation, a court may initiate a process *ex officio*.<sup>180</sup>

Romania has also taken steps towards shifting the burden of proof.<sup>181</sup> However, legal problems remain regarding homosexual and trans teachers. The joint order of the Ministry of Health and Ministry of Education deems homosexuality and trans identity incompatible with teaching. It states that "severe behavioural disorders owing to mental illnesses, including those that can accompany gender identity and sexual preference disorders" disqualify individuals from working as teachers.<sup>182</sup> This order has not been challenged in court or before the equality body.

In Hungary, Austria and Italy, there are some examples of good practices that encourage measures to reduce sexual orientation and gender identity discrimination, including awareness activities for the public administration. In Hungary, the government set up an NGO-consultation mechanism called the Human Rights Roundtable (*Emberi Jogi Kerekasztal*) in 2012,<sup>183</sup> which has a specific working group on the rights of LGBTI people, made up

of members from the government and from five NGOs that deal with this group.

At the local level, Austria and Italy have established specific offices dealing with LGBTI matters in some municipalities (Vienna,<sup>184</sup> Turin,<sup>185</sup> Venice<sup>186</sup> and Bologna<sup>187</sup>) in order to implement the respective city councils' commitment to addressing LGBTI issues and developing anti-discrimination policies. Regarding the role of public administrations, Italy has RE.A.DY (National network of public administrations to combat discrimination based on sexual orientation and gender identity),<sup>188</sup> a national network for local and regional public administrations to exchange good practices for promoting the civil rights of LGBTI people.<sup>189</sup> According to data available in March 2014, the network has 75 members (in six regions, 11 provinces and 51 municipalities).

## 2.2.2. National and CJEU case law on discrimination

### Key developments

- Underreporting of cases of discrimination based on sexual orientation remains a problem.
- Statistical data on the number of court cases involving discrimination on the ground of sexual orientation, and on the content of court rulings on such cases, is lacking, and there is insufficient information on both the number of complaints submitted to equality bodies and on the content of their decisions.

The European Commission has noted that available information indicates that the level of reported incidents

177 Spain, Act on social jurisdiction (*Ley reguladora de la jurisdicción social*), No. 36, 10 October 2011.

178 *Ibid.*, Art. 96 (1).

179 *Ibid.*, Art. 95 (3).

180 *Ibid.*, Art. 148.

181 Romania, Law No. 61/2013 for the modification of Governmental Ordinance No. 137/2000 on the prevention and sanctioning of all forms of discrimination (*Lege nr. 61/2013 pentru modificarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) of 21 March 2013, para. 1.

182 Romania, Joint Order concerning the annual medical examination of personnel from pre-university education (*Ordinul nr. 4840/IR 38342/2796/2005 privind controlul medical anual pentru personalul din învățământul preuniversitar*), No. 4840/IR 38342/2796/2005, 24 August 2005.

183 Hungary, Government Decision No. 1039/2012 (III. 22.) on the Human Rights Working Group (1039/2012. (II. 22.) *Korm. Határozataz Emberi Jogi Munkacso portról*), available in Hungarian at: [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=146229.230814](http://njt.hu/cgi_bin/njt_doc.cgi?docid=146229.230814).

184 Austria, Anti-discrimination Contact Point for Lesbian, Gay and Transgender Lifestyles (*Wiener Antidiskriminierungs stele für gleichgeschlechtliche und transgender Lebensweisen*), Tasks (*Aufgaben*), [www.wien.gv.at/kontakte/wast/aufgaben.html](http://www.wien.gv.at/kontakte/wast/aufgaben.html).

185 Italy, Municipality of Turin, LGBT service, [www.comune.torino.it/politichedigenere/lgbt/](http://www.comune.torino.it/politichedigenere/lgbt/).

186 Italy, Municipality of Venice, LGBT service, [www.comune.venezia.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/49638](http://www.comune.venezia.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/49638).

187 Italy, Municipality of Bologna (2011), 'Approvato l'atto di indirizzo per la costituzione dell'ufficio pari opportunità, differenze e diritti umani', Press release, 2 November 2011.

188 Rete nazionale delle pubbliche amministrazioni per il superamento delle discriminazioni basate sull'orientamento sessuale e sull'identità di genere.

189 Italy, Municipality of Turin, RE.A.DY network, [www.comune.torino.it/politichedigenere/lgbt/lgbt\\_reti/lgbt\\_ready/index.shtml](http://www.comune.torino.it/politichedigenere/lgbt/lgbt_reti/lgbt_ready/index.shtml).

of discrimination are low.<sup>190</sup> The number of court cases on sexual orientation discrimination in employment at the national level has been low since 2010, suggesting underreporting by victims.<sup>191</sup> Cases have been documented in Belgium, Croatia, Finland, France, Hungary, Italy, Lithuania, the Netherlands, Poland, Romania and the United Kingdom. But it is important to note that, alongside underreporting, the lack of statistical data – both on court cases and complaints to equality bodies that involve discrimination on the grounds of sexual orientation – remains a problem.<sup>192</sup>

Where statistics exist, the institutions responsible for collecting data often do not disaggregate them according to grounds of discrimination, making it impossible to know the number of discrimination cases relating specifically to sexual orientation and/or gender identity.

To address the lack of statistical data, the Lunacek Report<sup>193</sup> encourages the Commission and Member States – together with relevant agencies and Eurostat – to regularly collect relevant and comparable data on the situation of LGBTI persons in the EU while fully respecting EU data protection rules.

A good practice regarding data collection on discrimination started in Spain in 2013. The project, developed by the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), involved creating the Discrimination Map (*Mapa de la Discriminación*).<sup>194</sup> Among other things, the map aimed to address the lack of official statistics and

systematic and comprehensive studies on discrimination. The first step involved analysing available data sources to understand perceptions of both society and potential discrimination victims, with the goal of promoting better anti-discrimination policies in Spain. The project covered many grounds of discrimination, including sexual orientation, gender identity and multiple discrimination.

The few cases that have been identified in Member States make difficult a thorough analysis of the Employment Equality Directive's application to cases involving discrimination based on sexual orientation. The main issues raised in these cases concern (a) shifting the burden of proof; (b) the use of statistical evidence; (c) the interpretation of harassment in the workplace. It should be noted that in 2013 the CJECU made an important contribution to the interpretation of the Employment Equality Directive.<sup>195</sup>

In France, the burden of proof was shifted in at least three cases alleging discrimination based on sexual orientation.<sup>196</sup> In one, the Court of Cassation quashed the Court of Appeal's judgment for not having properly applied the burden of proof. The case involved the dismissal of an employee a few weeks after it was discovered that he was homosexual.<sup>197</sup> In Hungary, the court (*Curia*) ruled against a school that was unable to prove that the failure to renew a teacher's contract was not due to his sexual orientation. The court found that, taking into consideration all aspects of the case and statements by the headmaster, it was very unlikely that the headmaster did not know about the teacher's sexual orientation.<sup>198</sup>

In the United Kingdom, the Employment Appeal Tribunal (EAT)<sup>199</sup> confirmed an Employment Tribunal (ET) decision that found that an employee had suffered discrimination on the ground of sexual orientation. The case arose when the employee came upon a note – written by a colleague and insulting him as a gay man – in the course of his work. The employee complained and the

190 European Commission (2014a), *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')*, COM (2014) 2 final, 17 January 2014, para. 3.3.

191 FRA (2012), *European Union lesbian, gay, bisexual and transgender survey. Main results*, Luxembourg: Publications Office of the European Union, 2014, pp. 47-48.

192 The statistical data are rarely collected or not gathered in a systematic manner in many Member States. France, Germany, Slovenia and the UK collect and publish all or some of the data on case law. Also, in Croatia, Denmark, Estonia, Greece, Italy, Lithuania, the Netherlands and Sweden all or some of the complaints to equality bodies regarding discrimination on the ground of sexual orientation are collected.

193 European Parliament (2014a), *Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*.

194 Spain, Health, Social Services and Equality Ministry (*Ministerio de Salud, Servicios Sociales e Igualdad*) (2013), *Diagnostic study of secondary sources about discrimination in Spain*. No online reference for this initiative yet exists, other than the executive summary of a report identifying and analysing the available secondary data sources on this issue, available in English at: [www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r\\_Ingles\\_vf..pdf](http://www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r_Ingles_vf..pdf).

195 See CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combatere a Discriminării*, 25 April 2013 and CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.

196 France, Court of Cassation (*Cour de Cassation*), *M. X v. ITS (Company)*, No. 12-270, 6 November 2013; Court of Appeal of Versailles (*Cour d'appel de Versailles*), *Laurent B. c/ SAS SITEL FRANCE and Société Clientlogic (Company)*, No. 10/04996, 10 January 2012; Court of Appeal of Douai (*Cour d'appel de Douai*), *Julien P. c/ Association Fédération Laïque des associations Socio-Educatives du Nord (NGO)*, No. 10/00312, 17 February 2011.

197 France, Court of Cassation (*Cour de Cassation*), *M. X v. ITS (Company)*, No. 12-270, 6 November 2013.

198 Hungary, *Curia*, Decision No. Mfv.III.10.100/2012/9, 17 September 2012.

199 United Kingdom, Employment Appeal Tribunal, *Bivonas LLP & Ors v. Bennett* [2011] UKEAT 0254\_11\_3101, 31 January 2012.

employer conducted a grievance investigation, which dismissed the complaint, finding that the colleague could not have intended it to be offensive. The EAT concluded that the ET correctly shifted the burden of proof. The employer did not give any evidence of the investigation process, and the conclusion that the colleague did not hold homophobic views was unjustified given the wording of the note.

By contrast, in Lithuania, courts in two cases<sup>200</sup> found that the applicant established *prima facie* discrimination on the grounds of sexual orientation and social status, and shifted the burden of proof to the respondent. However, the courts ultimately ruled that no discrimination had been established. In both cases, the applicant asserted that, when applying for a job as university lecturer, he was simultaneously discriminated against on two grounds: his sexual orientation and his social status. The courts found that the members of both selection commissions were unaware of the applicant's sexual orientation, because they did not raise any questions, or make any allegations, in this regard during the hearing. The courts drew this conclusion even though the applicant's submissions explained that he was a well-known openly gay person in Lithuania and had published extensively on homophobia in Lithuania in his capacity as researcher and university professor (before being dismissed from his previous workplace).

Recital 15 of the Employment Equality Directive contains an important point relating to the burden of proof in anti-discrimination cases, stating: "[t]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence."

In 2013, the French Court of Cassation<sup>201</sup> approved the Court of Appeal's use of various indices to prove discrimination on the ground of sexual orientation, such as comparisons with other company employees and the homophobic atmosphere within a company. The case concerned an employee, dismissed for misconduct, who wanted to prove in court that he had not had a successful career in the company for reasons relating to his sexual orientation. To prove that he was a victim of discrimination due to his sexual orientation, the employee compared his situation with that of other employees hired on the same date, all of whom had made favourable progress in comparison with his career. On the

basis of the findings of the Court of Appeal, the Court of Cassation noted that:

*"after inclusion on the list of suitable sub-directors, the employee had applied fourteen times unsuccessfully to be a deputy director or equivalent position, he responded to proposals for international positions, and a proposal for a position in a subsidiary in Paris; he is the only one of his 1989 intake not to have advanced well, despite the fact that his inclusion on the list of suitable candidates was extended twice, in 1995 and 2000, and he was among the most qualified candidates".*

Furthermore, in its ruling, the Court of Appeal had noted that "several witnesses reported a homophobic atmosphere in the years 1970–1990 in the business". The Court of Appeal found that these elements suggested the existence of discrimination based on the employee's sexual orientation. The Court of Cassation confirmed the decision.

Case law shows that harassment is often raised in courts, which assess the evidence submitted to establish the facts. The duty to apply all necessary measures to prevent harassment at the workplace is often reiterated to employers.

An analysis of the case law shows that internal company policies and general regulations do not contain provisions that explicitly adversely affect employees' occupation or work by reason of their sexual orientation. However, in practice, discriminatory internal company policies and management's toleration of discriminatory behaviour by colleagues can be observed.

Courts have also examined how harassment in the workplace environment is interpreted and the extent to which the conduct of employees is taken into account when determining whether or not an individual was subjected to harassment due to their sexual orientation.

In Croatia, the Court of Appeals<sup>202</sup> confirmed a lower court ruling finding direct discrimination against a university lecturer based on his sexual orientation. Two senior faculty colleagues publicly used demeaning comments to block the lecturer from obtaining a professorship at the university. The court found that the lecturer had been the victim of behaviour that sought to blame and shame him within the university environment. At the same time, the court convicted the victim of speaking about his case in public, and fined him. His situation

200 Lithuania, Vilnius District Court (*Vilniaus apygardos teismas*), No. 2A-2140-464/2011, 11 November 2011.

201 France, Court of Cassation (*Cour de cassation*), *M. X v. Crédit agricole mutuel de Paris Ile-de-France*, Case No. 11-15204, 24 April 2013.

202 Croatia, Varaždin County Court, second instance (*Županijski sud u Varaždinu, drugistanj*), P-3153/10 *Kresic v. FOI*, 29 August 2013.



at the university did not change after the court's ruling finding discrimination against him, and he left Croatia.<sup>203</sup>

In the United Kingdom, two cases illustrate the impact of revealing one's sexual orientation to colleagues. In *Grant v. HM Land Registry & Anor*, the Court of Appeal took into account the fact that the employee had willingly revealed his sexual orientation to colleagues in the workplace; any further disclosure of that sexual orientation by others at a different workplace did not constitute direct discrimination or harassment. The court held that it was unreasonable and unjustified for the employee to feel aggrieved because the information was disseminated to other colleagues.<sup>204</sup> Similarly, the case of *Smith v. Ideal Shopping Direct Ltd* not only provided further guidance on the definition of harassment but also illustrated that the conduct of an employee and the context of the workplace environment are of great importance when determining whether the words or conduct of others constitute harassment. Specifically, the judgment confirmed that the court would take into account that the employee himself used derogatory terms and nicknames whilst in the workplace.<sup>205</sup>

In Hungary, the Metropolitan Court of Budapest<sup>206</sup> ruled against an employer for creating a hostile work environment for an employee because of his sexual orientation. During the proceedings, the employer argued that his jokes about the employee's sexual orientation were not intended to harass him. The court stressed that violating the prohibition of harassment does not require intentional humiliation or degrading treatment. The court stated that assessing allegedly discriminatory acts or behaviour requires taking into account the victim's subjective perceptions.

Finally, in Belgium, in 2010 and 2012, the Brussels Labour Tribunal<sup>207</sup> decided two cases in which employees complained of harassment and discrimination at work based on their sexual orientation. In both cases, the tribunal found that the employer unjustifiably terminated a labour contract because of the employee's sexual orientation, and ordered the employer to compensate the workers. The older case is particularly interesting – the contract was terminated because the worker complained to the internal service that he experienced harassment at work due to his sexual orientation. The

worker demanded compensation for being dismissed for filing a discrimination complaint.

In terms of CJEU case law, in 2013, in *Asociația Accept v. Consiliul Național pentru Combatere a Discriminării*, the CJEU ruled for the first time on the application of the Employment Equality Directive to discrimination a person believed to be homosexual can experience in the labour market as a result of homophobic statements by a person who is perceived to be the employer.<sup>208</sup>

The CJEU set out some key principles in the judgment. It stated that it does not suffice for an employer to respond to facts from which a discriminatory recruitment policy may be inferred merely by asserting that statements suggestive of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the employer's management, is not legally capable of binding it in recruitment matters.<sup>209</sup>

According to the CJEU, the Employment Equality Directive does not require the existence of a victim to assert that an employer's hiring policy violates the equal treatment principle enshrined in the EU Charter of Fundamental Rights.<sup>210</sup> This is consistent with the concept of 'potential discrimination' introduced by the CJEU in the *Feryn* case,<sup>211</sup> which addressed discriminatory statements by an employer who opposed employing people of a particular ethnic origin and precluded them from the selection process for available positions.

Regarding the burden of proof, the CJEU findings make clear that shifting the burden of proof does not make it more difficult for defendants to prove compliance with the equal treatment principle within the meaning of the Employment Equality Directive.

The CJEU also held that, when it is found that a discriminatory policy was adopted, the directive requires sanctions to be more than merely symbolic, such as imposing a warning. To ensure a deterrent effect, and for a sanction to be considered sufficient in light of the objective and purpose of the Employment Equality Directive, it must be effective, proportional and dissuasive.<sup>212</sup>

After the CJEU decision in April 2013, the Bucharest Court of Appeal<sup>213</sup> in Romania rejected in December

203 Croatia (2013) Varaždin: Krešić zbog diskriminacije otišao s faksa, <http://www.glasistre.hr/vijesti/hrvatska/varazdin-kresic-zbog-diskriminacije-otisao-s-faksa-427567>.

204 United Kingdom, Court of Appeal, *Grant v. HM Land Registry & Anor*, 2011.

205 United Kingdom, Employment Appeal Tribunal, *Smith v. Ideal Shopping Direct Ltd*, [2013] Eq. L.R. 943, 2013.

206 Hungary, Metropolitan Court of Budapest, Decision No. 22.P.24.669/2010/14, 24 January 2012.

207 Belgium, Brussels Labour Tribunal, 26 October 2010 and 15 May 2012.

208 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combatere a Discriminării*, 25 April 2013.

209 *Ibid.*, para. 49.

210 *Ibid.*, para. 52.

211 CJEU, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

212 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

213 Romania, Bucharest Court of Appeal (*Curtea de Apel București*), Decision No. 4180, 23 December 2013, para. 61.

the appeal filed by the NGO Asociația Accept in the main proceedings, endorsing the initial decision handed down by the National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*, NCCD). The claimant lodged a further appeal against the decision, which, at the time of writing, was pending before the Romanian High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*). The claimant argued, among other things, that the Court of Appeal was not entitled to refuse following the CJEU ruling.<sup>214</sup>

However, in Romania, legislative changes prompted by proceedings before the CJEU in the *Accept* case sought to rectify a gap in the law which, in some circumstances, had compromised the NCCD's ability to hand down sanctions that were effective, proportionate and dissuasive.<sup>215</sup>

The Bergamo Tribunal, Labour Section (*Tribunale di Bergamo, Sezione lavoro*)<sup>216</sup> applied the Employment Equality Directive in Italy for the first time in August 2014, after the CJEU had issued its *Accept* decision. The case involved a lawyer who in a radio interview repeatedly said that he would never hire a homosexual person in his law firm. The tribunal recognised that the lawyer's statements could constitute discrimination against homosexual people because they quite likely discouraged them from submitting their application and, therefore, were intended to prevent or hinder access to employment. The statements had a demoralising and deterrent effect on individuals who hoped to be recruited by the defendant's law firm. The tribunal found that the statements constituted discrimination under the Employment Equality Directive, even though the defendant was not performing recruitment activities at the time he made them. The decision states that discrimination includes behaviour that prevents or hinders access to employment on an abstract level.

In Croatia, a Supreme Court ruling<sup>217</sup> issued one year before the CJEU's judgment in some respects has points of contact with the CJEU judgment. During an interview, the President of the Croatian National Football Association declared that no homosexual would play in the national football team while he was president.

In the same interview, he said that football is played by healthy people. The Supreme Court held that the statement could produce significant effects owing to the defendant's particular influence in sports. The statement could have placed people of homosexual orientation in an unfavourable position with regard to access to work opportunities in sport. This was sufficient to shift the burden of proof onto the defendant, who failed to show that his statement did not create a hostile environment for homosexual people. The court ruled that homophobic public statements violate the dignity of homosexual citizens. Finally, the court determined that harassment includes homophobic speech in the media. The defendant was held responsible for discrimination and harassment on the ground of sexual orientation. The court ordered the defendant to pay for printing the judgment in the daily newspapers in which he had made the homophobic statement. The defendant was also banned from making homophobic statements in the media in the future.

In conclusion, the case law analysed highlights some of the most innovative aspects of the Employment Equality Directive. However, underreporting and the lack of statistical data make it difficult to identify problems with its application. A larger number of discrimination cases have to be decided to make it possible to truly assess the full impact of measures to combat discrimination on the ground of sexual orientation in employment.

### 2.2.3. Mandate of equality bodies

#### Key developments

- Equality bodies play an important role in raising awareness of the fundamental rights of LGBTI people.
- Finland and Spain have not yet established equality bodies dealing with discrimination on the ground of sexual orientation. The remaining EU Member States have single equality bodies that cover the range of discrimination grounds prohibited by EU law.

In the conclusion to its *Joint Report on the application of the Anti-Discrimination Directives*, the European Commission stated that strengthening the role of national equality bodies as watchdogs for equality can make

<sup>214</sup> Romania, High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*), File No. 12562/2/2010.

<sup>215</sup> Romania, Law No. 189/2013 for the approval of the Emergency Ordinance for the modification and completion of Governmental Ordinance No. 137/2000 on the prevention and sanctioning of all forms of discrimination (*Legea nr. 189/2013 privind aprobarea Ordonanței de urgență nr. 19/2013 pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) of 25 June 2013, para. 2.

<sup>216</sup> Italy, Bergamo Tribunal, Labour Section (*Tribunale di Bergamo, Sezione lavoro*), 6 August 2014.

<sup>217</sup> Croatia, Supreme Court (*Vrhovni sud Republike Hrvatske; drugistupanj*), *Zagreb Pride & others v. Marković*, 28 February 2012.

a crucial contribution to more effective implementation and application of the directives.<sup>218</sup>

Only Finland<sup>219</sup> and Spain<sup>220</sup> have not set up equality bodies responsible for dealing with sexual orientation discrimination, which means that five additional Member States (Croatia, Italy, Malta, Poland and Portugal) have done so since 2010.

With respect to gender identity, the logic underlying existing EU case law suggests that equality bodies that cover discrimination on the ground of gender should also address the position of trans persons.

A comparative analysis reveals that Member States have opted for the model of a single equality body covering the range of grounds protected by EU law rather than for a body specialised in sexual orientation discrimination.<sup>221</sup> This choice is justified primarily by considerations relating to economies of scale, the need for consistency in the interpretation of the law and the frequency of multiple discrimination. Similarly, the majority of EU Member States have merged equality bodies with national human rights institutions (NHRIs). However, national human rights institutions are still fragmented in some Member States,<sup>222</sup> with a variety of institutions and the absence of a coherent and coordinated approach to fundamental rights monitoring. Simi-

larly, the majority of Member States still need to ensure that NHRIs and equality bodies enjoy a broad mandate, are properly resourced and can act in full independence. Many Member States do not provide direct enforcement means for the equality bodies. The FRA report on the effectiveness of the Racial Equality Directive, published in 2011, reached a similar conclusion.<sup>223</sup>

With respect to LGBTI people, in 2013 the European Network of Equality Bodies (Equinet) published a perspective<sup>224</sup> based on a survey of its members, exploring the work being done by individual equality bodies in promoting equality for, and combating discrimination against, LGBTI people.<sup>225</sup> Most equality bodies reported that their legal work relating to LGBTI people is quantifiably more limited than that on other grounds.<sup>226</sup> There are several possible explanations for this finding. First, equality bodies' work on sexual orientation and gender identity does not benefit from sufficient visibility. Second, as demonstrated by the record of Sweden's former Ombudsman (HomO), a specialised institution is significantly better able to attract complaints and build a relationship of confidence with LGBTI victims of discrimination. Third, LGBTI people are reluctant to file formal complaints and to make use of available mechanisms, since filing a complaint and revealing one's sexual orientation or gender identity is still perceived by some to be costly in terms of reputation and risks to privacy.<sup>227</sup>

One partial solution to the problem of underreporting would be to allow equality bodies either to act on their own motion or to act on the basis of anonymous complaints, without revealing the victim's identity to the offender. Another solution would be to ensure that individuals alleging that they are victims of discrimination on grounds of sexual orientation or gender identity are heard by staff specialised in working with LGBTI issues or those openly identifying as LGBTI themselves to establish trust between the parties.

In this respect, equality bodies can benefit from involving in their work NGOs that are active in protection from discrimination on grounds of sexual orientation

218 European Commission, *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')*, COM (2014) 2 final, 17 January 2014, para. 7.

219 In Finland, there is no equality body dealing with discrimination on the ground of sexual orientation. The Ombudsperson for Minorities deals only with discrimination on the ground of ethnic origin, and the Ombudsperson for Equality deals with gender equality, including discrimination on the ground of gender identity.

220 In Spain, no equality body deals expressly with the protection of equal treatment and combating discrimination on the grounds of sexual orientation or gender identity. These functions correspond to the Ombudsperson at the state level, created by the Organic Act on the Ombudsperson (*Ley Orgánica del Defensor del Pueblo*), No. 3, 6 April 1981, and to the Ombudspersons of each of the Autonomous Communities, whose competences are to protect the rights and freedoms set out in Art. 14 of the Constitution, which prohibits any form of discrimination. Their task is to supervise the activity of the public administrations. They can carry out any investigations they consider necessary, informing parliament of the results. They do not themselves decide on possible sanctions in cases they investigate, but can make suggestions in this regard.

221 In Slovakia, a committee for the rights of LGBT persons (*Výbor pre práva LGBT osôb*) was founded in 2012. However, it is not a proper equality body, but a permanent expert body that deals mainly with legislative proposals to the Governmental Council to increase the protection of LGBT people.

222 This is the case at least in Belgium, Denmark, Estonia, Greece, Poland, Portugal and Slovakia.

223 FRA (2011a), *The Racial Equality Directive: Application and challenges*, Luxembourg, Publications Office.

224 Equinet (2013), *Equality bodies promoting equality & non-discrimination for LGBTI people*, Brussels.

225 The perspective collected information from equality bodies in all EU Member States, as well from the equality bodies of Norway and Serbia.

226 The percentage of complaints reportedly received by equality bodies from LGBT people ranged from 0 % to 3 % of total cases received. The percentage of queries ranged from 1.1 % to 2.8 % of total queries dealt with. Complaints involving lesbian, gay and bisexual people predominated, with only small numbers of complaints reportedly made by trans people, and none by intersex people.

227 FRA (2014), *EU LGBT survey – European Union lesbian, gay, bisexual and transgender survey. Main results*, Luxembourg, Publications Office, pp. 48-49.

and gender identity.<sup>228</sup> In Belgium, for instance, the equality body (ICEO) concluded formal protocols with several such NGOs so that they can act as (independent) local complaint offices for ICEO. They have now been integrated into the ICEO.<sup>229</sup> In Italy and in Lithuania, the respective equality bodies established cooperative efforts with LGBT NGOs, developing various projects aimed at raising awareness of equality principles.<sup>230</sup>

The role of equality bodies in addressing discrimination on grounds of sexual orientation and gender identity has increased since 2010. In at least eight countries, equality bodies, or governments working alongside such bodies, have designed national strategies to combat discrimination.<sup>231</sup> Luxembourg,<sup>232</sup> Poland<sup>233</sup> and Portugal<sup>234</sup> have overall plans that include all areas of discrimination, while Belgium,<sup>235</sup> Italy,<sup>236</sup> France,<sup>237</sup> the

Netherlands<sup>238</sup> and the United Kingdom have specific strategies for LGBT people. The Netherlands is the only Member State that has periodically issued policy papers on “homosexual emancipation policy” since 1986, with more specific attention gradually paid to trans persons issues. Recognising the particular concerns of trans people, the English Equalities Office prepared a general plan regarding LGBT issues<sup>239</sup> and a separate plan entirely dedicated to trans persons issues.<sup>240</sup>

In conclusion, it is necessary to increase LGBTI people’s awareness of their rights and about available legal tools. Raising awareness requires all equality bodies to at least publish specific reports on discrimination on grounds of sexual orientation and gender identity. The European Parliament made such a request in its Resolution against homophobia and discrimination on grounds of sexual orientation and gender identity,<sup>241</sup> which encourages equality bodies to inform LGBTI persons, as well as trade unions and employer organisations, about their rights.

228 Equinet (2013), *Equality bodies promoting equality & non-discrimination for LGBT people*, Brussels, pp. 13 and 17.

229 <http://www.diversite.be/>

230 In Italy, the National Office against Racial Discrimination (UNAR) promoted in 2010 and 2011 two projects called ‘Diversity as a value’ (*Diversità come valore*), together with a national working group, which included LGBT NGOs. In Lithuania, in 2013 the Equal Opportunities Ombudsperson, together with a national LGBT rights organisation (LGL), promoted the project ‘DIVERSITY.LT’ (*JVAIROVĖ.LT*). In 2012, the same equality body promoted the project ‘The Diversity Park’ (*Jvairovės parkas*) to improve equal opportunities in the labour market.

231 At the time of writing of this report, no information was available on the results achieved by the national plans.

232 Luxembourg, Ministry of Family and Integration (*Ministère de la Famille et de l’Intégration*) (2010), *Multi-annual national action plan on integration and against discrimination 2010-2014*, [www.olai.public.lu/en/publications/programmes-planactions-campagnes/plan/olai\\_plan\\_daction\\_uk.pdf](http://www.olai.public.lu/en/publications/programmes-planactions-campagnes/plan/olai_plan_daction_uk.pdf).

233 Poland, Prime Minister Chancellery (*Kancelaria Prezesa Rady Ministrów*) (2013), ‘Rząd zapoznał się z programem na rzecz równego traktowania’, Press release, 11 December 2013, [rownetraktowanie.gov.pl/aktualnosci/rzad-zapoznal-sie-z-programem-na-rzecz-rownego-traktowania](http://rownetraktowanie.gov.pl/aktualnosci/rzad-zapoznal-sie-z-programem-na-rzecz-rownego-traktowania).

234 Portugal, Commission for Citizenship and Gender Equality – CIG (*Comissão para a Cidadania e a Igualdade de Género – CIG*), *National action plans for gender equality, citizenship and non-discrimination*, [www.cig.gov.pt/planos-nacionais-areas/cidadania-e-igualdade-de-genero/](http://www.cig.gov.pt/planos-nacionais-areas/cidadania-e-igualdade-de-genero/).

235 Belgium (2013), Interfederal action plan to combat homophobic and transphobic discrimination 2013-2014 (*Interfederaal actieplan ter bestrijding van homofobe en transfobe discriminatie 2013-2014*), 10 June 2013.

236 Italy, National Office against Racial Discrimination (UNAR) – Equal Opportunities Department (*Dipartimento Pari Opportunità*) (2013), *National strategy to prevent and combat discrimination on grounds of sexual orientation and gender identity (2013-2015)*, Rome.

237 France, Prime Minister (*Premier Ministre*) (2012), *Governmental action programme against violence and discrimination committed because of sexual orientation or gender identity (Programme d’actions gouvernementales contre les violences et les discriminations commises à raison de l’orientation sexuelle ou de l’identité de genre)*, 12 October 2012, [www.textes.justice.gouv.fr/art\\_pix/JUSD1319893C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSD1319893C.pdf).

238 Netherlands (2011), *LGBT and gender equality policy plan of the Netherlands 2011-2015 (Hoofdlijnen emancipatiebeleid: vrouwen- en homo-emancipatie 2011-2015)*, available in English at: [www.government.nl/documents-and-publications/leaflets/2012/01/10/lgbt-and-gender-equality-policy-plan-of-the-netherlands-2011-2015.html](http://www.government.nl/documents-and-publications/leaflets/2012/01/10/lgbt-and-gender-equality-policy-plan-of-the-netherlands-2011-2015.html).

239 United Kingdom, Government Equalities Office (2011a), *Working for lesbian, gay, bisexual and transgender equality: Moving forward*, [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85482/lgbt-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85482/lgbt-action-plan.pdf).

240 United Kingdom, Government Equalities Office (2011b), *Advancing transgender equality: A plan for action*, [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85498/transgender-action-plan.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85498/transgender-action-plan.pdf).

241 European Parliament, Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.



Table 2: Protection against discrimination on the ground of sexual orientation in national legislation: scope and enforcement bodies

Country code	Scope			Equality body	Comments
	Employment only	Some areas of RED*	All areas of RED*		
AT	✓			✓	One of nine provinces (Lower Austria) has not extended protection to all areas covered by the RED. At the federal level, discrimination on the ground of sexual orientation is still implemented in the employment area only. Amendments to change this have been proposed, but according to the Federal Minister for Women, have not been agreed upon. **
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓	✓	
DE			✓	✓	
DK		✓		✓	
EE	✓			✓	
EL	✓			✓	
ES			✓		There is a trend in Autonomous Communities legislation to guarantee the right of all citizens to use the social service system under conditions of equality and non-discrimination on grounds including sexual orientation and gender identity.
FI		✓			
FR		✓		✓	
HR			✓	✓	
HU			✓	✓	
IE		✓		✓	In 2014, the government merged the Equality Authority and the Irish Human Rights Commission to form a single body: the Irish Human Rights and Equality Commission. Exemption permits discrimination by religious institutions with a particular religious ethos (under review by the Equality Authority as of May 2014)
IT	✓			✓	Decree of the Ministry of Public Administration of 31 May 2012 extended the scope of UNAR's activities from discrimination based on the grounds of racial and ethnic origin to include discrimination based on the grounds covered in Directive 2000/78. As a result, regarding sexual orientation, UNAR operates in the field of employment only.
LT			✓	✓	
LU		✓		✓	
LV	✓			✓	
MT		✓		✓	The National Commission for the Promotion of Equality's remit was extended to cover discrimination on the ground of sexual orientation in 2012.
NL		✓		✓	
PL	✓			✓	
PT		✓		✓	There is no explicit prohibition of discrimination on grounds of sexual orientation or gender identity regarding social protection and access to goods and services.
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	
UK			✓	✓	
TOTAL	7	8	13	26	

Notes: ✓ = applicable.

\* Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. In addition to employment and occupation, Directive 2000/43/EC (Racial Equality Directive, RED) covers social protection (including social security and healthcare), social advantages, education, and access to and supply of goods and services that are available to the public, including housing.

\*\* Austria, Der Standard (2012), 'Equal treatment amendment postponed' ('Gleichbehandlungsnovelle vertagt'), 21 November 2012, available at: <http://diestandard.at/1353206838284/Gleichbehandlungsnovelle-vertagt> (note this is the only available source; no official sources available on this issue).

Source: FRA, 2015

## 2.2.4. Role of LGBTI non-governmental organisations and trade unions

### Key developments

- Non-governmental organisations and trade unions are entitled to support victims of discrimination in all judicial and/or administrative procedures.
- In some EU Member States, trade unions actively promote equality in employment, including for LGBTI people.
- There are positive examples of NGO involvement in anti-discrimination procedures in the EU, although NGOs lack the necessary resources in some Member States.

As was highlighted by the Commission, trade unions and NGOs play a key role in raising anti-discrimination awareness among both employees and employers.<sup>242</sup> Article 9(2) of the Employment Equality Directive states that Member States shall ensure that associations, organisations and other legal entities may – either on behalf or in support of persons who consider themselves wronged by unequal treatment, and with their approval – engage in any judicial and/or administrative procedure provided for the enforcement of obligations under the directive.

The provisions in Article 9 (2) are important to increase an awareness of rights among potential LGBTI victims of discrimination and to increase the number of complaints filed.

Generally speaking, in EU Member States, trade unions and LGBTI NGOs are authorised to bring legal actions on behalf of individuals, but Member States' legislative frameworks specify many different criteria, making a comparison difficult.

Trade unions are entitled to represent – without special authorisation – their members in the settlement of individual disputes regarding discrimination, and to bring actions in court in the interests of their members. They can examine labour disputes about individual or collective discrimination. However, in practice, as of 2014, there have been few applications of these provisions to cases of discrimination concerning LGBTI people.

<sup>242</sup> European Commission (2014a), *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive')* and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM (2014) 2 final, 17 January 2014, para. 3.1.

Also, as of 2014, few data are available on complaints of alleged discrimination received by trade unions. This most likely relates to the fact that trade unions have only relatively recently started to gain awareness and develop their capacity to address discrimination at work.

However, in at least two Member States, trade unions are actively fostering equality in employment. For example, in France, most trade unions have LGBTI branches. In 2014, the Solidarity trade union (*Union syndicale Solidaires*) supported an employee who was the target of homophobic remarks from his manager by questioning the board of directors on the issue.<sup>243</sup>

In Portugal, the General Confederation of the Portuguese Workers (*Confederação Geral dos Trabalhadores Portugueses*, CGTP) trade union confederation approved a manifesto on equal opportunities.<sup>244</sup> In its action plan 2012–2016, the CGTP specifically refers to the persistence of discrimination on the ground of sexual orientation and expresses its commitment to equality.<sup>245</sup> The General Workers' Union (*União Geral dos Trabalhadores*, UGT) issued a statement on 17 May 2012, referring to the International Day against Homophobia and Transphobia, and asserting its opposition to all forms of discrimination, including on the ground of sexual orientation.<sup>246</sup>

As long as an organisation's statute clearly states that protecting fundamental rights or the rights of individuals is included in the organisation's scope, LGBTI NGOs have the right to turn – with the consent of the individual concerned – to authorities or courts to defend that person's rights or legal interests in cases relating to discrimination based on their sexual orientation or gender identity (or to breaches of the prohibition of unlawful or differential treatment). As of 2014, few LGBTI NGOs provide assistance in cases of discrimination on grounds of sexual orientation and/or gender identity.<sup>247</sup> This is often due to a lack of financial resources, necessary expertise and organisational capacity.

However, the experience of NGOs that do provide assistance in particular cases proves that the

<sup>243</sup> France, Longuet, M. (2014), 'Ça va l'homosexuel? Ça va le gay?', *un salarié de Pizza Hut victime d'homophobie*, TF1, 25 February 2014, <http://lci.tf1.fr/france/societe/un-salarie-de-pizza-hut-victime-d-homophobie-sur-son-lieu-de-travail-8371776.html>.

<sup>244</sup> Portugal, *The General Confederation of the Portuguese Workers (Confederação Geral dos Trabalhadores Portugueses, CGTP) trade union confederation approved a manifesto on equal opportunities*, [www.cgtp.pt/images/stories/Estatutos\\_CGTP-IN\\_bte17\\_2012.pdf](http://www.cgtp.pt/images/stories/Estatutos_CGTP-IN_bte17_2012.pdf).

<sup>245</sup> Portugal (2012) Action Program 2012–2016 (*Programa de Acção 2012–2016*), 27–28 January 2012, point 2.3.7.

<sup>246</sup> Portugal, UGT (2012), *Dia mundial de Luta contra a homofobia e transfobia*, [www.ugt.pt/UGT\\_17\\_05\\_2012.pdf](http://www.ugt.pt/UGT_17_05_2012.pdf).

<sup>247</sup> Some examples of assistance provided by LGBT NGOs in discrimination cases come from Croatia, Italy, Poland and Romania.

involvement of organisations in court proceedings may be of strategic importance, and may have a more general effect. For example, in Croatia and Poland, the involvement of NGOs<sup>248</sup> in cases concerning discrimination on the ground of sexual orientation contributed considerably to these cases reaching the respective Supreme Courts.<sup>249</sup> The same happened in Romania,

where a case brought to the court by the LGBTI NGO *Asociația ACCEPT* reached the CJEU.<sup>250</sup> In Italy, a case brought to court by Lawyers for LGBTI rights – Lenford Network (*Avvocatura per i Diritti GLBTI – Rete Lenford*)<sup>251</sup> resulted in the first ruling in Italy applying the Employment Equality Directive with respect to discrimination based on sexual orientation.

**Table 3: Protection against discrimination on grounds of gender reassignment or identity in national law**

Country code	Form of 'sex' discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			
BE		✓		
BG			✓	
CY			✓	
CZ		✓		The new Anti-Discrimination Act refers to 'sexual identification'
DE		✓		Trans people are covered by the ground 'sexual identity'
DK	✓			Cases decided by the Board of Equal Treatment
EE			✓	
EL			✓	
ES	✓			
FI	✓			A draft bill proposes explicitly covering discrimination against trans people in equality legislation; the government bill is expected to be presented to parliament. 'Draft bill' refers to a draft which is not presented to parliament, but circulated for comments. 'Government bill' refers to a bill presented by the government to parliament.
FR		✓		Sexual identity
HR		✓		
HU		✓		
IE	✓			
IT	✓			
LT			✓	
LU			✓	
LV			✓	
MT		✓		
NL	✓			
PL	✓			Discrimination on the ground of gender reassignment is considered sex discrimination by labour courts. The judgments are not available in official court databases. This information was obtained from NGOs that monitor such cases. No legal act contains autonomous grounds of gender reassignment or identity.
PT		✓		
RO			✓	

248 Zagreb Pride and Others, and Helsinki Foundation for Human Rights (*Helsinkińska Fundacja Praw Człowieka*), respectively.

249 Croatia, Supreme Court (*Vrhovni sud Republike Hrvatske; drugi stupanj*), *Zagreb Pride and Others v. Marković*, 28 February 2012; Poland, Supreme Court (*Sąd Najwyższy*), Case III CZP 65/12, 28 November 2012.

250 CJEU, C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013.

251 Italy, Bergamo Tribunal, Labour Section (*Tribunale di Bergamo, Sezione lavoro*), 6 August 2014.

Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU

Country code	Form of 'sex' discrimination	Autonomous ground	Dubious/unclear	Comments
SE	✓	✓		Discrimination on the ground of gender reassignment is still considered to be sex discrimination. The new ground of 'transgender identity or expression' now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination. Article 2 stipulates that equal treatment shall be ensured irrespective of sex, nationality, racial or ethnic origin, religious or other belief, disability, age, sexual orientation or other personal circumstance.
SK	✓			The Act on Anti-Discrimination prohibits discrimination based on sexual orientation; discrimination due to sexual orientation includes discrimination due to sexual and gender identification. No provision specifically protects against discrimination based on gender reassignment.
UK		✓		
TOTAL	10	9	9	

Note: ✓ = applicable

Source: FRA, 2015





# 3

## LGBTI people and public spaces: freedom of expression, assembly and protection from abuse and violence



This chapter reviews recent trends on a variety of phenomena linked to the enjoyment of the right to freedom of assembly and freedom of expression, as well as the rights to life and to physical and mental integrity, as the latter relate to personal security and protection from violence. It begins by describing both the remaining difficulties and positive developments in the exercise of freedom of assembly by individuals or organisations demonstrating in favour of the rights of LGBTI people. Next, it provides a comparative overview of domestic legislation concerning freedom of expression regarding, and access to information on, different sexual orientations and gender identities, and reviews proactive initiatives that some Member States have taken to improve the public acceptance of LGBTI people. Finally, the chapter describes various developments concerning the use of criminal law to counter incitement to hatred and violence based on prejudice against LGBTI people.

### 3.1. Background

#### Key developments

- Acts of homophobic and transphobic violence remain frequent across the EU.
- EU Member States have taken various types of measures to promote acceptance of LGBTI people and to fight homophobic and transphobic violence.

The examples of homophobic and transphobic incidents featured in this chapter evidence the persistence of negative attitudes identified in the 2010 report, which

prevent LGBTI people from living openly and free from fear, and from participating fully in the communities in which they live. Such attitudes contribute to the invisibility of LGBTI people.<sup>252</sup>

However, the chapter also reviews positive developments. It documents both Member State policies aimed at ensuring that LGBTI people are as free and safe as heterosexuals when they live and express their sexual orientation or gender identity openly. It also documents the increasing involvement and geographical spread of civil society mobilisation in support of equal rights of LGBTI people.

The 2010 report demonstrated that the free manifestation of LGBTI identities and relationships was not yet evenly granted throughout the EU. Positive and negative developments since 2010 appear to confirm that this assessment remains accurate as of 2014.

In particular, as documented below, public demonstrations in favour of LGBTI rights still encounter various obstacles, including outright bans by relevant authorities. However, since publication of the 2010 report, issues now more often relate to establishing the material conditions for peaceful assembly and demonstration – including the safety of demonstrators and their ability to gather in visible public places – than to outright denials of the right to demonstrate and be visible. At the same time, this chapter reviews a number of anti-LGBTI protests, as well as negative social and political reactions to the increasing recognition of the rights

<sup>252</sup> FRA (2009), *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II – the social situation*, Luxembourg, Publications Office, p. 51.

of LGBTI people. Such reactions indicate that negative attitudes remain widespread.

To reduce the homophobia and transphobia caused by these attitudes, criminal law provisions remain crucial, especially to deal appropriately with certain cases. As this chapter will show, the European Union currently lacks a criminal law instrument that protects LGBTI people from hate speech and hate crimes.<sup>253</sup> However, by 2015 a majority of Member States included sexual orientation among the grounds for protection within criminal law. The number of Member States that include gender identity has steadily grown, as well. As the chapter will show, however, including sexual orientation and/or gender identity among the protected grounds is not sufficient. The chapter therefore also reviews practices and initiatives aimed at fostering trust among LGBTI people towards law enforcement institutions, as well as LGBTI people's knowledge of their rights and law enforcement officials' and judges' awareness of the extent and gravity of hate-motivated crimes against LGBTI people.

Similarly, institutional communication campaigns aimed at improving public knowledge and acceptance of homosexuality and of LGBTI people are of key importance. Such campaigns were launched, for example, in Cyprus,<sup>254</sup> the Netherlands<sup>255</sup> and Portugal.<sup>256</sup>

In at least two Member States, these activities are incorporated into other, mainstream civic communication campaigns. Thus, in the Netherlands, every year on 4 May (National Remembrance Day for War Victims) special attention is paid to LGBTI people, and in Amsterdam and The Hague, special LGBTI remembrance meetings take place at what are known as the *homomonumenten*.<sup>257</sup> Similar initiatives take place in several French cities.<sup>258</sup> Interestingly, in 2011 Germany founded the Federal Magnus Hirschfeld Foundation,<sup>259</sup> which aims to increase acceptance of non-heterosexual people.

253 Council of the European Union, Council Framework Decision 2008/913/JHA, 28 November 2008, OJ 2008 L 328/55.

254 Cyprus, *No discrimination*, [www.no-discrimination.ombudsman.gov.cy/diafimistiki-ekstratia-entipa](http://www.no-discrimination.ombudsman.gov.cy/diafimistiki-ekstratia-entipa).

255 Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2013), Report of the 99th meeting (*Verslag van de 99e vergadering, 25 juni 2013*).

256 Portugal, *Dislike bullying homofóbico*, [www.dislikebullyinghomofobico.pt](http://www.dislikebullyinghomofobico.pt).

257 Netherlands, Homomonument (2014), *Homomonument*, [www.homomonument.nl](http://www.homomonument.nl).

258 France, France 3 Television (2012), 'Lille: homosexuals with other deportees' ('Lille: les homosexuels avec les autres déportés'), 29 April 2012, <http://nord-pas-de-calais.france3.fr/info/lille--les-homosexuels-avec-les-autres-deportes-73669824.html>.

259 Germany, Federal Foundation Magnus Hirschfeld (*Bundesstiftung Magnus Hirschfeld*), <http://mh-stiftung.de/en/>.

## 3.2. LGBTI pride marches and freedom of assembly

Concerning freedom of expression and peaceful assembly, the Council of Europe's Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity<sup>260</sup> called on authorities to protect participants in peaceful demonstrations and avoid arbitrary restrictions of these rights. More recently, the European Parliament called on Member States to "ensure that rights to freedom of expression and assembly are guaranteed, particularly with regard to pride marches and similar events, by ensuring these events take place lawfully and by guaranteeing the effective protection of participants".<sup>261</sup> The following subsections summarise the main trends in EU Member States since the 2010 report was published, first with respect to LGBTI people's enjoyment of the right to assemble and demonstrate peacefully, and then to the treatment of demonstrations opposing equal rights for LGBTI people.

### 3.2.1. Freedom of assembly for LGBTI people and organisations demonstrating in favour of their rights – pride marches

#### Key development

- Events in support of equality for LGBTI people are organised in all EU Member States. They are increasingly also organised outside of capital cities. However, authorities in several Member States have taken action to prevent such events.

Regarding the exercise of freedom of assembly by individuals or organisations demonstrating in favour of the rights of LGBTI people, the 2008 and 2010 reports documented instances of authorities (particularly at the local level) imposing arbitrary or disproportionate restrictions on the organisation of public events. Reasons given for such bans included participant safety, the possible violation of public morals and the

260 Council of Europe (2010), Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

261 European Parliament (2014b), Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)), Plenary sitting, No. A7-0009/2014, 7 January, Strasbourg, p. 9, [www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0383&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0383&language=EN).

preservation of public order.<sup>262</sup> The reports noted that authorities were able to rely on vague or broad provisions to prohibit demonstrations and showed how such provisions made it possible to act in an arbitrary or discriminatory manner.

Between 2010 and 2014, LGBTI pride marches and public events in support of the rights of LGBTI people were organised at least once in every EU Member State. These events often appear to have been less politically contentious than before. For example, for the first time, no incidents were reported during or after the LGBTI pride event held in Prague in 2012,<sup>263</sup> and the same is true of Sofia in 2013, though that event had to be rescheduled to prevent tensions.<sup>264</sup> These marches have increasingly become part of the mainstream democratic debate. This is illustrated by a Court of Cassation decision in Italy, which reviewed a case relating to the use of recorded images of an actor participating in an LGBTI parade in a TV programme. Although it was not relevant to the outcome of the case, the court rejected the applicant's claim that being associated with gay people could damage his reputation, stating that LGBTI parades do not have negative implications that could damage the reputation of participants.<sup>265</sup>

In two Member States, LGBTI marches and similar public manifestations are a novelty. In Cyprus, the first LGBTI pride demonstration took place in 2014. In Lithuania, the first Baltic Pride demonstration took place in 2010, and the second in 2013. Indeed, the cooperation among the Estonian, Lithuanian and Latvian communities in organising the rotating Baltic Pride demonstrations should be considered a good practice for how to organise public events in support of the rights of LGBTI people in face of objective difficulties and even opposition from authorities (see below).

In 26 Member States, more than one initiative in support of the rights of LGBTI people took place each year. Indeed, only in Cyprus and Lithuania have LGBTI pride events not been held at least yearly since 2010.

There is also a growing trend of events being organised outside capital cities, which aims to increase visibility and the involvement of larger communities. For example, in 2012, the city of Thessaloniki hosted the first

LGBTI pride event held in Greece outside of Athens, and in Croatia, the Split Pride demonstration was organised three times during the period covered in this report – though the march of 2011 was violently interrupted by opponents and the authorities failed to effectively protect participants.<sup>266</sup> In Italy, the national LGBTI pride demonstration systematically rotates among the country's main urban centres (though yearly events take place in the capital city, too). In Bulgaria the International Day Against Homo- Bi- and Trans-phobia (IDAHOT) was for the first time organised outside of Sofia – in Stara Zagora and Plovdiv – in 2013. However, in Plovdiv, a subsequent film festival in June provoked violent reactions by fans of a local football club.<sup>267</sup>

The activism of LGBTI communities has not always met with support from the authorities. Between 2010 and 2014, attempts to interfere with, prevent or even ban LGBTI pride events and other public demonstrations in favour of the rights of LGBTI people were documented in at least four Member States. These actions were frequently justified on security grounds, conflicts with traffic or urban needs, or perceived threats to morality.

Thus, in Bulgaria the 2013 Sofia Pride march had to be postponed for several months (finally taking place in September) because of concerns regarding participant safety.<sup>268</sup> In Croatia, local authorities attempted to change the route of the 2012 Split Pride march, but several ministers ultimately participated in the parade to demonstrate the national government's clear support for the event.<sup>269</sup> In Hungary, the police issued bans in 2011<sup>270</sup> and 2012,<sup>271</sup> claiming the marches would disrupt traffic in Budapest. In both instances, the court

262 FRA (2011b), *Homophobia and discrimination on grounds of sexual orientation in the EU Member States: Part I – legal analysis, 2010 update*, Luxembourg, Publications Office, p. 111.

263 Interview by FRA national expert with Kateřina Baňacká, social worker in the NGO In IUSTITIA, 17 May 2014.

264 Bulgaria, Sofia Pride (2013), *Final financial report*, 16 October 2013, available in Bulgarian at: <http://sofiapride.org/2013/10/16/okonchatelen-finansov-otchet-na-sofiya-prajd-2013/>.

265 Italy, Court of Cassation, third civil section (*Corte di Cassazione, III sez. civile*), judgment 24 October 2013.

266 European Parliament (2011), Resolution on the application of Croatia to become a member of the European Union, P7\_TA(2011)0539, Brussels, 1 December 2011, point 15.

267 Bulgaria, Inews.bg (2013), 'Homophobes attacked a festival in Plovdiv' ('Хомофоби нападнаха фестивал в Пловдив'), 15 June 2013, <http://goo.gl/5jсXF3>.

268 Bulgaria, Bulgarian Helsinki Committee (BHC) (Български хелзинкски комитет, БХК) (2013), 'BHC Protest Against The Pressure of the Authorities for Cancellation of Sofia Pride 2013' ('БХК протестира срещу натиска на властите за отмяна на „София Прайд“ 2013'), Open letter, 21 June 2013 available in Bulgarian at: [www.bghelsinki.org/bg/novini/press/single/otvoreno-pismo-bhk-protestira-sreshu-natiska-na-vlastite-za-otmyanata-na-sofiya-prajd-2013/](http://www.bghelsinki.org/bg/novini/press/single/otvoreno-pismo-bhk-protestira-sreshu-natiska-na-vlastite-za-otmyanata-na-sofiya-prajd-2013/).

269 Croatia, Ombudswoman for Gender Equality (Pravobraniteljica za ravnopravnost spolova) (2012), *Public statement regarding change of route of the Split Pride (Javno priopćenje povodom promjene rute Split Pride-a)*, [www.prs.hr/index.php/priopcenja-prs/223-javno-priopcenje](http://www.prs.hr/index.php/priopcenja-prs/223-javno-priopcenje).

270 Hungary, Chief of the Budapest Police (Budapesti Rendőrfőkapitány) (2011), Decision No. 01000/37289-15/2011.Ált., 11 February 2011.

271 Hungary, Chief of the Budapest Police (Budapesti Rendőrfőkapitány) (2012), Decision No. 01000/15246-6/2012.Ált., 5 April 2012.

overruled the police decisions<sup>272</sup> and the events could have taken place. Moreover, in a case filed against the Budapest Police (*Budapesti Rendőr-főkapitányság, BRFK*), which claimed that the police acted in a discriminatory manner and harassed members of the LGBTI community in 2012, the court found that the police had directly discriminated on the grounds of sexual orientation and gender identity and ordered it to issue a letter of apology and refrain from further violations.<sup>273</sup>

In Latvia, in 2012 the Security, Order and Corruption Prevention Committee (*Drošības, kārtības un korupcijas novēršanas jautājumu komiteja*) of Riga's city council supported a proposal to amend local public order regulations to ban 'propaganda' in favour of homosexuality in Riga.<sup>274</sup> The amendment, which was criticised by the European Parliament Resolution on the fight against homophobia in Europe,<sup>275</sup> aimed to prevent the Baltic pride event scheduled for June 2012. The mayor of Riga ultimately did not include the proposed amendment in the city council's agenda and the 2012 Baltic pride event took place.

Financial and administrative obstacles have also been reported, for instance in relation to requests to pay local fees or attempts to shift the cost and/or the organisation of security measures to the organisers. For example, in Bulgaria in 2010 and 2011, the organisers of Sofia's LGBT pride event were obliged to pay BGN 4,158 (€2,126) to cover the costs of preserving public order.<sup>276</sup> The fee was removed only from 2012 onwards, after the Bulgarian Helsinki Committee initiated talks with the Ministry of the Interior.<sup>277</sup> In Romania, the Accept Association accused the Bucharest mayor's office of having a hostile attitude towards the organisation of the Diversity Marches in 2010–2012, noting that it was exceedingly slow in approving the march and inflexible

in defining its itinerary, allegedly for security reasons.<sup>278</sup> In 2013 there were no more refusals or bans, and the local authorities accepted a new route, which passed through the city centre's main boulevard.

In Poland, changes to the Act on Assemblies (*Ustawa Prawo o Zgromadzeniach*) were introduced in 2012,<sup>279</sup> allowing the prohibition of assemblies if these involve risks of violence. According to NGOs and the Human Rights Defender, these changes disproportionately limit freedom of assembly.<sup>280</sup> The changes were introduced following violent incidents at the Kraków pride event in May 2011.<sup>281</sup> No major episodes of violence were reported at subsequent pride events in Warsaw in 2013 and 2014, or in Wrocław and Poznań, and the first pride event in Gdańsk took place in 2015 without major incidents.

### 3.2.2. Legal obstacles to the freedom of assembly of LGBTI people and supporters

#### Key development

- Although there were attempts to limit the rights to freedom of expression and assembly of LGBTI people in some EU Member States, only one Member State retains legislation that imposes limitations.

As of 2014, Lithuania remained the only EU Member State in which local and/or national law is interpreted as imposing limitations on the right to demonstrate freely and peacefully in favour of LGBTI rights. As discussed in the 2010 report, the Council of the Municipality of Vilnius repeatedly amended its Rules on Disposal and Cleanliness so these could be interpreted as allowing the banning of legitimate and peaceful events due to security concerns.<sup>282</sup> Nonetheless, the 2010 and 2013 Baltic pride demonstrations took place in Vilnius, thanks

272 Hungary, Metropolitan Court of Budapest, Decision No. 27.Kpk.45.188/2011/4, 18 February 2011; and Metropolitan Court of Budapest, Decision No. 27.Kpk.45.385/2012/2, 13 April 2012. For detailed summaries, see cases *Pride Ban 2011* and *Pride Ban 2012* in Annex I.

273 Hungary, Metropolitan Regional Court of Appeal, Case no. 18.Pf.20.436/214/8, 18 September 2014.

274 Latvia, Diena.lv (2012), 'Smits' amendments would be contrary to the constitution' (*Šmits grozījumi būtu pretrunā ar Satversmi*), 26 April 2012, [www.diena.lv/sodien-laikraksta/smita-grozijumi-butu-pretruna-ar-satversmi-13944132](http://www.diena.lv/sodien-laikraksta/smita-grozijumi-butu-pretruna-ar-satversmi-13944132).

275 European Parliament (2012a), Resolution on the fight against homophobia in Europe (2012/2657 (RSP)), [www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2012-0234&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P7-RC-2012-0234&language=EN).

276 Bulgaria, Sofia Pride (2010), *Financial report*, available in Bulgarian at: <http://sp2010.deystvie.org/bg/component/k2/item/download/10>.

277 Bulgaria, Bulgarian Helsinki Committee (*Български хелзинкски комитет*) (2012), Communication between Ms Margarita Ilieva, Legal Director of the Bulgarian Helsinki Committee, and Mr Veselin Vuchkov, Deputy Minister of the Interior, March 2012 (unpublished).

278 Accept Association, 'Atitudine ostilă a Primăriei Municipiului București față de Marșul Diversității' ('Hostile attitude of the Bucharest mayor's office towards the Diversity March'), Press release, <http://accept-romania.ro/blog/2012/06/28/comunicat-de-presa-re-atitudine-ostila-a-primariei-municipiului-bucuresti-fata-de-marsul-diversitatii/>.

279 Poland, Act on Assemblies (*Ustawa Prawo o Zgromadzeniach*), 5 July 1990.

280 Poland, Helsinki Foundation for Human Rights (*Helsinki Fundacja Praw Człowieka*) (2014), *Opinia w sprawie ustawy Prawo o Zgromadzeniach*, 17 April 2014, [www.hfhr.pl/wp-content/uploads/2014/04/HFPC\\_TK\\_amicus\\_17042014.pdf](http://www.hfhr.pl/wp-content/uploads/2014/04/HFPC_TK_amicus_17042014.pdf).

281 Poland, *Gazeta.pl* (2011), 'Pobicie po Marszu Równości', 22 May 2011.

282 FRA (2011b), *Homophobia and discrimination on grounds of sexual orientation in the EU Member States: Part I – legal analysis, 2010 update*, Luxembourg, Publications Office, pp. 34–35.

to rulings by the Lithuanian Supreme Administrative Court.<sup>283</sup> However, following the 2013 Baltic pride event an amendment to the Law on Public Meetings<sup>284</sup> and a draft law on administrative liability were introduced in parliament, which could impose further obstacles to LGBTI people's freedom of expression. The proposed changes would make organisers of public events financially liable for the costs of ensuring safety and public order, and introduce administrative fines for "events contradicting public morals, such as marches and parades of homosexuals".<sup>285</sup> A draft law to the same effect was already introduced in parliament in 2010 and reintroduced in 2011, but was rejected.<sup>286</sup>

Recent attempts to introduce similar regulations in Bulgaria, Hungary and Latvia raise concerns. In Bulgaria, the Bulgarian National Union (*Български национален съюз*) organised a petition to ban the Sofia pride march and allegedly collected around 15,000 signatures.<sup>287</sup> Additionally, the Ataka (*Атака*) party submitted to the Parliament Secretary a proposal to amend the criminal code to make it a criminal offence to publicly manifest homosexuality, punishable with one to five years' imprisonment and fines of BGN 1,000–5,000 (€511.29–2,556.46).<sup>288</sup> On 30 January 2014, parliament rejected the proposed amendment.<sup>289</sup>

In Hungary, the Jobbik party tabled in parliament three bills banning homosexual 'propaganda', which failed to reach a majority.<sup>290</sup> The bills proposed revising the Fundamental Law's article on freedom of assembly and revoking protection for events that "propagate disorders of sexual behaviour – especially sexual relations between members of the same sex".

In Latvia, as mentioned above, a proposal to amend Riga's public order regulations to ban public displays of homosexuality was opposed by Riga's mayor in 2012. However, on 27 November 2013, the national Central Election Commission (*Centrālā vēlēšanu komisija*, CVK) registered the Draft law on amendments to the Protection of the rights of the child law (*Likumprojekts 'Grozījumi Bērnu tiesību aizsardzības likumā'*) submitted by the NGO Let Us Protect Our Children! (*Biedriba 'Sargāsimusubērnus!'*).<sup>291</sup> The draft envisaged amending two sections of the Protection of the Rights of the Child Law. On the one hand, it advocated basing education in schools and childcare institutions on the article of the constitution (*Satversme*) defining marriage as a union between a man and a woman only. On the other hand, it aimed to prohibit the popularisation of sexual or marriage relations between persons of the same sex, including "the involvement of children as participants or spectators of events".<sup>292</sup> According to the NGO, the amendments would have helped prohibit the holding of the Euro Pride 2015 event in Riga.<sup>293</sup> However, the initiative failed to collect 30,000 signatures within 12 months and was discontinued.<sup>294</sup>

The Latvian Ministry of Justice noted that sexual orientation is one of the grounds on which discrimination is prohibited and therefore "the distribution of information about the existence of non-traditional sexual orientation in order to educate and facilitate understanding about the diversity of society should not be prohibited, because such education is aimed at

- 283 Lithuania, Lietuvos vyriausiojo administracinio teismo 2010 m. gegužės 7 d. nutartis administracinėje byloje Nr. AS822-339/2010 (*Lithuanian Supreme Administrative Court, Decision of 7 May 2010, Case No. AS822-339/2010*).
- 284 Lithuania, Draft law amending and supplementing Articles 11 and 14 of the Law on Assemblies (*Susirinkimų įstatymo 11, 14 straipsnių papildymo ir pakeitimo įstatymo projektas*), No. XIII-940, 3 September 2013, [www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=455236](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=455236).
- 285 Lithuania, The explanatory memorandum regarding the draft law amending Articles 224 and 259 (1) of the Code of Administrative Offences and supplementing it with Article 188 (21) (*Aiškinaamasis raštas dėl administracinių teisės pažeidimų kodekso 224 bei 259 (1) straipsnių pakeitimo ir Kodekso papildymo 188 (21) straipsniu įstatymo projekto*), No. XIP-4490(2), 10 May 2013, para. 2, [www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=448190](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=448190).
- 286 Lithuania, Draft law amending Articles 224 and 259 (1) of the Code of Administrative Offences and supplementing it with Article 214 (30) (*Administracinių teisės pažeidimų kodekso 224 bei 259 (1) straipsnių pakeitimo ir Kodekso papildymo 214 (30) straipsniu įstatymas*), No. XIP-2595(2), 22 April 2011, [www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=397252](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=397252).
- 287 Bulgaria, Bulgarian National Union (*Български национален съюз*) (2013), 'A petition for banning the gay parade was submitted today to the Sofia Municipality' (*Подписка за забрана на гей-парада бе внесена днес в Столична община*), 5 June 2013, <http://goo.gl/E84bMa>.
- 288 Bulgaria, National Assembly (2013), Draft laws, Draft Law on Amendments and Supplements of the Criminal Code (*Законопроект за изменение и допълнение на Наказателния кодекс*) submitted in the National Assembly on 20 September 2013, <http://parliament.bg/bills/42/354-01-58.pdf>.
- 289 Bulgaria, Dnevnik.bg (2014), 'The MPs rejected Ataka's proposal for jail for participating in gay parades' (*„Депутатите отхвърлиха искането на 'Атака' за затвор за участие в гей паради"*), 30 January 2014, [www.dnevnik.bg/bulgaria/2014/01/30/2230813\\_deputatite\\_othvurliha\\_iskaneto\\_na\\_ataka\\_zatvor\\_z/](http://www.dnevnik.bg/bulgaria/2014/01/30/2230813_deputatite_othvurliha_iskaneto_na_ataka_zatvor_z/).

- 290 Hungary, Bills Nos. T/6719., T/6720. and T/6721., [www.mkogy.hu/internet/plsql/ogy\\_irom.irom\\_adat?p\\_ckl=39&p\\_izon=6719](http://www.mkogy.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=6719), [www.mkogy.hu/internet/plsql/ogy\\_irom.irom\\_adat?p\\_ckl=39&p\\_izon=6720](http://www.mkogy.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=6720) and [www.mkogy.hu/internet/plsql/ogy\\_irom.irom\\_adat?p\\_ckl=39&p\\_izon=6721](http://www.mkogy.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=6721).
- 291 Latvia, Central Election Commission (*Centrālā vēlēšanu komisija*) (2013), 'Centrālā vēlēšanu komisija reģistrē parakstu vākšanai grozījumus Bērnu tiesību aizsardzības likumā', Press release, 27 November 2013.
- 292 Latvia, Draft law on amendments to the Protection of the rights of the child law (*Likumprojekts 'Grozījumi Bērntiesību aizsardzības likumā'*), available in Latvian at: <http://cvk.lv/pub/public/30673.html>.
- 293 Latvia, LETA (2013), 'Rosina rīkot referendumu, lai aizliegtu viendzimuma attiecību popularizēšanu', 8 October 2013.
- 294 Kamensk, A., European network of legal experts in the non-discrimination field (2014), *Attempts to Ban Homosexual Propaganda Among Children Fail*, [http://www.non-discrimination.net/content/media/LV-12-Attempts\\_to\\_Ban\\_Homosexual\\_Propaganda\\_among\\_Children\\_Fail.pdf](http://www.non-discrimination.net/content/media/LV-12-Attempts_to_Ban_Homosexual_Propaganda_among_Children_Fail.pdf).

facilitating tolerance”.<sup>295</sup> The need for amendments was also rejected by the State Inspectorate for Protection of Children’s Rights.<sup>296</sup> Moreover, both the Ministry of Welfare and the Ombudsperson’s Office highlighted that the draft contradicted Latvia’s international obligations,<sup>297</sup> and the Ombudsperson’s Office noted that the terms ‘popularisation’ and ‘advertising’ included in the draft lacked clarity.<sup>298</sup>

### 3.2.3. Demonstrations against LGBTI people and events

#### Key development

- Demonstrations that involve explicit homophobic and/or transphobic hate speech continued to take place in EU Member States during the reporting period.

The 2008 report discussed in detail ECtHR case law holding that, in a democracy, the right to counter-demonstrate cannot justify restricting the right to demonstrate.<sup>299</sup> The 2010 report noted that, while most EU Member States have legislation providing for the possibility of banning demonstrations that incite hatred, violence or discrimination (including on grounds of sexual orientation or gender identity), they may be slow or reluctant to use these powers. Counter-demonstrations hostile to the rights of LGBTI people and threatening to disrupt – or actually disrupting – pride marches or similar events were of particular concern. As already mentioned, there have been both negative and positive developments throughout the EU since then.

On the one hand, at least six Member States have still been affected by recurring ‘traditional’ homophobic

protests at pride marches, often resulting in violence and/or homophobic hate speech (e.g. in Croatia,<sup>300</sup> Hungary,<sup>301</sup> Lithuania,<sup>302</sup> Slovenia,<sup>303</sup> Slovakia<sup>304</sup> and, as mentioned above, Poland<sup>305</sup>). In at least eight further Member States, these type of protests increased in size and frequency, and in parallel to the development of far-right and xenophobic movements and/or the radicalisation of religious beliefs among some population sectors. For example, in Romania, members of the New Right organisation and other extreme right-wing groups with an openly anti-LGBT agenda were involved in violent episodes in 2011,<sup>306</sup> 2012<sup>307</sup> and 2013.<sup>308</sup> Public acts or statements by these organisations often featured homophobic expressions. In Portugal, the National Party for Renovation (*Partido Nacional Renovador*, PNR) explicitly states in its long-term programme that a man and a woman are “naturally” necessary for the education and healthy upbringing of children.<sup>309</sup>

- 295 Latvia, Ministry of Justice (*Tieslietu ministrija*) (2013), ‘Par likumprojektu „Grozījumi likumā „Bērnu tiesību aizsardzības likums”’, 25 October 2013, [http://cvk.lv/pub/upload\\_file/Atzinumi%202013/Atzinums\\_Tieslietu%20ministrija\\_102013.pdf](http://cvk.lv/pub/upload_file/Atzinumi%202013/Atzinums_Tieslietu%20ministrija_102013.pdf).
- 296 Latvia, State Inspectorate for Protection of Children’s Rights (*Valsts bērnu tiesību aizsardzības inspekcija*) (2013), ‘Par atzinuma sniegšanu’, 21 October 2013, [http://cvk.lv/pub/upload\\_file/Atzinumi%202013/Atzinums\\_Valsts%20Bernu%20tiesibu%20aizsardzibas%20inspekcija.pdf](http://cvk.lv/pub/upload_file/Atzinumi%202013/Atzinums_Valsts%20Bernu%20tiesibu%20aizsardzibas%20inspekcija.pdf).
- 297 Latvia, Ministry of Welfare (*Labklājības ministrija*) (2013), ‘About the draft law prepared by NGO “We Protect Our Children!” (“Par biedrības „Sargāsim mūsu bērnus!” sagatavoto likumprojektu)’, [http://cvk.lv/pub/upload\\_file/Atzinumi%202013/Atzinums\\_Labklajibas%20ministrija.pdf](http://cvk.lv/pub/upload_file/Atzinumi%202013/Atzinums_Labklajibas%20ministrija.pdf).
- 298 Latvia, Ombudsperson’s Office (*Tiesībsarga birojs*), ‘About the draft law “Amendments to the protection of the rights of the child law” (“Par likumprojektu “Grozījumi likumā “Bērnu tiesību aizsardzības likums””’, 25 November 2013, available in Latvian at: [http://cvk.lv/pub/upload\\_file/Atzinumi%202013/Atzinums\\_Tiesibsargs\\_102013.pdf](http://cvk.lv/pub/upload_file/Atzinumi%202013/Atzinums_Tiesibsargs_102013.pdf).
- 299 FRA (2011b), *Homophobia and discrimination on grounds of sexual orientation in the EU Member States: Part I – legal analysis, 2010 update*, Luxembourg, Publications Office, pp. 108–109.

- 300 Croatia, Ombudsperson for Gender Equality (*Pravobraniteljice za Ravnopravnost Spolova*) (2010), ‘Javno priopćenje povodom priopćenja Mladeži HČSP-a’, 11 June 2010, <http://www.prs.hr/index.php/priopcenja-prs/311-javno-priopcenje-povodom-priopcenja-mladezi-hcsp-a>.
- 301 Hungary, Pest Central District Court (*Pest iKözpont iKerületi Bíróság*), Case No. 19 B. 33 334/2013 (pending); and Budapest Chief Prosecution Service (*Fővárosi Főügyészség*) (2014), ‘Vádemelés a Budapest Pride felvonulás résztvevőit zaklató férfi ellen’, Press release, 21 February 2014, <http://mkl.hu/hnlp14/wp-content/uploads/sajto1/2014/02/2014.02.21-fovaros-vademeles-a-budapest-pride-resztvevoit-zaklato-ferfi-ellen.pdf>.
- 302 Lithuania, Delfi.lt (2011), ‘Nuteistas per gėjų eitynes policininkus užsipuoles vyras’, 28 April 2011, [www.delfi.lt/news/daily/lithuania/nuteistas-per-geju-eitynes-policininkus-uzsipuoles-vyras.d?id=44857721](http://www.delfi.lt/news/daily/lithuania/nuteistas-per-geju-eitynes-policininkus-uzsipuoles-vyras.d?id=44857721).
- 303 See for example Slovenia, District Court in Ljubljana (*Okrožnosodišče v Ljubljani*), Judgment No. III 5357/2010, 10 March 2010. See also Slovenia, Local Court in Sevnica (*Okrajnosodišče v Sevnici*), Judgment No. I K 46756/2012, 23 November 2012.
- 304 Slovakia, *SME Daily* (2010), ‘Duhový pochodstopli extrémisti’, 22 May 2010, [www.sme.sk/c/5387434/duhovy-pochod-stopli-extremisti.html](http://www.sme.sk/c/5387434/duhovy-pochod-stopli-extremisti.html).
- 305 Poland, *Gazeta.pl* (2011) ‘Pobicie po Marszu Równości’, 22 May 2011.
- 306 Romania, Mediafax, ‘Lozinci homofobe ale unor membri Nou aDreaptă, la proiectia unui documentar la DaKINO’ (‘Homophobic slogans of the New Right members at the projection of a documentary within DaKINO Festival’), 23 November 2011, [www.mediafax.ro/cultura-media/lozinci-homofobe-ale-unor-membri-noua-dreapta-la-proiectia-unui-documentar-la-dakino-8998668](http://www.mediafax.ro/cultura-media/lozinci-homofobe-ale-unor-membri-noua-dreapta-la-proiectia-unui-documentar-la-dakino-8998668).
- 307 Romania, România Liberă, *Organizatorii unei piese despre ISTORIA GAY în România, BĂTUȚI după o reprezentanție la SNSPA* (The organizers of a play about gay history in Romania have been beaten after a show at SNSPA), [www.romanalibera.ro/actualitate/bucuresti/organizatorii-unei-piese-despre-istoria-gay-in-romania-batuti-dupa-o-reprezentantie-la-snspa-283274.html](http://www.romanalibera.ro/actualitate/bucuresti/organizatorii-unei-piese-despre-istoria-gay-in-romania-batuti-dupa-o-reprezentantie-la-snspa-283274.html).
- 308 Romania, ACCEPT (2013), ‘Angajati ai statului in cardasie cu extremistii’, Press release, February 2013, available at <http://accept-romania.ro/blog/2013/02/21/angajati-ai-statului-in-cardasie-cu-extremistii/>.
- 309 Portugal, Partido Nacional Renovador, *Valores e fundamentos*, <http://www.pnr.pt/ideario/valores-e-fundamentos/>.

On the other hand, in Poland, following a Warsaw Court of Appeal decision,<sup>310</sup> the regional court ruled against registering “No queering!” (“*Zakaz pedałowania!*”) as the official symbol of National Rebirth of Poland (*Narodowe Odrodzenie Polski*, NOP), a radical organisation.<sup>311</sup> Such movements were also reported in Member States in which anti-LGBTI protests occur less frequently, such as Germany,<sup>312</sup> Greece,<sup>313</sup> Finland,<sup>314</sup> Italy<sup>315</sup> and the United Kingdom.<sup>316</sup>

### 3.3. Bans on disseminating information on homosexuality or on LGBTI expression in the public sphere

#### Key development

- Attempts were made to legally limit LGBTI people’s freedom of expression and to limit access to information on different sexual orientations and gender identities in some EU Member States. Only one Member State retains legislation that imposes limitations on providing information on these issues.

As described in detail in the 2010 report, in 2009 the Lithuanian Parliament (*Seimas*) adopted the Law on the Protection of Minors against the Detrimental effects of Public Information (*Nepilnamečių apsaugos nuo neigiamo viešosios informacijos poveikio įstatymo 1*,

2, 3, 4, 5, 7, 9 *straipsnių pakeitimo ir papildymo*).<sup>317</sup> This law addresses sexuality and family relations, stating that information “which promotes sexual relations; [...] which expresses contempt for family values, encourages the concept of entry into a marriage and creation of a family other than that stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania [...] is detrimental to minors”.<sup>318</sup> This wording results from amendments passed to an earlier version, contested both domestically and internationally,<sup>319</sup> which explicitly sought to ban from schools, public places and the media materials that “agitate for homosexual, bisexual and polygamous relations”.<sup>320</sup>

The amendment of Article 39 of the Law on Provision of Information, which entered into force on 30 June 2011, appeared to be a positive development.<sup>321</sup> It aimed to ensure that advertising and audiovisual commercial communications do not discriminate or incite discrimination on a variety of grounds, including sexual orientation, as this is prohibited by the Audiovisual Media Services Directive.<sup>322</sup> However, on 7 July 2013, the Commission of Lithuanian Radio and Television (*Lietuvos radijo ir televizijos komisija*, LRT, the national broadcaster) censored both promotional videos produced in

310 Poland, *Gazeta Wyborcza* (2012), *Sąd odmówił rejestracji „zakazu pedałowania” dla NOP*.

311 Poland, *Gazeta Wyborcza* (2012), *Sąd odmówił rejestracji „zakazu pedałowania” dla NOP*.

312 On the movement against the so-called *Bildungsplan* – education plan – in the state of Baden-Württemberg, see, for example, Vail, B.J. (2014), ‘The global sexual revolution and the assault on freedom and family’, *Catholic World Report*, 8 September 2014, available at [www.catholicworldreport.com/Item/3357/the\\_global\\_sexual\\_revolution\\_and\\_the\\_assault\\_on\\_freedom\\_and\\_family.aspx](http://www.catholicworldreport.com/Item/3357/the_global_sexual_revolution_and_the_assault_on_freedom_and_family.aspx).

313 Greece, Ministry of Citizen Protection Police Headquarters (Υπουργείο Προστασίας του Πολίτη, Αρχηγείο Ελληνικής Αστυνομίας) (2014), Response to application for information, P.N.:3017/1/725-α/4.2.2014.

314 Aalto, M. (2013), ‘Hetero Pride jäi piienen joukon mielenosoitukseksi’, *Helsingin Sanomat*, 31 September 2013.

315 See, for example, Ballone, A. and Sasso, M. (2014), ‘Sentinelle in piedi, chi sono e cosa fanno i nuovi guardiani dei valori cattolici’, *L’Espresso*, 9 October 2014, <http://espresso.repubblica.it/inchieste/2014/10/09/news/identikit-delle-sentinelle-in-piedi-1.183549>.

316 United Kingdom, *Christian Voice* (2012), ‘Tesco-funded Gay Pride “shambles” snakes through London’, 7 July 2012, [www.christianvoice.org.uk/index.php/tesco-funded-gay-pride-shambles-still-shames-london/](http://www.christianvoice.org.uk/index.php/tesco-funded-gay-pride-shambles-still-shames-london/).

317 Lithuania, Law on the Protection of Minors against the Detrimental Effects of Public Information, ĮSTATYMAS, XI-594, 24 December 2009, [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=361998](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=361998).

318 Article 38 of the Constitution of the Republic of Lithuania provides that “Marriage shall be concluded upon the free mutual consent of a man and a woman.”

319 European Parliament (2009a), Resolution of 17 September 2009 on the Lithuanian Law on the Protection of Minors against the Detrimental Effects of Public Information (P7\_TA(2009)0019), [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2009-0019&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2009-0019&language=EN). See also the visit of the Council of Europe Commissioner for Human Rights October on 19–20 October 2009, and his subsequent letters of inquiry to the Prime Minister and the Chair of the parliament; more information [https://wcd.coe.int/ViewDoc.js?p?Ref=PR132%282010%29&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE/t/commissioner/News/2010/100217Lithuania\\_en.asp](https://wcd.coe.int/ViewDoc.js?p?Ref=PR132%282010%29&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE/t/commissioner/News/2010/100217Lithuania_en.asp).

320 The initial version of the Law on the Protection of Minors against the Detrimental Effects of Public Information was passed by parliament, overruling the President’s veto by 87 votes to six (25 abstentions), on 14 July 2009. See Lithuania, Law on the Protection of Minors against the Detrimental Effects of Public Information, IX-1067, 14 July 2009, available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=349641](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=349641).

321 Lithuania, Law on amending Articles 25, 31 and 39 of the law on the Provision of Information to the Public (*Visuomenės informavimo įstatymo 25, 31 ir 39 straipsnių pakeitimo įstatymas*), No. XI-1454, 16 June 2011, [www3.lrs.lt/pls/inter3/oldsearch.preps2?a=402018&b=](http://www3.lrs.lt/pls/inter3/oldsearch.preps2?a=402018&b=).

322 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (*Audiovisual Media Services Directive*) (Text with EEA relevance), OJ L 95, 15.4.2010, p. 1–24, Article 9.1.(c)(ii).

anticipation of Baltic Pride 2013, agreeing to broadcast them only during night hours and only if marked as adult content. The Deputy Director General of LRT stated that this limitation was based on Article 4 (2) (16) of the Law on the Protection of Minors from the Detrimental Effect of Public Information.<sup>323</sup> LGL, a Lithuanian NGO, lodged complaints with the Lithuanian Office of the Inspector of Journalist Ethics (*Lietuvos žurnalistų etikos inspektorius*) and with the European Commission. The inspector found the first video to be detrimental to children because one person in the video wore a t-shirt with the slogan “For family diversity”, and thus “encourage[d] the concept of entry into a marriage and creation of a family other than that stipulated in the Constitution of the Republic of Lithuania”, prohibited by Article 4 (16).<sup>324</sup> Although the second video was found to comply with the law, the inspector emphasised that the LRT did not ban it, but “merely” limited its broadcasting.<sup>325</sup>

Moreover, according to Lithuanian NGOs, several other news websites have established a practice of branding LGBTI-related articles as adult content, thus sending a clear message that depictions of LGBTI issues (both positive and negative) qualify as information detrimental to children. These practices so far remain unchallenged, reportedly owing to financial constraints on Lithuanian NGOs.<sup>326</sup> However, the European Commission is scrutinising the law: ‘[t]he Commission is in contact with the Lithuanian authorities to see whether the Lithuanian law on the ‘Protection of Minors against the Detrimental Effect of Public Information’ is compatible with, *inter alia*, the scope of derogations under Article 3 [of] Audiovisual Media Services Directive’.<sup>327</sup>

As discussed in Section 3.2.1, a draft proposal to limit the public display of homosexuality was rejected in Bulgaria

and in Latvia.<sup>328</sup> In all these cases, it should be recalled that, according to ECtHR case law, any differences in treatment based on sexual orientation must be justified by particularly serious reasons, and the states’ margin of appreciation is narrow.<sup>329</sup>

As documented in the 2010 report, the EP has repeatedly intervened on this point, and recently reiterated that:

*“[T]he Commission and the Council of the European Union should consider that Member States adopting laws to restrict freedom of expression in relation to sexual orientation and gender identity breach the values on which the European Union is founded, and react accordingly”.*<sup>330</sup>

The attempts in Lithuania and Latvia outlined above appear to be the only recent attempts to keep LGBTI communities invisible through laws that “embod[y] a predisposed bias on the part of a heterosexual majority against a homosexual minority”.<sup>331</sup> As clarified by the ECtHR, this is as unacceptable as differential treatment based on “similar negative attitudes towards those of a different race, origin or colour”.<sup>332</sup>

### 3.4. Protection from homophobic and transphobic expression and violence through criminal law

This section is divided into five subsections. Sections 3.4.1 and 3.4.2 deal with the role of the European Union and other international organisations in fighting prejudice, hate speech and hate crime motivated by the victim’s sexual orientation or gender identity. Sections 3.4.3 and 3.4.4 examine the extent to which national criminal law protects LGBTI persons from forms of expression likely to incite, spread or promote hatred or other forms of discrimination (‘hate speech’), and to what extent such law takes into account the homophobic

323 Lithuania, Delfi.lt (2013a), ‘Seksualinių mažumų eitynių reklama – su „S“ ženklų’, 15 July 2013, [www.delfi.lt/verslas/media/seksualiniu-mazumu-eityniu-reklama-su-s-zenklu.d?id=61861311](http://www.delfi.lt/verslas/media/seksualiniu-mazumu-eityniu-reklama-su-s-zenklu.d?id=61861311).

324 Lithuania, Klaipeda.diena.lt (2013), ‘Ekspertai: gėjų eitynių reklamoje - nepilnamečiams žalingas užrašas ant marškinėlių’, *Kaunodiena.lt*, 16 September 2013, [www.klaipeda.diena.lt/naujienos/lietuva/salies-pulsas/ekspertai-spres-del-geju-eityniu-reklamos-413824#.UvafPbRDVJQ](http://www.klaipeda.diena.lt/naujienos/lietuva/salies-pulsas/ekspertai-spres-del-geju-eityniu-reklamos-413824#.UvafPbRDVJQ).

325 Lithuania, Delfi.lt (2013b), ‘LRT pagrįstai riboja seksualinių mažumų eitynių reklamą’, 23 September 2013, [www.delfi.lt/verslas/media/lrt-pagristai-ribojo-seksualiniu-mazumu-eityniu-reklama.d?id=62419677](http://www.delfi.lt/verslas/media/lrt-pagristai-ribojo-seksualiniu-mazumu-eityniu-reklama.d?id=62419677).

326 Lithuania, Human Rights Monitoring Institute (HRMI) and Lithuanian Gay League (LGL) (2013), *Lithuania: Follow-up report, September 2013*, [www.hrmi.lt/uploaded/Lithuania%20FU%20LGL%20and%20HRMI%20Combined%20Report.pdf](http://www.hrmi.lt/uploaded/Lithuania%20FU%20LGL%20and%20HRMI%20Combined%20Report.pdf).

327 European Parliament (2015), Answer given by Günther Öttinger on behalf of the Commission (23.1.2015) to question for written answer E-008868/2014 by Sophia in ‘t Veld, Ulrike Lunacek, Daniele Viotti, Sirpa Pietikäinen, Tanja Fajon, Dennis de Jong, Brussels, 26 February 2015, [www.europarl.europa.eu/meetdocs/2014\\_2019/documents/libe/dv/7\\_e\\_008868\\_2014\\_answer\\_/7\\_e\\_008868\\_2014\\_answer\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_e_008868_2014_answer_/7_e_008868_2014_answer_en.pdf).

328 Latvia, Draft law on amendments to the Protection of the rights of the child law (*Likumprojekts ‘Grozījumi Bērnu tiesību aizsardzības likumā’*), <http://cvk.lv/pub/public/30673.html>.

329 See ECtHR, *L. and V. v. Austria*, Nos. 39392/98 and 39829/98, 9 January 2003, para. 45; ECtHR, *S.L. v. Austria*, No. 45330/99, 9 January 2003, para. 37; ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003, para. 37; ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010, para. 92.

330 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (*Lunacek Report*), P7\_TA(2014) 0062, Brussels, 4 February 2014, p. 10.

331 ECtHR, *S.L. v. Austria*, No. 45330/99, 9 January 2003, para. 44.

332 ECtHR, *S.L. v. Austria*, No. 45330/99, 9 January 2003, para. 44.



and transphobic motivation ('hate crimes').<sup>333</sup> Finally, Section 3.4.5 deals with underreporting, police training and the lack of statistical data on hate crimes against LGBTI people.

### 3.4.1. EU legal framework

#### Key development

- Violence against LGBTI people and bias against perceived sexual orientation and/or gender identity remain a problem across the EU.

The Victims' Rights Directive, to be implemented by all Member States by 16 November 2015, remains the only EU legislation that explicitly protects individuals who become victims of violence because of their sexual orientation or gender identity.

In its 2012 report *Making hate crime visible in the European Union: acknowledging victim's rights*, FRA noted that, given that the right to non-discrimination under Article 14 of the ECHR ties in with the right to an effective remedy under Article 13 of the Convention, remedies should be available to victims of hate crime to enable them to assert their rights under Article 14 of the ECHR.<sup>334</sup> That same year, FRA carried out an EU-wide lesbian, gay, bisexual and transgender survey,<sup>335</sup> which involved some 93,000 participants. The survey showed that 6 % of respondents were physically or sexually attacked or threatened with violence and believe this happened partly or entirely because they were perceived to be LGBT. It showed that, in the 12 months preceding the survey, one-fifth (19 %) of respondents experienced harassment which they believed occurred partly or entirely because they were perceived to be LGBT. The results of the survey consistently showed that 'hate crime' – violence and crimes motivated by

a person's identity – based on sexual orientation or gender identity are a daily reality throughout the EU.<sup>336</sup>

Referring to the FRA survey's results, the European Parliament in February 2014 adopted a resolution calling on the Commission to propose a recast of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (the Framework Decision)<sup>337</sup> to include other forms of bias crime and incitement to hatred, including on grounds of sexual orientation and gender identity.<sup>338</sup> The Framework Decision is the main EU legislation defining a union-wide, criminal law-based approach to racism and xenophobia, and aims to ensure that the same types of behaviour constitute offences in all Member States. It is currently restricted to race, colour, religion, descent and national or ethnic origin. However, some EU Member States (listed in Sections 3.4.4 and 3.4.5) extended the protection granted to victims of discrimination based on other grounds, such as sexual orientation or gender identity, when implementing the Framework Decision.<sup>339</sup>

To comply with non-discrimination principles, it would be appropriate to include all grounds of discrimination covered by Article 21 of the EU Charter of Fundamental Rights – such as sexual orientation – in criminal law provisions. This would also help address the problem of the hierarchy of grounds, discussed in Chapter 1.

The Victims' Rights Directive includes sexual orientation, gender identity and gender expression as victim personal characteristics covered by its provisions.<sup>340</sup> This makes it possible for LGBTI people who have confronted incitement to hatred or discrimination, or abuse or violence, to be protected as victims. The directive requires individual assessments of victims. It aims to ensure victims recognition, respect and dignified treatment, protection and support, access to justice, compensation,

333 Definitions of 'hate crimes' and 'hate speech' based on Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, points I.A.1 and I.A.6.

334 FRA Opinion on the issue of acknowledging victims of hate crime'; FRA (2012a), *Making hate crime visible in the European Union: Acknowledging victims' rights*, p.11. Luxembourg, Publications Office, [http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf).

335 FRA (2013), *European Union survey of discrimination and victimization of lesbian, gay, bisexual and transgender persons*, Luxembourg, Publications Office of the European Union (Publications Office), <http://fra.europa.eu/en/survey/2012/eu-lgbt-survey>.

336 With reference to sexual orientation and gender identity, FRA has also reached this conclusion in the following report: FRA (2012a), *Making hate crime visible in the European Union: Acknowledging victims' rights*, Luxembourg, Publications Office, [http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf).

337 Council Framework Decision 2008/913/JHA, 28 November 2008, OJ 2008 L 328/55.

338 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, para. 4 (j) (ii).

339 FRA (2012a), *Making hate crime visible in the European Union: Acknowledging victims' rights*, p.25.

340 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315/63, Recital 56.

and restoration.<sup>341</sup> In the above-mentioned 2014 resolution,<sup>342</sup> the European Parliament called on the Commission to monitor and provide assistance to Member States with issues specific to sexual orientation, gender identity and gender expression when implementing the Victims' Rights Directive, particularly when crimes are committed with a bias or discriminatory motive that could be related to victims' personal characteristics. The Commission's Guidance Document aims to facilitate the effective and timely transposition of the directive and underlines that "Member States should pay particular attention to the principle of non-discrimination, which covers all possible discrimination grounds, including sexual orientation and gender identity."<sup>343</sup>

### 3.4.2. Role of Council of Europe instruments, ECtHR case law, and other international organisations

#### Key developments

- The Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) prohibits discrimination based on sexual orientation and gender identity.
- The European Court of Human Rights (ECtHR) has ruled that protection from homophobic hate speech does not violate freedom of expression. It also ruled that this type of speech can amount to inhuman or degrading treatment.
- The European Commission against Racism and Intolerance (ECRI) has started to monitor LGBTI-related issues in Council of Europe member states.
- The UN High Commissioner for Human Rights has found that violence and discrimination based on sexual orientation and gender identity are widespread across the world.

One of the main aims of the Council of Europe Convention on preventing and combating violence against women and domestic violence, which entered into force on 1 August 2014, is to 'prevent, prosecute and eliminate violence against women and domestic violence'. The convention defines 'gender' as 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' and prohibits discrimination on the grounds of gender, sexual orientation and gender identity. The convention is a key instrument for the protection of women, especially lesbian and trans women, particularly those who are victims of gender and domestic violence.<sup>344</sup>

In 2010, when the Council of Europe Committee of Ministers adopted its first recommendation on discrimination based on sexual orientation or gender identity,<sup>345</sup> it asked member states to adopt legislative measures to combat hate crimes or other hate-motivated incidents committed because of the victim's sexual orientation or gender identity.<sup>346</sup> It also called on member states to take appropriate measures against hate speech.<sup>347</sup> Previously, the Committee of Ministers had adopted Recommendation No. R 97(20),<sup>348</sup> which contains a set of principles for combating hate speech. The recommendation clarifies that specific instances of hate speech may be "so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the ECHR to other forms of expression". This is the case where hate speech is aimed at the destruction or unjustified limitation of the rights and freedoms laid down in the ECHR.

In 2013, a report by the Committee of Ministers' Steering Committee for Human Rights (CDDH) underlined that, in implementing the recommendation, many member states paid more attention to "a review of the current legal situation rather than [on taking] proactive measures, such as training and awareness raising, and that these measures are often not part of a cross-sectoral comprehensive policy including national and local

341 European Commission (2011a), Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on strengthening victims' rights in the EU, COM(2011) 274 final, Brussels, 18 May 2011.

342 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.

343 European Commission (2013), *DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, p. 8.

344 Council of Europe, Convention on preventing and combating violence against women and domestic violence, CETS No. 201, 2011, Articles 1.1.a., 3.c., 4.3.

345 Council of Europe, Committee of Ministers (2010a), Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

346 *Ibid.*, Appendix paras. 1–5.

347 *Ibid.*, Appendix paras. 6–8.

348 Council of Europe, Committee of Ministers (2010b), Recommendation No. R 97(20) of the Committee of Ministers to Member States on 'hate speech', 30 October 1997, [www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/dh-lgbt\\_docs/CM\\_Rec%2897%2920\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf).

levels”.<sup>349</sup> The European Commission against Racism and Intolerance (ECRI), which has started to look into the protection of LGBT persons’ rights as part of its mandate to deal with racism, xenophobia, anti-Semitism, intolerance and discrimination on grounds such as race, national/ethnic origin, colour, citizenship, religion and language, also monitors the activities of Council of Europe Member States in this field.<sup>350</sup>

The Council of Europe’s commitment to combating hate crimes and hate speech is based in the ECHR and in ECtHR case law. As discussed in Section 3.4.1, the ECtHR has recognised that Article 14 of the ECHR covers sexual orientation<sup>351</sup> and gender identity.<sup>352</sup> ECtHR case law indicates that exercising freedom of expression entails corresponding “duties and responsibilities”,<sup>353</sup> and that expressions that clearly amount to hate speech do not enjoy the protection of Article 10 of the ECHR.<sup>354</sup> With respect to expressions that would fall within the scope of Article 10, the ECtHR places particular emphasis on the context in which they take place, the circumstances of the case and the applicant’s intentions when assessing whether an infringement can be justified as necessary in a democratic society.<sup>355</sup> In *Féret v. Belgium*, which concerned racist remarks during an electoral campaign, the ECtHR explained its understanding of ‘incitement to hatred’. It concluded that it was not necessary to demonstrate an actual call to violence or crime; rather, insult, ridicule and defamation can constitute incitement to hatred. This would give an “irresponsible” exercise

of “freedom of expression, undermining dignity and security” of certain groups of the population.<sup>356</sup> That the applicant was a member of parliament (and thus played an important role in the democratic process) did not justify the speech. In fact, the ECtHR emphasised that it is of “crucial importance that politicians, in the context of their public speeches, avoid voicing views capable of fostering intolerance”.<sup>357</sup>

In 2012, the ECtHR again assessed the right to freedom of expression under Article 10 of the ECHR in relation to hateful actions and language towards gay people, in *Vejdeland and others v. Sweden*.<sup>358</sup> That case concerned several young men who handed out at a school leaflets containing, among others, statements about homosexuality being a disease. The statements did not directly recommend that individuals commit hateful acts, but contained serious and prejudicial allegations that discriminated on the basis of sexual orientation. In its decision, the ECtHR found that national authorities could regard interference with the applicants’ exercise of their right to freedom of expression as necessary in a democratic society for the protection of the reputation and rights of others.<sup>359</sup> In doing so, it stressed that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”.<sup>360</sup>

In 2014, in *Mladina D.D. Ljubljana v. Slovenia*,<sup>361</sup> the ECtHR examined the right of a journalist to use offensive language in a magazine article. The article targeted a Slovenian parliament member who used words expressing contempt against homosexual people during a parliamentary debate on same-sex civil unions. The ECtHR underlined that it construed the journalist’s controversial statements as a counterpoint to the parliament member’s remarks, which portrayed homosexual people as a generally undesirable sector of the population and could promote negative stereotypes. The ECtHR held that even offensive language that would fall outside of the protection of freedom of expression if its sole intent were to insult, can be protected by

349 Council of Europe, Steering Committee for Human Rights (CDDH) (2013), Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, CM(2013)36 add2, 2 May 2013, para. 8. At its meeting on 22 January 2014, the Committee of Ministers adopted a decision on the report on the implementation. The decision encourages member states to continue their efforts to implement the various provisions of Recommendation CM/Rec(2010)5. The decision is available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2014\)189/4.1&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2014)189/4.1&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

350 Council of Europe, European Commission against Racism and Intolerance (ECRI) (2012), *Information document on the fifth monitoring cycle of the European Commission against Racism and Intolerance (ECRI)*, 28 September 2012, point 9.

351 See, among others, ECtHR, *Salgueiro da Silva Mouta v. Portugal*, No. 33290/96, 21 December 1999, para. 28; ECtHR, *Vejdeland and Others v. Sweden*, No. 1813/07, 9 February 2012, para. 55.

352 ECtHR, *P.V. v. Spain*, No. 35159/09, 30 November 2010.

353 ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976, para. 49.

354 ECtHR, *Jersild v. Denmark*, No. 15890/89, 23 September 1994, para. 35; ECtHR, *Norwood v. UK*, No. 23131/03, 16 November 2004.

355 ECtHR, *Sürek and Özdemir v. Turkey*, Nos. 23927/94 and 24277/94, 8 July 1999, para. 61. See Oetheimer, M. (2009), ‘Protecting freedom of expression: The challenge of hate speech in the European Court of Human Rights case law’, *Cardozo Journal of International and Comparative Law*, Vol. 17, No. 3, p. 427.

356 ECtHR, *Féret v. Belgium*, No. 15615/07, 16 July 2009, para. 73 (currently available in French only): “l’incitation à la haine ne requiert pas nécessairement l’appel à tel ou tel acte de violence ou à un autre acte délictueux. Les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l’incitation à la discrimination, comme cela a été le cas en l’espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d’expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population”.

357 ECtHR, *Féret v. Belgium*, No. 15615/07, 16 July 2009, para. 75.

358 ECtHR, *Vejdeland and others v. Sweden*, No. 1813/07, 9 February 2012.

359 *Ibid.*, paras. 47–60.

360 *Ibid.*, para. 55.

361 ECtHR, *Mladina D.D. Ljubljana v. Slovenia*, No. 20981/10, 17 April 2014.

Article 10 when serving merely stylistic purposes.<sup>362</sup> In such a case, the protection of the parliament member's reputation cannot be given more weight than the journalist's right to freedom of expression and the general interest in promoting freedom of expression where issues of public interest are concerned. The ECtHR thus concluded that the domestic courts, which condemned the journalist, failed to strike a fair balance between the competing interests and interfered with the journalist's right to freedom of expression.<sup>363</sup>

Recommendation CM/Rec(2010)5 calls on Council of Europe member states to

*"take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons".<sup>364</sup>*

According to the recommendation, such 'speech' should be prohibited and publicly disavowed whenever it occurs, taking into account the right to freedom of expression as interpreted in Article 10 of the ECHR and ECtHR case law. The member states are asked to "raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination". Furthermore, public officials and other state representatives should be encouraged to "promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities".<sup>365</sup>

In *Identoba and Others v. Georgia*, the applicants participated in a peaceful march to mark the International Day Against Homophobia. They were surrounded by counter-demonstrators who verbally and physically attacked them. Death threats, physical assaults and the homophobic bias triggered intense fear and anxiety among march participants, which was intensified by the police's failure to protect them. The ECtHR ruled that homophobic hate speech can amount to a form of 'inhuman or degrading treatment', which Article 3 prohibits.<sup>366</sup> It follows from the ruling that, to avoid

violations of Article 3 of the ECHR, states are under a positive obligation to protect individuals from public attacks connected to sexual orientation.

Among other international organisations, the Organization for Security and Co-operation in Europe (OSCE) and its Office for Democratic Institutions and Human Rights (ODIHR) are especially committed to combating hate speech and hate crime. In 2009, an OSCE's Ministerial Council Decision defined hate crimes as criminal acts committed with a bias motive.<sup>367</sup> Among its activities, OSCE/ODIHR produces an annual hate crime report, which, starting from 2014, has been transformed into a Hate Crime Reporting website, an interactive resource.<sup>368</sup> According to the information collected and published in the OSCE/ODHIR annual report, crimes or incidents against LGBT people are often characterised by a high degree of cruelty and brutality, often involving severe beatings, torture, mutilation, castration or even sexual assault, and may result in death. They may also take the form of damage to property, insults or verbal attacks, threats or intimidation.<sup>369</sup> Notwithstanding that the information is based largely on official data provided by governments, the OSCE/ODHIR annual report draws attention to the chronic lack of reliable and comprehensive data on crimes committed with a bias motive.<sup>370</sup> In this regard, the OSCE is committed to improving hate crime data-collection mechanisms at the national level and comparability of information about the prevalence of hate crimes at the international level. For this reason, in 2014, ODIHR published a document, entitled *Hate crime data collection and monitoring: A practical guide*.<sup>371</sup> The document specifically underlines that underreporting by LGBT victims may result from fears about having their identity or status exposed.

In 2014, ODIHR published another relevant document, entitled *Prosecuting hate crimes: A practical guide*, in which it stated that hate crimes against LGBT persons are a serious issue throughout the OSCE area.<sup>372</sup> This document, jointly developed in cooperation with the

<sup>362</sup> *Ibid.*, para. 45.

<sup>363</sup> *Ibid.*, para. 47.

<sup>364</sup> Council of Europe, Committee of Ministers (2010a), Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

<sup>365</sup> *Ibid.*, Appendix, paras. 7–8.

<sup>366</sup> ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015, para. 81.

<sup>367</sup> OSCE Ministerial Council Decision No. 9/09, Combating hate crimes, 1 December 2009.

<sup>368</sup> OSCE, ODIHR, *Hate Crime Reporting website*, <http://hatecrime.osce.org>. As of 14 November 2014, the update data to 2013 were available on the website.

<sup>369</sup> OSCE, ODIHR (2013), *Hate crimes in the OSCE region: incident and responses. Annual report for 2012*, Warsaw, November 2013, [http://tandis.odihhr.pl/hcr2012/pdf/Hate\\_Crime\\_Report\\_full\\_version.pdf](http://tandis.odihhr.pl/hcr2012/pdf/Hate_Crime_Report_full_version.pdf).

<sup>370</sup> OSCE, ODIHR (2013), *Hate crimes in the OSCE region: incident and responses. Annual report for 2012*, Warsaw, November 2013, pp. 7 and 92, [http://tandis.odihhr.pl/hcr2012/pdf/Hate\\_Crime\\_Report\\_full\\_version.pdf](http://tandis.odihhr.pl/hcr2012/pdf/Hate_Crime_Report_full_version.pdf).

<sup>371</sup> OSCE, ODIHR (2014a), *Hate crime data collection and monitoring: A practical guide*, Warsaw, OSCE, 29 September 2014, p. 2, [www.osce.org/odihr/datacollectionguide](http://www.osce.org/odihr/datacollectionguide).

<sup>372</sup> OSCE, ODIHR (2014b), *Prosecuting hate crimes: A practical guide*, Warsaw, OSCE, 29 September 2014, p. 33, [www.osce.org/odihr/prosecutorsguide](http://www.osce.org/odihr/prosecutorsguide).



International Association of Prosecutors (IAP), aims to assist participating states in addressing hate crimes effectively and comprehensively.

Finally, the United Nations Human Rights Council has expressed grave concern at acts of violence and discrimination committed in all regions of the world against individuals because of their sexual orientation and/or gender identity. The updated report by the UN High Commissioner for Human rights, requested by the Council,<sup>373</sup> found that, although many advances were made to make the situation of LGBTI people more equal, serious and widespread human rights violations were still perpetrated, too often with impunity, against individuals based on their sexual orientation and gender identity.

### 3.4.3. Homophobic or transphobic hate speech

#### Key developments

- Since 2010, the number of EU Member States that prohibit homophobic hate speech has increased from 13 to 20.
- 8 EU Member States explicitly prohibit hate speech based on gender identity in their criminal codes.

The European Parliament resolution of 4 February 2014<sup>374</sup> calls on EU Member States to criminalise incitement to hatred on grounds of sexual orientation and gender identity.

As of mid-2015, 20 Member States (Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden and the United Kingdom) make it a criminal offence to incite hatred, violence or discrimination on the ground of sexual orientation. This figure does not include the specific case of harassment in the workplace, which, according to the Employment Equality Directive, should be treated as a form of discrimination and be subject to effective, proportionate and dissuasive sanctions that may be of a criminal nature. In 2010, thirteen Member States explicitly criminalised incitement to hatred or discrimination on the ground of sexual orientation (Belgium, Denmark, Estonia, France, Ireland, Lithuania,

the Netherlands, Portugal, Romania, Sweden, Slovenia, Spain and the United Kingdom). This means that, since 2010, eight additional Member States explicitly protect against incitement to hatred based on sexual orientation (Austria, Croatia, Cyprus, Finland, Greece, Hungary, Luxembourg and Malta). Only Romania changed its law to no longer explicitly include sexual orientation.

In eight other Member States (Bulgaria, the Czech Republic, Germany, Italy, Latvia, Poland, Romania and Slovakia) incitement to hatred, violence or discrimination against LGBTI people is not explicitly defined as a criminal offence. As of 2014, only two states explicitly restrict existing criminal law provisions against incitement to hatred to protecting groups other than LGBTI people (Bulgaria (Articles 162 and 164 of the Criminal Code)<sup>375</sup> and Italy (Article 3, Law 654/1975)).<sup>376</sup>

As stated above, in Austria, Croatia, Finland, Greece, Hungary and Malta, relevant legislative developments have taken place since publication of the 2010 report.

Article 283 (1) of the Austrian Criminal Code (*Strafgesetzbuch*, StGB)<sup>377</sup> – in effect since 1 January 2012 – criminalises public incitement to acts of violence against a group or a member of a group based on certain personal characteristics, including their sexual orientation. The incitement must take place *explicitly* because the individual or group of individuals belongs to that group, and be carried out in a manner suitable to disturbing the public order or noticeable for the wider public. Article 283 (2) also prohibits public agitation against a group specified in Article 283 (1) and further prohibits insults violating the human dignity of such a group, provided that the insult aims to disparage the group and is made to the wider public. These provisions also apply to transgender or gender reassignment issues.

In Croatia, the Criminal Code (*Kazneni zakon*)<sup>378</sup> provides that any public incitement to violence or hate against an individual or group of citizens due to their sexual orientation or gender identity is punishable (Article 325). Although the police may be determined to take legal steps against individuals who engage in hate speech, these need to be followed up by the Office of the State Attorney General. If the State Attorney General does not do so, the police can use its independent powers of prosecution to proceed against the hate speech in misdemeanour courts, but only after (re)classifying the

373 The updated report of the High Commissioner on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity was published on 4 May 2015.

374 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.

375 OSCE, ODIHR (2009), *Preventing and responding to hate crimes*, p. 9, [www.osce.org/publications/odihr/2009/10/40781\\_1382\\_en.pdf](http://www.osce.org/publications/odihr/2009/10/40781_1382_en.pdf).

376 Italy, Law 654/1975, 13 October 1975.

377 Austria, Criminal Code (*Strafgesetzbuch*, StGB), Art. 283, 13 November 1998, as amended.

378 Croatia, Criminal Code (*Kazneni zakon*) (2011), *Official Gazette (Narodne novine)* 125/11, 144/12.

hate speech as a misdemeanour against public order. As a result, possible hate speech ends up not being treated as such.

In Finland, hate speech can constitute incitement to hatred against a population group under section 10 of Chapter 11 of the penal code. It punishes anyone who makes available to the public or otherwise spreads among the public or keeps available for public information an expression of opinion or other message in which a certain group is threatened, defamed or insulted on the basis of its characteristic. The provision was amended in 2011 to explicitly cover sexual orientation.<sup>379</sup>

In Greece, recent legislation punishes incitement to actions or deeds that may cause discrimination, hatred or violence against persons or groups of persons defined on the basis of, among others, sexual orientation or gender identity. The sanctions introduced range from 3 months to 3 years of imprisonment and fines from €5,000 to 20,000. These sanctions are increased if the incitement results in actual crimes. Sanctions of more than 1 year of imprisonment also lead to the deprivation of political rights. Moreover, sanctions are increased when the perpetrator is a public servant or employee and acts during the exercise of their function.<sup>380</sup>

Since July 2013, Hungarian criminal law<sup>381</sup> explicitly protects against both hate speech and hate crimes based on sexual orientation and gender identity. However, the provision on hate speech is not enforced by the police. Moreover, the courts restrictively interpret the provision, holding that incitement against a community can only be established if “stirring up hatred” carries a direct and immediate risk of violent action. General racist, homophobic or transphobic comments that do not reach this severity level are not punished. After repeatedly attempting<sup>382</sup> to introduce criminal law sanctions for less severe forms of hate speech – which the Constitutional Court deemed unconstitutional<sup>383</sup> – the parliament adopted an amendment to the Fundamental

Law (constitution) in March 2013.<sup>384</sup> The revised Fundamental Law contains a general provision favouring dignity over free speech, and a more specific provision making it possible for specific communities to launch legal action against offensive speech. However, only the communities listed in the provision may do so. The provision includes national, ethnic, racial or religious hate speech but not homophobic and transphobic speech.

In Malta, Section 82 A of the Criminal Code,<sup>385</sup> as amended in 2012, was extended to cover incitement to hatred based on sexual orientation and gender identity.

In Italy, the parliament is considering a bill<sup>386</sup> that, if approved, would extend the scope of the existing criminal law provisions on incitement to hatred, which are currently explicitly restricted to the protection of groups other than LGBTI people. Nevertheless, the Lower Chamber has approved a legislative proposal that introduces an amendment providing that political parties, religious representatives and associations following specific beliefs will not be punished for expressions that can be considered incitement to hatred. If approved, this amendment would diminish the effects of the law prohibiting hate crime based on sexual orientation or gender identity. The proposal is still under discussion, and it is not clear whether it will be approved.

As of mid-2015, eight Member States (Croatia, France, Greece, Hungary, Malta, Portugal, Spain and the United Kingdom) have passed laws that protect ‘gender identity’ in criminal law. The legislative changes introduced in Croatia, Hungary and Malta are described above. In Portugal, Law 19/2013 of 21 February amended the penal code by adding “gender identity” in 2013.<sup>387</sup> In the United Kingdom, “transgender identity” is now protected by law; until 2010, it was only considered to be a circumstance leading to an “aggravated offence”.<sup>388</sup>

In addition, it should be noted that Spain’s parliament adopted legislation amending the penal code<sup>389</sup> to introduce “sexual identity” among the protected grounds, alongside sexual orientation. The law criminalises sev-

379 Finland, Criminal Code (*Rikoslaki/Strafflag*), Act No. 39, 19 December 1889, as amended by Act No. 511/2011.

380 Greece, Law N. 927/1979 on punishing acts or activities aiming at racial discrimination, Art. 1; Criminal Code, Art. 79 and 81A.

381 Hungary, Act No. C of 2012 on the Criminal Code (2012. évi C törvény a Büntető Törvénykönyvről), Arts 216 and 332.

382 Hungary, Bill No. T/3719; Hungary, Act No IV of 1978 on the Criminal Code (1978. évi IV törvény a Büntető Törvénykönyvről), Art. 181/A (adopted, but never entered into force); Hungary, Bill No. T/6219 on securing legal means protecting from certain severe conducts violating human dignity (T/6219. számú törvényjavaslat az ember méltóságát súlyosan sértő egyes magatartásokkal szembeni védelem érdekében szükséges jogérvényesítési eszközök biztosításáról).

383 Hungary, Constitutional Court (2008), Decision No. 96/2008 (VII. 3.), 3 July 2008; Hungary, Constitutional Court (2008), Decision No. 95/2008 (VII. 3.), 3 July 2008.

384 Hungary, Fourth Amendment to the Fundamental Law of Hungary (*Magyarország Alaptörvényének negyedik módosítása*), Art. 5 (2).

385 Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854, as amended in 2012.

386 Italy, Senate Bill No 1052, 2013.

387 Portugal, Law 19/2013, 29th amendment to the Penal Code, (*Lei n.º 19/2013, 29.ª alteração ao Código Penal*), 21 February 2013.

388 United Kingdom, Parliament (2012) *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, s 65, [www.legislation.gov.uk/ukpga/2012/10](http://www.legislation.gov.uk/ukpga/2012/10).

389 Spain, Organic Law 1/2015 of 30 March 2015 which amends the Organic Law 10/1995 of 23 November 1995 of the Penal Code (*Ley Orgánica 1/2015, de 30 de marzo de 2015, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*).

eral acts, including the promotion, encouragement, exaltation or justification of violence, hostility, hatred or discrimination by any means of public expression, including in the media. Furthermore, it punishes offending the dignity of people through humiliation, contempt or disrespect against members of a protected group. Finally, the bill also proposes outlawing associations that promote or incite to hatred against persons, groups or associations because of their sexual identity or orientation, among other grounds.

Despite legislative advances, hate speech incidents fail to reach the prosecution stage in some Member States. For instance, in Lithuania, Young Lithuania (*Jaunoji Lietuva*), a political party, in February 2011 unveiled the slogan “For Lithuania without blue, black, red, and gypsies from the encampment” – accompanied by a photo depicting a person wearing a rainbow flag.<sup>390</sup> A number of Lithuanian fundamental rights organisations complained to the Prosecutor General on the grounds that the party’s homophobic and racist speech violated the country’s law regulating political parties and campaigning.<sup>391</sup> On 27 June 2011, the Kaunas City District Prosecutor terminated the pre-trial investigation, finding that the party’s political campaign did not incite hatred.<sup>392</sup> The complainants could have appealed the prosecutor’s decision pursuant to Article 214 (5) of the Criminal Procedure Code,<sup>393</sup> but the decision was not challenged, allegedly because Lithuanian NGOs lacked sufficient human resources to proceed with the legal action on their own and financial resources to cover attorney’s fees. Young Lithuania won four seats in the Kaunas City Municipality Council.<sup>394</sup>

In Hungary, in 2011, the police was requested to investigate a case involving a group of activists affiliated with an extreme right-wing website holding up signs at the pride march that called for the extermination of

gays. The signs depicted a rope, a pink triangle referring to the persecution of gays in Nazi Germany, and the words: “New treatment for gays”. The police argued that the incident did not constitute incitement against a community (Article 269). The applicant NGO appealed the decision, but the Prosecution Service agreed with the police and argued that “holding up the signs might have incited hatred, but not active hatred” and thus the incident “does not reach the minimum level of criminal sanctioning”.<sup>395</sup>

An analysis of relevant case law shows that it can be difficult to establish criminal liability in hate speech cases in court. For instance, in Lithuania, according to case law, hate speech must be committed intentionally to constitute a crime – that is a person should understand that with a particular expression he or she “ridicules, expresses contempt of, urges hatred towards or encourages discrimination against a group of residents or against a specific person, on account of his or her sex, sexual orientation, race, nationality, language, ethnicity, social status, faith, religion or beliefs” and wants to act in this manner. In other words, such crimes must be committed with direct intent.<sup>396</sup> In hate speech cases, when determining a speaker’s intention, courts sometimes merely ask the accused about their intentions and do not analyse the context or content of the remark. Also, courts sometimes dismiss expert findings without any explanation.<sup>397</sup> The Lithuanian Supreme Court set a particularly worrying precedent in a criminal case against an individual who posted a homophobic comment in reaction to an article describing a protest called ‘Kisses against homophobia’. The court focused on the actions of the persons described in the article – who organised and participated in the protest against homophobia – and ruled that, since the protest was held without an authorisation certificate from the authorities and “failed to attain to the fact that a vast majority of Lithuanians respect traditional family values”, the commentator’s reaction was normal. The defendant was acquitted.<sup>398</sup>

In contrast, in the United Kingdom in 2012, a man was convicted after he distributed leaflets with the heading “Death penalty?”, which portrayed an image of a wooden mannequin hanging from a noose and stated that the death sentence was the only way to end homosexuality in society. The decision made clear that mere adverse criticisms of homosexuality do not constitute an offence. The conviction was based on the

390 Čekutis, R. (2011), ‘Patriotai Vilniuje balsuoja už partiją „Jaunoji Lietuva“’ Nr. 12, *Patriotai.lt*, 4 February 2011, [www.patriotai.lt/straipsnis/2011-02-04/patriotai-vilniuje-balsuoja-uz-partija-jaunoji-lietuva-nr-12](http://www.patriotai.lt/straipsnis/2011-02-04/patriotai-vilniuje-balsuoja-uz-partija-jaunoji-lietuva-nr-12).

391 Hrm.lt (2011), Request to launch a pre-trial investigation and apply temporary protective measures (Prašymas pradėti ikiteisminį tyrimą ir pritaikyti laikinąsias apsaugos priemones), Hrm.lt, 9 February 2011, [www.hrm.lt/uploaded/PDF%20dokai/Koalicija\\_Prasymas\\_GP\\_Jaunoji\\_Lietuva\\_20110215\\_1.pdf](http://www.hrm.lt/uploaded/PDF%20dokai/Koalicija_Prasymas_GP_Jaunoji_Lietuva_20110215_1.pdf).

392 Lithuania, Kaunas city regional prosecutor’s office (Kauno miesto apylinkės prokuratūra), Decision to terminate pre-trial investigation (Nutarimas nutraukti ikiteisminį tyrimą), 27 June 2011.

393 Lithuania, Law on approval, enactment and implementation of the civil procedure code. Civil procedure code (*Civilinio proceso kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Civilinio proceso Kodeksas*), No. 37-1341, 14 March 2002, [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=468093](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=468093).

394 Lithuania, Supreme election Commission (*Vyriausioji rinkimų komisija*) (2014), Kaunas city council. The council seats (*Kauno miesto taryba. Tarybos sudėtis*), 18 February 2014, [www.2013.vrk.lt/2011\\_savivaldybiu\\_tarybu\\_rinkimai/output\\_lt/savivaldybiu\\_tarybu\\_sudetis/rapg\\_7136.html](http://www.2013.vrk.lt/2011_savivaldybiu_tarybu_rinkimai/output_lt/savivaldybiu_tarybu_sudetis/rapg_7136.html).

395 Hungary, Budapest District VI and VII Prosecution Service (*Budapesti VI. és VII. Kerületi Ügyészség*) (2012), Decision No. B. VI-VII. 5303/2011/4, 29 November 2012.

396 Lithuania, Panevėžys District Court (*Panevėžio apygardos teismas*), No. 1A-845-366/2011, 1 December 2011.

397 *Ibid.*

398 Lithuania, Lithuanian Supreme Court (*Lietuvos aukščiausiasis teismas*), No. 2K-677/2012, 18 December 2012.

fact that the material distributed was threatening and that, by distributing it, the defendants intended to stir up hatred against homosexuals.<sup>399</sup> This case was the first to allege hatred on the ground of sexual orientation, and was based on the provisions on incitement to religious hatred in the Public Order Act 1986,<sup>400</sup> as amended in 2008.<sup>401</sup>

In Hungary, an activist published an article under his own name on an extreme right-wing web portal. In the article, he called for disruption of the pride march. The article contained statements such as “we have to show force”, “we need more gunpowder”, “we can drop down on them at several spots”, “we have to put forward our fighting side once again” and “we were heroic last year”. The Hättér Society reported the case to the police, asserting that it amounted to incitement against a community, preparation to commit violence against a member of a community and preparation to commit a violation of the freedom of assembly. The police started to investigate the case on all three charges, but the prosecution services took up the last one only. The Central District Court of Pest found the defendant guilty of preparing to commit a violation of the rights to freedom of association, freedom of assembly and to participate in election campaign events. While the defendant claimed he did not intend to promote violence, the court found that the statements were sufficient to establish that the articles called for violence, also taking into account the context of the statements and their potential impact on readers.<sup>402</sup> The case was appealed and the Metropolitan Court of Appeal upheld the decision.<sup>403</sup>

Finally, it should be noted that in some EU Member States where incitement to hatred, violence or discrimination against LGBTI people is not explicitly defined as constituting a criminal offence, generally worded offences have sometimes been used to protect LGBTI persons from homophobic or transphobic expressions. This has been the case in nine Member States (Bulgaria, Cyprus, the Czech Republic, Germany, Italy, Luxembourg, Latvia, Poland and Slovakia).

Protection may also be sought under civil or administrative laws that protect the honour, dignity and rights of the person. For example, in Italy – where criminal law provisions on hate speech do not include homophobic statements as a punishable offence – two

cases involving homophobic statements were decided on the basis of civil law (as a tort) and administrative law, respectively. In the first case, the defendant was convicted of defaming the victim. The case was related to offensive statements made against a politician during a TV programme. The Tribunal of Milan stated that the words used against this person were meant to perpetuate an image of LGBTI persons as human beings of poor morality and to offend their dignity.<sup>404</sup> For this reason, the verbal aggressor was sentenced to pay €50,000. In the second case, the principal of a private university expelled a postgraduate student for one year following two homophobic acts. According to the administrative court, writing offensive statements against LGBTI persons and ripping down posters of an LGBTI support association on the Day against Homophobia constitute actions meant to offend the dignity of LGBTI persons. Therefore, taking into account the seriousness of these acts, the administrative court found proportionate the exclusion from all university activities for one year, considering that the university’s code of conduct allowed expulsions of up to three years.<sup>405</sup>

Notwithstanding the protection provided by general legislation, an analysis of the cases collected by FRA for this report suggests that the absence of specific criminal law legislation and proper guidance and training for police and legal practitioners make it a big challenge to deal with expressions of homophobic or transphobic prejudice, verbal threats and abuse.

For an overview of criminal law provisions on double left quoteincitement to violence and hatred” that explicitly cover sexual orientation, see [Table 4](#).

### 3.4.4. Homophobic or transphobic hate crimes

#### Key developments

- 15 EU Member States explicitly prohibit homophobic hate crimes in their criminal codes. Practice shows that in some other Member States carrying out a crime with homophobic or transphobic intent constitutes an aggravating circumstance.
- 8 EU Member States explicitly prohibit transphobic hate crimes in their criminal codes.

399 United Kingdom, Derby Crown Court, *R. v. Ikhaz Ali, Razwan Javed and Kabir Ahmed*, 2012.

400 United Kingdom, Parliament (1986), Public Order Act 1986, c. 64.

401 United Kingdom, Parliament (2008), Criminal Justice and Immigration Act 2008, c. 4

402 Hungary, Central District Court of Pest, Decision No. 17. B. 80.001/2011/6, 22 March 2011.

403 Hungary, Metropolitan Court of Budapest, Decision 3l.Bf. 7662/2011/5.

404 Italy, Tribunal of Milan, First Civil Section (*Tribunale di Milano – Prima sezione civile*), No. 12187, 13 October 2011.

405 Italy, Regional Administrative Tribunal of Milan (*Tribunale Amministrativo Regionale di Milano*), 20 December 2011.



In addition to criminalising certain forms of homophobic or transphobic expression as ‘hate speech’, a number of Member States have also chosen to treat the existence of a homophobic or transphobic motivation as an aggravating circumstance or as a factor triggering stronger penalties for other, common criminal offences (which are therefore treated as ‘hate crimes’). As noted in the 2008 and 2010 reports, committing some common crimes, such as violence against the person and damage to property, with homophobic or transphobic intent is sometimes considered as an aggravating factor.

Acts of hatred towards LGBTI people continue to be widespread across the EU and have sometimes even resulted in murder. Courts have sometimes highlighted hate motive/bias. For example, in France, three offenders were sentenced to prison in 2012 for attempted murder and torture. The Rouen Criminal Circuit Court recognised that the crime was committed because of the victims’ supposed sexual orientation.<sup>406</sup> In another case, in Hungary in 2013, the Debrecen City Court sentenced a person to life imprisonment for homicide committed with special cruelty. The court found that the homicide was committed with bias towards homosexual people, and thus imposed a significantly higher sanction.<sup>407</sup>

As of 2014, 15 EU Member States (Belgium, Croatia, Denmark, Finland, France, Greece, Hungary, Lithuania, Malta, Portugal, Romania, Spain, Slovakia, Sweden and the United Kingdom) consider homophobic intent an aggravating circumstance or an element to be taken into account when determining penalties, either for all common crimes or for a closed set of criminal offences. In 11 other Member States (Bulgaria, Cyprus, the Czech Republic, Germany<sup>408</sup>, Estonia, Ireland, Italy, Luxembourg, Latvia, Poland and Slovenia), committing criminal offences with such intent is not an aggravating circumstance. In Austria and in the Netherlands, the courts apply higher penalties to crimes committed with a homophobic intent even if such motivations are not specifically addressed in legislation.

There have been changes in Austria, Croatia, Hungary, Malta and Slovakia since 2010 that should be reported.

In Austria, according to an August 2013 statement by the Federal Minister of Justice<sup>409</sup> replying to a parliamentary inquiry, it is possible to assume that homophobia is an especially reprehensible motive and falls under Article 33 (1) 5 of the Criminal Code (*Strafgesetzbuch – StGB*)<sup>410</sup> on aggravating circumstances.

In Croatia, the Criminal Code (*Kazneni zakon*)<sup>411</sup> (Article 87/12) defines hate crime as a criminal act motivated by one of the grounds specifically listed, which include sexual orientation and gender identity. In addition, the code explicitly prescribes increased penalties for some specific criminal acts when motivated by hate.

In Hungary, the new criminal code includes sexual orientation and gender identity in relevant provisions since 2012. This should have led to more severe punishments for crimes committed for a so-called “base reason” (Article 216, formerly 174/B).<sup>412</sup> Courts have referred to homophobic motive as a “base reason” in some cases. For example, similar reasoning was put forward in a 2013 court decision concerning a homophobic murder.<sup>413</sup> However, more commonly, the enforcement of Article 216 remains problematic. In many cases where crimes are committed with a bias motive, authorities still fail to investigate and prosecute the crimes based on the appropriate code provision.

In Malta, Article 251 D of the Criminal Code,<sup>414</sup> as amended in 2012, explicitly treats committing crimes in relation to the victim’s sexual orientation or gender identity as an aggravating circumstance.

In Slovakia, an amendment to the criminal code in 2013 widened aggravating circumstances to include hatred based on sexual orientation (Article 140 (f)).<sup>415</sup>

It has to be noted that, in Slovenia, homophobic intent is considered an aggravating circumstance only in the case of murder.

409 Austria, Federal Ministry of Justice (*Bundesministerium für Justiz*) (2013), Reply to a parliamentary inquiry (*Anfragebeantwortung*), 26 August 2013, [www.parlament.gv.at/PAKT/VHG/BR/AB-BR/AB-BR\\_02734/fname\\_320943.pdf](http://www.parlament.gv.at/PAKT/VHG/BR/AB-BR/AB-BR_02734/fname_320943.pdf).

410 Austria, Criminal Code (*Strafgesetzbuch, StGB*), Art. 33 (1) 5, 13 November 1998.

411 Croatia, Criminal Code (*Kazneni zakon*), *Official Gazette (Narodne novine)* 125/11, 144/12.

412 Hungary, Act No. XL of 2011 amending Act No. IV of 1978 on the Criminal Code (*2011. évi XL. törvény a Büntető Törvénykönyvről szóló 1978. évi IV. törvény módosításáról*), Art. 216, 2011.

413 Hungary, Debrecen City Court (*Debreceni Városi Bíróság*), Decision No. 25.B.48/2013/23, 18 October 2013.

414 Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854 as amended in 2012.

415 Slovakia, *Zákon 204/2013, ktorým sa mení a dopĺňa zákon č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov a o zmene a ktorým sa menia a dopĺňajú niektoré zákony*, 25 June 2013.

406 France, Rouen Criminal Circuit Court (*Cour d’assises de Rouen*), 15 November 2012.

407 Hungary, Debrecen City Court, Decision No. 25.B.48/2013/23, 18 October 2013.

408 In Germany such intent will be taken into account when determining the sentence within the available range, in accordance with s. 46(2) of the Criminal Code (*Strafgesetzbuch, StGB*)

Finally, as of mid-2015, eight EU Member States (Croatia,<sup>416</sup> France,<sup>417</sup> Greece,<sup>418</sup> Hungary, Malta,<sup>419</sup> Portugal,<sup>420</sup> Spain,<sup>421</sup> and the UK,<sup>422</sup>) have made committing a crime with hatred due to gender identity an aggravating circumstance.

Table 4 provides an overview of the relevant legislation in force.

### 3.4.5. Three major challenges: underreporting, improving police training and lack of statistical data

#### Key developments

- Underreporting of homophobic and transphobic hate crimes and hate speech remains a problem across EU Member States, and has a negative impact on the quantity and quality of statistical data on these crimes.
- The main reason for underreporting is the victims' lack of trust in the efficiency of law enforcement authorities. Some Member States have made efforts to address this problem, for instance by introducing compulsory training on homophobic and transphobic hate crimes for police forces.

Underreporting of, and a lack of statistical data on, hate speech and hate crimes on the grounds of sexual orientation or gender identity remain problems across EU Member States. These issues are intimately related to police training because, as discussed below, victims of hate crimes still fear negative reactions on the part of the police or believe that reporting is useless. Underreporting makes it difficult to gather statistical data on (reported and unreported) crimes.<sup>423</sup>

The EU-wide survey carried out by FRA shows very high levels of non-reporting among respondents who said that they were victims of violence or harassment.<sup>424</sup> Only 22 % of the most serious incidents of violence experienced by respondents in the last five years due to their sexual orientation were brought to the attention of the police. For incidents of harassment the figure even drops to 6 %. Underreporting of hate crime was also reported by national surveys, for example by Stonewall, an NGO, in the UK in 2013<sup>425</sup> and in Spain.<sup>426</sup> Reasons for not reporting violence or harassment are diverse, and include the belief that nothing will change, fear that one's sexual orientation could be revealed to family or friends, or a lack of knowledge about how or where to report an incident.<sup>427</sup>

The Lunacek Report therefore emphasised that the police, prosecution services and judges play a key role in ensuring effective, prompt and impartial investigations of alleged crimes and other incidents in which the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive.<sup>428</sup>

In the FRA survey, the fear of homophobic or transphobic reactions from the police was one of the most frequently given reasons for not reporting incidents.<sup>429</sup> Accordingly, police training appears to be an important tool for addressing underreporting. In this regard, the Lunacek Report called on the European Commission (together with relevant agencies) to facilitate among Member States the exchange of good practices pertaining to training and raising awareness among police forces, prosecution services, judges and victim support services.<sup>430</sup>

In January 2014, in its report on the implementation of the Framework Decision, the Commission noted that hate speech and hate crime are underreported to the

416 Croatia, Criminal Code (*Kazneni zakon*), *Official Gazette (Narodne novine)* 125/11, 144/12.

417 France, Criminal Code (Code Pénal), Article 132-77.

418 Greece, Narcotic Acts and other provisions (*Νόμος περί εξαρτησιογόνων ουσιών και άλλες διατάξεις*), No. 4139, 20 March 2013.

419 Malta, Criminal Code (*Kodiċi Kriminali*), 10 June 1854, as amended in 2012.

420 Portugal, Law 19/2013, 29th amendment to the Penal Code (*Lei n.º 19/2013, 29.ª alteração ao Código Penal*), 21 February 2013, Art. 132 (2) f), Art. 145 (2) and Art. 240.

421 Spain, Organic Law 1/2015 of 30 March 2015 which amends the Organic Law 10/1995, of 23 November 1995, of the Penal Code (*Ley Orgánica 1/2015, de 30 de marzo de 2015, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*).

422 United Kingdom, Criminal Justice Act 2003 as amended by Legal Aid, Sentencing and Punishment of Offenders Act 2012, Section 146(2)(a)(iii), 146(2)(b)(iii), 146(6).

423 FRA (2012), *Making hate crime visible in the European Union: acknowledging victims' rights*, p. 31.

424 FRA (2013), *European Union survey of discrimination and victimization of lesbian, gay, bisexual and transgender persons*, Luxembourg, Publications Office, <http://fra.europa.eu/en/survey/2012/eu-lgbt-survey>.

425 Stonewall (2013), *Homophobic hate crime: The gay British crime survey 2013*, [www.stonewall.org.uk/documents/hate\\_crime.pdf](http://www.stonewall.org.uk/documents/hate_crime.pdf).

426 Spain, State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*) (2013), 2013 research on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), p. 38.

427 FRA (2013), *European Union survey of discrimination and victimization of lesbian, gay, bisexual and transgender persons*.

428 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.

429 FRA (2013).

430 European Parliament (2014a).

police because of the nature of these crimes.<sup>431</sup> That is also true for crimes involving a bias or discriminatory motive relating to another person's sexual orientation or gender identity.<sup>432</sup> To counter underreporting, the Commission emphasised that speedy implementation of the Victims' Rights Directive<sup>433</sup> is essential to protect victims of hate speech and crime.

Since 2010, police training modules on homophobic and transphobic hate crimes have been introduced in at least six Member States (France,<sup>434</sup> Denmark,<sup>435</sup> Ireland,<sup>436</sup> Italy,<sup>437</sup> Poland<sup>438</sup> and Portugal<sup>439</sup>). Some Member States have published specific guidelines

for promoting improved practices by police forces (Romania,<sup>440</sup> Spain<sup>441</sup> and Poland<sup>442</sup>). In at least three Member States (Ireland,<sup>443</sup> Sweden<sup>444</sup> and the United Kingdom<sup>445</sup>), many police stations have liaison officers specifically trained as contact points for cases of homophobic or transphobic violence, and many states are working to improve the registration of offences and crimes of a discriminatory nature. Some Member States also encourage networking activities: Ireland has developed an LGBT Community Safety Strategy for the Dublin Metropolitan Region; in Italy, the police and the *carabinieri* have promoted the Observatory for Security against Acts of Discrimination (*Osservatorio per la sicurezza contro gli atti discriminatori*, OSCAD); the Netherlands has implemented an LGBT police network called Pink in Blue (*Roze in Blauw*).

The international seminar on 'Police training relating to LGBT issues', which took place in Budva, Montenegro in December 2012, is an example of an exchange among states of promising practices pertaining to training and educating police forces.<sup>446</sup> The conference was attended by police representatives from Croatia, Italy, Latvia and Poland (as well as Albania and Montenegro), as well as relevant NGOs, to exchange views and good practices. One of the aims was to develop trust between the police and the LGBT community. The seminar was organised by the Council of Europe.

Finally, a major issue that must be addressed by Member States is the lack of data about homophobic and transphobic hate crime. Official data collection on hate crime is fundamental to making hate crime visible in the EU and to ensure that EU Member States

- 431 European Commission (2014b), *Report on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, COM (2014) 27 final, 27 January 2014, point 4, [http://ec.europa.eu/justice/fundamental-rights/files/com\\_2014\\_27\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf).
- 432 FRA (2013).
- 433 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315/63. The Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by November 2015.
- 434 France, Women's Rights Ministry (*Ministère des droits des femmes*) (2014), Progress report about the governmental programme for actions against homophobic violence and discrimination (*Bilan d'étape du programme d'actions gouvernemental contre les violences et les discriminations homophobes*), <http://femmes.gouv.fr/decouvrez-le-bilan-detape-du-programme-dactions-gouvernemental-contre-les-violences-et-les-discriminations-homophobes/>.
- 435 Denmark, Police of Funen (*Fyns Politi*) (2012), The Police of Funen fights hate crimes (*Fyns Politi bekæmper hadforbrydelser*), 14 November 2012, [https://www.politi.dk/Fyn/da/lokalnyt/Nyheder/Fyns-Politi-bekaemper-hadforbrydelser.htm?wbc\\_purpose=Ba](https://www.politi.dk/Fyn/da/lokalnyt/Nyheder/Fyns-Politi-bekaemper-hadforbrydelser.htm?wbc_purpose=Ba); Danish Institute for Human Rights (*Institut for Menneskerettigheder*) (2014), The police is being prepared for investigating hate crimes (*Politiet rustes til efterforskning af hadforbrydelser*), 21 March 2014, <http://menneskeret.dk/nyheder/politiet-rustes-efterforskningen-hadforbrydelser>.
- 436 Ireland, information obtained in correspondence with Craig Dwyer, Policy and Programmes Officer, Gay and Lesbian Equality Network, 6 March 2014.
- 437 Italy, National Office against Racial Discrimination (UNAR) – Equal Opportunities Department (*Dipartimento Pari Opportunità*) (2013), National strategy to prevent and combat discrimination on grounds of sexual orientation and gender identity (2013–2015), Rome.
- 438 Poland, Ministry of the Interior (*Ministerstwo Spraw Wewnętrznych*), *Program zwalczania przestępstw na tle nienawiści*, [www.msw.gov.pl/pl/bezpieczenstwo/ochrona-praw-czlowieka/program-zwalczania-prz-program-zwalczania-prz/4348,Informacje-ogolne.html](http://www.msw.gov.pl/pl/bezpieczenstwo/ochrona-praw-czlowieka/program-zwalczania-prz-program-zwalczania-prz/4348,Informacje-ogolne.html).
- 439 Portugal, Council of Ministers Resolution 103/2013 approving the V National Action Plan for Gender Equality, Citizenship and Non-Discrimination, 2014–2017 (*Resolução do Conselho de Ministros n.º 103/2013 que aprova o V Plano Nacional para a Igualdade de Género, Cidadania e Não-Discriminação, 2014–2017*), <http://dre.pt/pdf/isdip/2013/12/25300/0703607049.pdf>.

- 440 In Romania, a partnership between the police and the Danish Institute for Human Rights led to the development of guidelines for policemen, which were distributed to police stations in Bucharest and at training courses for police officers on tracking and approaching hate crimes against LGBT persons.
- 441 Spain, Platform for Diversity Management (2013), Handbook for diversity management by the police (*Guía para la gestión policial de la diversidad*), [http://gestionpolicialdiversidad.org/PDFactividades/guia\\_gestion\\_policial\\_diversidad.pdf](http://gestionpolicialdiversidad.org/PDFactividades/guia_gestion_policial_diversidad.pdf).
- 442 Poland, Police Information Service (*Informacyjny serwis policyjny*) (2013), *Po pierwsze człowiek*, [isp.policja.pl/isp/prawa-czlowieka-w-poli/aktualnosci/4344,dok.html](http://isp.policja.pl/isp/prawa-czlowieka-w-poli/aktualnosci/4344,dok.html).
- 443 Ireland, An Garda Síochána (2012), *National contact details for ELO/LGBT officers*, 2 November 2012.
- 444 Sweden, National Police Board (*Rikspolisstyrelsen*), Inspection of police authorities' ability to detect and investigate hate crimes: Monitoring report 2013:4 (*Inspektion av polismyndigheternas förmåga att upptäcka och utreda hatbrott: Tillsynsrapport 2013:4*), p. 18.
- 445 United Kingdom, Metropolitan Police (2014), *Lesbian, gay, bisexual and transgender borough liaison*, <http://content.met.police.uk/Article/Lesbian-Gay-Bisexual-and-Transgender-Borough-Liaison/1400018932800/ContactUs>.
- 446 Council of Europe (2012), *Combating discrimination on the grounds of sexual orientation or gender identity, Activities*, [http://www.coe.int/t/dg4/lgbt/Project/Activities\\_EN.asp](http://www.coe.int/t/dg4/lgbt/Project/Activities_EN.asp).

effectively respond to hate crime as an abuse of fundamental rights.

In February 2014, the European Parliament called on FRA to assist Member States in improving their collection of comparative data on hate crimes against LGBT people.<sup>447</sup> FRA found that comprehensive data collection mechanisms that record a variety of bias motivations, characteristics of victims and perpetrators, and further information on incidents, are in place in Finland, the Netherlands, Sweden and the United Kingdom.<sup>448</sup>

Examples of promising practices in this field have been identified in Denmark, France, Finland and Spain. In Denmark, the Ministry of Children, Gender Equality, Integration and Social Affairs in 2013 issued a call for bids on a project concerning the mapping of all forms of

hate crimes.<sup>449</sup> In France, the government has initiated a reform of the statistical system used by the Interior Ministry and the Justice Ministry to obtain accurate and reliable representations of crimes and offences on the grounds of sexual orientation or gender identity.<sup>450</sup> In Finland, the Police College of Finland (*Poliisiammattikorkeakoulu/Polisyrkeshögskolan*) produces an annual report on hate crime,<sup>451</sup> which includes cases of hate crime motivated by the victim's real or perceived sexual orientation, transgender identity or appearance. In Spain, the Ministry of the Interior published a special report in April 2014 on hate crimes committed in Spain in 2013,<sup>452</sup> referring to 453 hate crimes based on sexual orientation or sexual identity. However, it is not possible to further disaggregate these data to obtain a clearer picture of the characteristics of these crimes.

447 European Parliament (2014a).

448 FRA (2012a), *Making hate crime visible in the European Union: Acknowledging victims' rights*, Luxembourg, Publications Office, 30 October 2012, [http://fra.europa.eu/sites/default/files/fra-2012\\_hate-crime.pdf](http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf).

449 Call for bids posted on the official website for the purpose, [udbud.dk](http://udbud.dk), <http://udbud.dk/Pages/Tenders/ShowTender?tenderid=9296>.

450 France, SOS Homophobia (*SOS Homophobie*) (2013), 2013 annual report (*Rapport annuel 2013*), p. 100, [www.sos-homophobie.org/sites/default/files/rapport\\_annuel\\_2013.pdf](http://www.sos-homophobie.org/sites/default/files/rapport_annuel_2013.pdf).

451 Tihveräinen, T. (2013), *Poliisin tietoon tullut viharikollisuus Suomessa 2012*, Tampere, Poliisiammattikorkeakoulu.

452 Spain (2013), Report on evolution of hate crimes in Spain 2013 (*Informe sobre la evolución de los delitos de odio en España 2013*), 24 April 2013.



Table 4: Criminal law provisions on 'incitement to hatred' and 'aggravating circumstances' explicitly covering sexual orientation

Country code	Criminal offence to incite hatred, violence or discrimination on the ground of sexual orientation	Aggravating circumstance	Comments
AT	✓		Article 283 of the Criminal Code on incitement to hatred was amended on 1 January 2012, and now also covers sexual orientation. According to a statement by the Federal Minister of Justice in August 2013, replying to a parliamentary inquiry, one can assume that homophobia is an especially reprehensible motive and falls under Article 33 (1) 5 of the Criminal Code on aggravating circumstances.*
BE	✓	✓	
BG			Existing criminal law provisions against incitement to hatred explicitly restrict the protection to groups other than LGBT people. In December 2013, a draft of a new criminal code included "provisions on incitement to hatred" (Articles 188 and 189) and "aggravating circumstances" (Articles 110, 125, 208 and 589), which explicitly cover sexual orientation. As of February 2014, the new bill is still pending in parliament.
CY	✓		
CZ			The 2009 Criminal Code contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category "group of people", which is covered by both criminal incitement and aggravating circumstance, but this has not yet been tested in case law. The law's explanatory report also does not define the term. The law entered into force in January 2010 and no relevant case law was known as of 2013.
DE			Hate speech legislation does not explicitly cover homophobic motives, but courts have confirmed that it is broadly interpreted, and, in practice, sentences are increased accordingly.
DK	✓	✓	
EE	✓		According to Article 151 of the penal code, (1) activities that publicly incite hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, <b>sexual orientation</b> , political opinion, or financial or social status, and result in danger to the life, health or property of a person, are punishable by a fine of up to 300 fine units or by detention. A proposed draft act would amend these provisions. However, as of April 2014, no amendments have been made.
EL	✓	✓	
ES	✓	✓	
FI	✓	✓	
FR	✓	✓	
HR	✓	✓	
HU	✓	✓	
IE	✓		Homophobic motivation may be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing criminal law provisions against incitement to hatred explicitly restrict the protection to groups other than LGBT people. A bill is currently under discussion in parliament (Italy, Senate, Bill on the fight of homophobia and transphobia ( <i>Disposizioni in materia di contrasto all'omofobia e alla transphobia</i> ) Senate Bill No. 1052)
LT	✓	✓	
LU	✓		General provisions could extend to LGBT people.
LV			Homophobic motivation may be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT	✓	✓	
NL	✓		The Public Prosecution Service's Discrimination Directive recommends a 50 %–100 % higher sentence for common crimes with discriminatory aspects.**

Country code	Criminal offence to incite hatred, violence or discrimination on the ground of sexual orientation	Aggravating circumstance	Comments
PL			General provisions could extend to LGBT people. The Criminal Code does not include homophobic or transphobic motivation of hate crimes. In general, when sentencing, courts make a decision on the punishment within the legally set boundaries. Pursuant to Article 53 (2) of the Criminal Code, courts must consider motivation when determining penalties.*** It can also be significant when deciding on particular criminal measures ( <i>środki karne</i> ). For example, in light of Article 40 of the Criminal Code,**** the court can sentence somebody to deprivation of their public rights in the case of imprisonment for more than three years, for crimes committed as a result of motivations deserving particular condemnation.
PT	✓	✓	Sexual orientation was already one of the factors for hate crimes set out in Article 240 of the Penal Code, and was an aggravating circumstance in other crimes. Following the amendments made by way of Law 19/2013 of 21 February 2013, gender identity is also included.*****
RO		✓	
SE	✓	✓	
SI	✓		Homophobic intent is considered an aggravating circumstance in the case of murder only.
SK		✓	Article 140 of the Criminal Code was amended in 2013, incorporating "hatred due to sexual orientation" among so-called "special motives". If a crime is committed with special motives, it is considered to be harsher, and thus the punishment shall be more severe. "Special motive" is not listed among aggravating circumstances, but its effect is the same.
UK (England and Wales)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23 March 2010. It applies to Scotland, as well. The Criminal Justice Act 2003 was amended in 2012 and now extends the statutory aggravation of offences for hostility based on both sexual orientation and transgender identity
UK (Northern Ireland)	✓	✓	
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed. It entered into force on 24 March 2010, and identifies homophobic and transphobic motive as an aggravating circumstance.
	20	15	

Notes: ✓ = applicable

\* Austria, Federal Ministry of Justice (Bundesministerium für Justiz) (2013), Reply to a parliamentary inquiry (Anfragebeantwortung), 26 August 2013, [www.parlament.gv.at/PAKT/VHG/BR/AB-BR/AB-BR\\_02734/fname\\_320943.pdf](http://www.parlament.gv.at/PAKT/VHG/BR/AB-BR/AB-BR_02734/fname_320943.pdf).

\*\* Netherlands, Public Prosecution Service (Openbaar Ministerie) (2007, 2011), Discrimination instruction (Aanwijzing discriminatie), [www.om.nl/algemene\\_onderdelen/uitgebreid\\_zoeken/@155214/aanwijzing/](http://www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@155214/aanwijzing/).

\*\*\* Poland, Criminal Code (Ustawa z dnia 6 czerwca 1997 kodeks karny), 6 June 1997, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>. Article 53 (2): "In imposing the penalty, the court shall above all take into account the motivation and the manner of conduct of the perpetrator [...]".

\*\*\*\* Poland, Criminal Code (Ustawa z dnia 6 czerwca 1997 kodeks karny), 6 June 1997, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553>. Article 40 (2): "The court may decide on the deprivation of civil rights in the event of sentencing to the deprivation of liberty, for a period of not less than 3 years for an offence committed with motives deserving particular reprobation."

\*\*\*\*\* Portugal, Law 19/2013, 29th amendment to the Penal Code (Lei 19/2013, 29.ª alteração ao Código Penal), 21 February 2013, <http://dre.pt/pdf1s/2013/02/03700/0109601098.pdf>.

Source: FRA, 2015

# 4

## The fundamental rights situation of intersex people



‘Intersex’ is used in this paper as an umbrella term to denote a number of variations in a person’s bodily characteristics that do not match strict medical definitions of male or female. These characteristics may be chromosomal, hormonal and/or anatomical and may be present to differing degrees. Many variants of sex characteristics are immediately detected at birth, or even earlier. Sometimes these variants become evident only at later stages in life, often during puberty. While most intersex people are healthy, a very small percentage may have medical conditions that can be life-threatening if not treated promptly.

Intersex is a collective term for many natural variations in sex characteristics. It is not a medical condition.

Medically, some of these variants are grouped under ‘disorders of sexual development’. However, this is rejected by many, including activists and intersex people themselves, who consider it stigmatising and pathologising.<sup>453</sup> It should also be noted that some intersex people may not wish to identify as such.

Various practices, such as issuing birth certificates and medical treatments, can have an impact on the fundamental rights of intersex people. For example, Article 1 of the EU Charter of Fundamental Rights protects human dignity. Other Charter rights include: the right to integrity of the person (Article 3); respect for private and family life (Article 7); the right to found a family (Article 9); and rights of the child, including the right of children to express their views freely and to have their views taken into consideration on matters which concern them in accordance with their age and maturity (Article 24).

Intersex people also benefit from the Charter’s prohibition of discrimination (Article 21).

With basic aspects of a person’s legal status (e.g. birth or death registration), social status (e.g. access to services) or health conditions frequently defined by the so-called ‘sex binary’ classification of being either ‘male’ or ‘female’, intersex people are often discriminated against. This is because they fall outside of this classification due to their sex characteristics. It can also lead to grave violations of their rights to physical and psychological integrity and other fundamental rights.

### 4.1. Background

#### Key findings

- Intersex people face several challenges that relate to the law and medical intervention.
- Legal and medical professionals should be better aware of these challenges to ensure that the fundamental rights of intersex people are fully respected - particularly when they are children.

In the EU, intersex issues have gradually been recognised as relevant to fundamental rights protection. However, they are still largely treated as medical issues falling outside the scope of public scrutiny. A number of developments at EU level in recent years have contributed to a better understanding of the problems faced by intersex people. For example, in 2013, the ‘working definitions’ laid down by the Council of the European Union stated that traditional notions of maleness and

453 Oll Intersex Network (2012), *The Terminology of Intersex*.

femaleness are culturally established.<sup>454</sup> The European Parliament's Lunacek Report, also adopted in 2013, recommended that the European Commission, EU Member States and relevant agencies address the current lack of knowledge, research and pertinent legislation on the human rights of intersex people.<sup>455</sup>

Member States have also raised the issue of intersex. For instance, in 2010, the Italian Committee on Bioethics published a report reinforcing the exclusively medical approach to intersex issues, reinstating sex binary as an "indispensable element of personal identity".<sup>456</sup> However, the Committee also stressed the importance of acting in the best interests of the child, following a case-by-case approach, and avoiding surgical and medical intervention until a child is able to give informed consent. In 2012, the German Ethics Council (*Ethikrat*) published a comprehensive opinion on intersex issues, providing a range of recommendations to safeguard the rights of intersex people.<sup>457</sup> The opinion argues that legal systems presume the existence of a strict sex binary that does not always occur in nature. Thus, legal professionals and policy makers, and not just health and healthcare professionals, should concern themselves with intersex issues. However, most organisations concerned with protecting the rights of intersex people in the EU support the recommendations developed by the Swiss National Advisory Commission on Biomedical Ethics, instead of those adopted in EU Member States. The Swiss recommendations emphasise that, as a rule, sex assignment treatment should only be performed when the person concerned agrees. They also emphasise that intersex children and their parents should be given psychological counselling and support. The recommendations consider essential protecting the child's integrity.<sup>458</sup>

A study of intersex people published by the Netherlands Institute for Social research in 2014 found that virtually all intersex people interviewed encountered problems in social situations. They talked about being 'different',

feeling lonely and experiencing shame and embarrassment.<sup>459</sup> The study called for further research into their experiences.

Intersex issues are also increasingly being addressed by civil society, including lesbian, gay, bisexual and transgender organisations. For example, ILGA-Europe started working on intersex issues in 2008.<sup>460</sup> The Organisation Intersex International Europe (OIIE) was established to provide a cooperation platform for intersex organisations in several European countries.<sup>461</sup> In Austria, for instance, the Homosexual Initiative Salzburg (*Homosexuelle Initiative Salzburg*, HOSI) assigned a representative for intersex issues (*Intersex-Beauftragte*). Specific intersex NGOs have also been established, such as the Association of Intersex People Austria (*Verein Intersexueller Menschen Österreich*), and the Intersex Platform Austria (*Plattform Intersex Österreich*) - an independent network of NGOs, scientists and activists that aims to foster public discussion and offer advice and information.<sup>462</sup>

## 4.2. Grounds for protection from discrimination

### Key finding

- Given that it concerns physical (sex) characteristics, intersex discrimination is better covered under sex discrimination than under discrimination on the basis of sexual orientation and/or gender identity.

The Council of the European Union,<sup>463</sup> the European Parliament,<sup>464</sup> the Council of Europe,<sup>465</sup> the UN High

454 Council of the European Union (2013), *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBT) persons*, Foreign Affairs Council Meeting, Luxembourg, 24 June 2013, p. 4.

455 European Parliament (2014), *Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI))*, Plenary sitting, No. A7-0009/2014, 7 January 2014, Strasbourg, (para. G. iv)

456 Italy, National Committee on Bioethics (*Comitato Nazionale di Bioetica*) (2010), *The disturbances of sexual differentiation in children: Bioethics aspects (I disturbi della differenziazione sessuale nei minori: aspetti bioetici)*, Rome, Presidenza del Consiglio dei Ministri, p. 18.

457 Germany, German Ethics Council (*Deutscher Ethikrat*) (2012), *Intersexualität*, Berlin, Pinguin Druck.

458 Switzerland, Swiss National Advisory Commission on Biomedical Ethics (2012), *On the management of differences of sex development. Ethical issues relating to 'intersexuality'*, Berne, November 2012, p. 18.

459 Lisdonk, J. (2014), *Living with intersex/dsd. An exploratory study of the social situation of persons with intersex/dsd*, Netherlands Institute for Social Research, The Hague, August 2014, p. 60.

460 See ILGA-Europe's website for information on its intersex work: <http://www.ilga-europe.org>.

461 See <http://oiieurope.org>.

462 Austria, Federal Ministry for Education, the Arts and Culture (*Bundesministerium für Unterricht, Kunst und Kultur*) (2012), *Really intimate (ganzschönintim)*, p. 69.

463 Council of the European Union (2013), *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBT) persons*, Foreign Affairs Council Meeting, Luxembourg, 24 June 2013.

464 European Parliament (2014), *Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI))*, Plenary sitting, No. A7-0009/2014, 7 January 2014, Strasbourg.

465 Council of Europe (2013), *Children's right to physical integrity*, Resolution 1952, Parliamentary Assembly, Strasbourg. See also Council of Europe (2014), Commissioner for Human Rights Comments, *A boy or a girl or a person - intersex people lack recognition in Europe*, 9 May 2014.



Commissioner for Human Rights<sup>466</sup> and the UN Special Rapporteur on Torture<sup>467</sup> have all pointed out that intersex people can suffer from discrimination that results in ill-treatment, especially during childhood. An overview of the key human rights at stake in the protection of intersex people can also be found in the Council of Europe's Commissioner for Human Rights' *Issue Paper on human rights and intersex people*.<sup>468</sup>

The protection from discrimination provided by Article 21 of the EU Charter of Fundamental Rights is of special relevance for EU law and policy. The EU has exercised its competence in this area with respect to several specific domains that touch on the protection of intersex people, such as employment, access to goods and services, and free movement.

EU policies and advocacy have frequently addressed the unequal treatment of intersex people as part of discrimination on the grounds of sexual orientation and/or gender identity. However, such treatment can better be addressed as discrimination on the ground of sex, as it is linked to the sex assigned to a person at birth and its direct consequences. For example, an intersex person incorrectly assigned a female sex at birth may be prevented from marrying a woman in countries that do not allow same-sex couples to marry.

It is also important to bear in mind that intersex refers to a person's bodily characteristics. There is no evidence linking specific sex characteristics with either gender identity or sexual orientation. Thus, intersex people are as likely as non-intersex people to self-identify as heterosexual, bisexual, homosexual, trans, etc. However, regardless of their sexual orientation or gender identity, intersex people should benefit from protection from discrimination on the ground of sex under Article 21 of the EU Charter of Fundamental Rights. In terms of secondary EU law, it should be noted that the Lunacek Report has called on the European Commission to issue, together with relevant agencies, "guidelines specifying that transgender and intersex persons are covered under 'sex' in Directive 2006/54/EC [Gender Equality Directive (recast)]" (para. C. ii).<sup>469</sup>

However, so far it appears that the directive has not been implemented in this manner. FRA's research did not find legislation or case law clarifying whether intersex people are protected from discrimination on the ground of sex in Member States. The German Ethics Council has stated that discrimination against intersex people should generally be covered under the category of sex. However, in the explanatory note on the German General Law on Equal Treatment intersex issues fall under the 'sexual identity' category.<sup>470</sup>

Intersex civil society organisations maintain that the specific category of 'sex characteristics' best identifies their needs when it comes to protection from discrimination.<sup>471</sup> Malta recently became the first (and only) EU Member State to explicitly provide protection against discrimination on the ground of 'sex characteristics'. The recently adopted Gender Identity, Gender Expression and Sex Characteristics Act<sup>472</sup> requires public services to eliminate unlawful discrimination and harassment on the ground of sex characteristics. It also requires public services to promote equality of opportunity for all, irrespective of these characteristics.<sup>473</sup>

Two other positive examples were identified in Spain and the United Kingdom, both at the regional level. In Spain, the Basque Country Act 14/2012 on non-discrimination based on gender identity includes references to "intersex persons", requiring specific support for them.<sup>474</sup> In the United Kingdom, the Scottish Offences (Aggravation by Prejudice) Act 2009 includes intersex issues in its very wide definition of gender identity (which includes "not standard male or female")<sup>475</sup> - thus also treating intersex as a form of gender identity.

In at least 10 EU Member States (Bulgaria, Estonia, Hungary, Italy, Luxembourg, Poland, Portugal, Romania, Spain and Slovakia), the law contains an open list

466 United Nations (UN), High Commissioner for Human Rights (2011), *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, Human Rights Council, Nineteenth session, Report No. A/HRC/19/41, 17 November 2011.

467 United Nations (UN), Special Rapporteur on Torture (2013), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, Human Rights Council, Twenty-second session, Report No. A/HRC/22/53, 1 February 2013.

468 Council of Europe Commissioner for Human Rights Issue Paper, forthcoming.

469 European Parliament (2014), *Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity* e2013/2183(INI), Plenary sitting, No. A7-0009/2014, 7 January 2014, Strasbourg.

470 Germany, Federal Parliament (*Bundestag*) (2006), BT-Drs. 16/1780, 8 June 2006, p. 31; Germany, German Ethics Council (*Deutscher Ethikrat*) (2012), *Intersexualität*, Berlin, Pinguin Druck, p. 133.

471 European Intersex Meeting (2014), *Statement of the European Intersex Meeting*, 8 October 2014, point 2.

472 Malta (2015), Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person (*Att għar-rikonoxximent u registrazzjoni tal-generu ta' persuna u sabiex jirregola l-effetti ta' dik il-bidla, kif ukoll għarrikonoxximent u l-protezzjoni tal-karatteristiki tas-sess ta' persuna*), 2 April 2015.

473 *Ibid.*, Article 14.

474 Spain (2012), Law of 14/2012 approved by the Vasque Parliament on 28 June 2012, on non-discrimination on the ground of gender identity and recognition of the rights of transexual persons (*Ley de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*), Spanish State Official Bulletin No. 172 of 19 July 2012, pp. 51730-51739 (BOE-A-2012-9664).

475 United Kingdom, Scottish Parliament (2009), *Offences (Aggravation by Prejudice) (Scotland) Act 2009*, asp 8, sections 2 (2) and 2 (8).

of grounds of discrimination. Here intersex could be included under the protected characteristics or social groups category of 'other'. This could help protect intersex people from discrimination. However, given the social and legal invisibility of intersex issues in society and in the legal system, such an approach could also perpetuate this invisibility. It could also result in acts of discrimination against intersex people remaining unchallenged. Using this ground of protection remains largely untested and, given the scarcity of relevant case law, its ramifications are unclear.

In seven EU Member States, policymakers or courts have embraced broader concepts, which may implicitly cover intersex. Examples include: gender (in Austria,<sup>476</sup> Denmark,<sup>477</sup> Finland<sup>478</sup> and the Netherlands<sup>479</sup>); gender identity (in Romania<sup>480</sup> and Slovenia<sup>481</sup>); or both gender and gender identity (in Sweden<sup>482</sup>).

Intersex covers a large and diverse variation of sex characteristics. This makes it likely that, in the absence of specific protective legislation, intersex cases will be approached in different ways even within the same legal systems.

### 4.3. Registration of sex at birth

#### Key findings

- Intersex people, especially children, will remain vulnerable to discrimination as long as birth and other registries do not appropriately record sex identities, and as long as they are medically diagnosed as men or women with health disorders.
- To protect intersex people, alternatives to using gender markers in identity documents should be considered. Including gender-neutral markers could also be considered. This is particularly important for birth registration/certificates in situations where the new-born child's sex is unclear.

Apart from a few legislative changes described below, birth registration legislation in EU Member States tends to consider all individuals as being either male or female. Consequently, in most Member States it is obligatory – but not always possible – to assign a sex to intersex new-borns. The moment birth certificates are issued and registration takes place is frequently the first time intersex people are confronted with a legal issue. This has very problematic implications for intersex children because it forces those involved in certifying and registering births (particularly parents or other family members responsible for a child, health professionals, and birth registry officials) to officially choose either the male or the female option. Parents frequently lack psychological support services in these situations. Such support would help them confront the realities of being a parent of an intersex child, and so support them in better responding to the challenging social expectations and legal and medical requirements that they and their children will face.

Legal requirements regarding birth certification and registration reinforce the social expectation that all children fit into existing sex categories. This influences the perception of a 'medical need' for treatment and intervention.

The interplay of legal, social, and medical expectations creates a context in which a child's rights to physical and mental integrity, and to freely express views, can easily be overridden. A child's views on matters that concern the child should be taken into consideration, in accordance with the child's age and maturity.

Concerning birth certificates, 18 EU Member States allow specific delays in registering new births: a week in Austria, Belgium, Bulgaria, France, Luxembourg and

476 Austria, Ombudsperson for Equal Treatment (*Gleichbehandlungsanwaltschaft*) (2013), *Gleichbehandlung für transgener Personen und intersexuelle Menschen*.

477 Denmark, Board of Equal Treatment (*Ligebehandlingsnævnet*) (2013), *Decision No. 249/2013*, 27 November 2013.

478 Finland, Ombudsperson for Equality (2012), *Selvitys sukupuolivähemmistöjen asemasta*, Helsinki, Tasa-arvovaltuutettu.

479 Netherlands, Arnhem Court of Appeal (*Gerechtshof Arnhem*) (2005), *Case No. ECLI:NL:GHARN:2005:AU7290*, 15 November 2005.

480 Information by the NCCD Centre for Legal Resources.

481 Slovenia, Advocate of the Principle of Equality (*Zagovorniknačelaenakosti*), *Opinion No. 0921-22/2010-7*; Slovenia, Advocate of the Principle of Equality (*Zagovorniknačelaenakosti*), *Opinion No. 0921-41/2011-UEM/10*.

482 Sweden, Swedish Government (2007), *Report by the Gender Identity Investigation (Betänkande av Könstillhörighetsutredningen), Modified gender identity: A proposal for a new law (Ändradkönstillhörighet – förslag till ny lag)*, Stockholm, SOU 2007/16., p. 39.

Slovakia; and longer than that in Cyprus, Denmark, Greece, Hungary, Ireland, Italy, Malta, Portugal, Romania, Slovenia, Spain and the United Kingdom. Sometimes certification is delayed by a preliminary communication immediately filed by the medical staff. For some intersex children, this delay may suffice to allow for the medical identification of a 'preponderant' sex, however this may be defined. This then leads to the legal imposition of a 'male' or 'female' sex. However, medical treatments on very young intersex children, including surgery, is common.<sup>483</sup>

At least four EU Member States allow a sex-neutral identification – such as 'unknown sex' in the United Kingdom – to be registered in birth certificates. In Latvia, sex is not included on the birth certificate, but 'unclear sex' is allowed in medical certificates issued by medical staff.<sup>484</sup> In the Netherlands, if the sex of a child is unclear, the birth certificate can state that the sex could not be determined. Within three months of the date of birth, a new birth certificate should be drawn up and the first one destroyed. In the new birth certificate the sex of the child should be specified based on a medical statement. If no medical statement is submitted or if the sex still cannot be determined, the new birth certificate should indicate that it is not possible to determine the sex of the child. Once an intersex person decides on their sex identity, they can change the registration pursuant to Article 1:24 of the Civil Code; no time limit is set. In Portuguese intersex cases, persons reporting births at the civil registry office are advised to choose a first name that is easily adapted to either sex. The law permits the birth certificate to be amended once a sex can be attributed with some precision.<sup>485</sup>

The German Ethics Council has recommended allowing the use of an 'other' sex category in certifications.<sup>486</sup> In Germany, it is possible to issue birth certificates without a sex identifier or marker; since 1 November 2013, there is no deadline to include such a marker.<sup>487</sup>

483 Agius, S. and Tobler, C. (eds.), European Commission (2012), *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression*, Report by the European Network of Legal Experts in the non-discrimination field, Brussels.

484 Latvia (2012), *Law on the Registration of the Civil Status Acts (Civilstāvokļa aktu reģistrācijas likums)*, 29 November 2012, *Latvian Herald (Latvijas Vēstnesis)* 197(4800), 14 December 2012; Latvia, Cabinet of Ministers (*Ministru kabineta*) (2006), Regulations No. 265 *On the record-keeping procedures for medical documents (Noteikumi Nr. 265 "Medicīnisko dokumentu lietvedības kārtība")*, 4 April 2006, 39. pielikums, *Latvian Herald (Latvijas Vēstnesis)* 57(3425), 7 April 2006.

485 Information provided by the Institute of Registration and Notary Affairs (*Instituto dos Registos e Notariado*, IRN).

486 Germany, German Ethics Council (*Deutscher Ethikrat*) (2012), *Intersexualität*, Berlin, Pinguin Druck.

487 Germany (2013), Act to Amend Civil Status Regulations (*Gesetz zur Änderung personenstandsrechtlicher Vorschriften (Personenstandsrechts-Änderungsgesetz – PStRÄndG)*), 7 May 2013.

In Malta, following adoption of the Gender Identity, Gender Expression and Sex Characteristics Act in April 2015, including a sex marker on birth certification can be postponed until a child's gender identity is determined.<sup>488</sup> Malta has also committed to recognising gender markers other than male or female, as well as the absence of such markers, from competent foreign courts or responsible authorities acting in accordance with that country's laws.

To a limited extent it is also possible to issue birth certificates without sex identifiers or markers in France and Finland. In France, ministerial guidelines advise parents to check with their doctor what the sex of the new-born is 'most likely' to be. This should be based on the expected results of medical treatments, where appropriate.<sup>489</sup> In cases involving expected medical treatments, it is possible, with the public prosecutor's consent, not to specify a child's sex, as long as sex determination can reasonably be expected within three years of medical treatment.<sup>490</sup>

In Finland, a lack of sex certification results in an incomplete personal identity code, which has potentially negative consequences. For example, a complete personal code is needed for contacts with authorities, the payment of wages and salaries, and to open bank accounts.

The positive impact of obviating requirements to identify a sex for the child may not be felt in practice for so long as the sex binary persists in social thinking: even where legislation does not make binarism compulsory, child carers may feel compelled to adapt to it in order to respond to social expectations and avoid differentiating intersex children.

If birth certificates contain errors it is possible for intersex people to change the sex identifier later in life in some EU Member States, such as Denmark, France and the Netherlands, without meeting the requirements demanded of trans people. In France, these requirements include: a diagnosis of gender dysphoria; hormonal treatment or physical adaptation; a court order;

488 Malta (2015), Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person (*Att għar-rikonoxximent u reġistrazzjoni tal-generu ta' persuna u sabiex jirregola l-effetti ta' dik il-bidla, kif ukoll għarrikonoxximent u l-protezzjoni tal-karatteristiki tas-sess ta' persuna*), 2 April 2015, article 21.

489 France, Minister of Justice (*Ministère de la Justice*) (2011), *Instruction about particular rules for various acts of civil status concerning birth and filiation (Circulaire relative aux règles particulières à divers actes de l'état civil relatifs à la naissance et à la filiation)*, 28 October 2011.

490 Dan Christian Ghattas (2013), *Human Rights between the Sexes. A preliminary study on the life situations of inter\* individuals*, Heinrich-Böll-Stiftung, p. 39.

a medical opinion; and genital surgery which can lead to sterilisation.

In general, intersex people and those responsible for caring for intersex children largely have to rely on external medical assessments when it comes to certifying an intersex person's sex.

## 4.4. Medical treatment of intersex children

### Key finding

- EU Member States should avoid imposing 'sex-normalising' medical treatments on intersex people without their free and informed consent. This would help prevent violations of the fundamental rights of intersex people, especially children, by way of practices with irreversible consequences.

In May 2014, various UN bodies, including the World Health Organisation (WHO), the Office of the High Commissioner for Human Rights (OHCHR), UN Women, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the UN Development Programme (UNDP), the UN Population Fund (UNFPA) and the UN's Children's Fund (UNICEF), released an interagency statement noting that:

*"Intersex persons, in particular, have been subjected to cosmetic and other non-medically necessary surgery in infancy, leading to sterility, without informed consent of either the person in question or their parents or guardians. Such practices have also been recognized as human rights violations by international human rights bodies and national Courts."*

There are no comprehensive statistical data in Europe on medical treatments or surgeries performed on intersex children. The Council of Europe's Commissioner for Human Rights has repeatedly pointed out that intersex children are often subjected to surgery and hormonal or other medical treatments that aim to impose a particular sex on them.<sup>491</sup> Such surgery, which is performed on intersex babies and toddlers, can be cosmetic rather than essential from a medical

perspective, and can result in irreversible sex assignment and even sterilisation.<sup>492</sup>

In its Resolution 1952 (2013) on a child's right to physical integrity, the Parliamentary Assembly of the Council of Europe called on its member states to "ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, [and to] guarantee bodily integrity [...] to persons concerned".<sup>493</sup>

The UN Special Rapporteur on torture has similarly called on states

*"to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned".*<sup>494</sup>

The UN Special Rapporteur on torture has also called on states to outlaw forced or coerced sterilisation in all circumstances and to provide special protection to individuals belonging to marginalised groups.

Unless dictated by medical emergency, surgery and medical treatments without a patient's or legal representative's consent are recognised by international human rights law as a form of cruel, inhuman and degrading treatment. The Conference of State (Länder) Ministers for Equality of Germany equated genital surgery performed on intersex people with female genital mutilation (FGM).<sup>495</sup> FGM is internationally recognised as a violation of the human rights of women and a form of child abuse, and has been strongly condemned by the European Commission<sup>496</sup> and the Council of the European Union.<sup>497</sup> In Malta, the Gender Identity, Gender

<sup>491</sup> Council of Europe, Commissioner for Human Rights (2014), *A boy or a girl or a person – intersex people lack recognition in Europe*, Human Rights Comment, Strasbourg.

<sup>492</sup> Council of Europe, Commissioner for Human Rights (2014), *LGBT children have the right to safety and equality*, Human Rights Comment, Strasbourg.

<sup>493</sup> Council of Europe, Parliamentary Assembly (PACE) (2013), Resolution 1952 (2013) Final version on Children's right to physical integrity, 1 October 2013, para. 7.5.3.

<sup>494</sup> UN Special Rapporteur on torture (2013), p. 23.

<sup>495</sup> This was stated by the Conference of State (Länder) Ministers for Equality of Germany. See further Germany (2014), 24. Konferenz der Gleichstellungs- und Frauenministerinnen und -minister, -senatorinnen und -senatoren der Länder am 1./2. Oktober 2014 in Wiesbaden, TOP 8.1 Paragraph 3.

<sup>496</sup> European Commission (2013), *Towards the elimination of female genital mutilation*, COM(2013) 833 final, Brussels, 25 November 2013, p. 4.

<sup>497</sup> Council of the European Union (2014), Council conclusions – *Preventing and combating all forms of violence against women and girls, including female genital mutilation*, Justice and Home Affairs Council meeting, Luxembourg, 5 and 6 June 2014, p. 2.

Expression and Sex Characteristics Act<sup>498</sup> forbids sex assignment treatments and/or surgical intervention on a child's sex characteristics that can be deferred until the person to be treated can provide informed consent, unless exceptional circumstances apply. The law also requires agreement between an interdisciplinary team, appointed by the equality minister, and those with parental authority or the child's guardian.<sup>499</sup>

There is little information on the existence of medical protocols concerning the treatment of intersex people across the EU. In Austria, Estonia, Spain, Finland, France, Hungary, Ireland, Italy, Luxembourg and the United Kingdom, no official, general medical protocol is applied. In Sweden, the National Board of Health and Welfare (*Socialstyrelsen*) has produced guidelines regarding the treatment of intersex children. These specify that examinations and genital surgical procedures should not be performed on children between the ages of 2 and 12. In most cases, genital surgery is reportedly performed before the age of six months.<sup>500</sup>

In Austria, the recommendations of the previously mentioned German report,<sup>501</sup> the Lawson Wilkins Pediatric Endocrine Society (USA), and the European Society for Paediatric Endocrinology are referenced. These two institutions have published the so-called 'Consensus Statement on management of intersex disorders' (also known as 'the Chicago Consensus'), which proposed changes in the relevant terminology.<sup>502</sup> However intersex organisations have criticised this document for introducing the term 'disorders of sex development' to describe intersex characteristics. Intersex organisations view this term as pathologising the sex characteristics of intersex people, and worry that it can justify 'sex normalising' medical treatment.<sup>503</sup>

In the Netherlands, it is also common practice to follow 'the Chicago Consensus', but this may not apply to all

hospitals.<sup>504</sup> In any case, the issue is not how 'good' the treatment becomes, but whether it meets human rights standards when administered without consent even though the 'condition' is not life-threatening and will not lead to significant harm.

In the United Kingdom, there are specific medical protocols for specific types of intersex characteristics. The National Health Service's website also includes a general information page.<sup>505</sup>

In Spain, protocols for specific forms of intersex characteristics are followed, including the protocol developed by the Spanish Association of Paediatrics (*Asociación Española de Pediatría*)<sup>506</sup> and the protocol of the European Association of Urology.<sup>507</sup> In France, the protocol on the management of a specific form of intersex (congenital adrenal hyperplasia due to 21-hydroxylase deficiency) refers to surgical treatment during the first months after birth. Although there is no reference to consent, the protocol notes that "patients and parents should be accompanied psychologically in the surgical project".<sup>508</sup>

There is also little case law on medical treatments of intersex people. In an important German case, the Cologne District Court recognised the pain and suffering of an intersex person who was subjected to medical surgery 30 years earlier without receiving adequate information.<sup>509</sup> The claimant brought a suit for damages - on the grounds of erroneous assignment of a sex and physical mutilation - against the surgeon who removed the claimant's uterus and fallopian tubes when she was 18 years old. The court ruled that the operation was conducted without the necessary consent and that the claimant had not been comprehensively informed by the defendant surgeon. It awarded damages of €100,000 plus interest.<sup>510</sup>

Sex (re)assignment and sex-related surgery appears to be performed on intersex children, and young people,

498 Malta (2015), Act for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.

499 *Ibid.*, Article 15.

500 Sweden, National Board of Health and Welfare (*Socialstyrelsen*) (2010), *Transsexuals and other people with gender identity disorder: Legal conditions for determination of sex as well as care and support (Transsexuella och övriga personer med könsidentitetsstörningar – Rättsliga villkor för fastställelse av könstillhörighet samt vård och stöd)*, 30 June 2010.

501 Germany, German Ethics Council (*Deutscher Ethikrat*) (2012), *Intersexualität*, Berlin, Pinguin Druck.

502 'The Chicago Consensus', see: Lee, P.A. et al. (2006), 'Consensus statement on management of intersex disorders', *Pediatrics*, Vol. 118, No. 2, pp. e488–e500.

503 OII Intersex Network (2012), *The Terminology of Intersex*. See also: Switzerland, Swiss National Advisory Commission on Biomedical Ethics (2012), *On the management of differences of sex development. Ethical issues relating to 'intersexuality'*, Berne, November 2012, p. 9.

504 *De Volkskrant* (2010), *Kiezen om te leven als man, als vrouw of allebei tegelijk*, 22 May 2010.

505 NHS Choices (2014), *Disorders of sex development*, 12 November 2014.

506 Spain, Spanish Association of Pediatrics (*Asociación Española de Pediatría*) (2011), *Anomalies of sexual differentiation (Anomalías de la diferenciación sexual)*.

507 European Association of Urology (2010), *Guía clínica sobre urología pediátrica*.

508 France, High Authority for Health (*Haute autorité de santé*, HAS) (2011), *Congenital adrenal hyperplasia due to 21-hydroxylase deficiency: National protocol for diagnosis and care (Hyperplasie congénitale des surrénales par déficit en 21-hydroxylase: Protocole national de diagnostic et de soins pour les maladies rares)*, p. 16.

509 Germany, Cologne District Court (*Landgericht Köln*) (2008), Case No. 25 O 179/07, 6 February 2008. It should be noted that this ruling was criticised by intersex organisations for endorsing a medicalised approach.

510 Germany, Cologne District Court (*Landgericht Köln*), (2009), Case No. 25 O 179/07, 12 August 2009.

in at least 21 EU Member States (Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Slovakia, Spain, Sweden and the United Kingdom). However, it is not known how frequently such operations are conducted. In all of these countries, the patient and/or legal representative's informed consent is required for surgery, except in medical emergencies.

Legislation or medical practice in eight Member States (Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Hungary, Poland and Sweden), requires consent by the legal representative, independently of the child's ability to decide. In Spain, this is the case when a medical intervention entails 'a serious risk' for the child.

Patient consent appears to be legally required in at least 18 Member States (Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Slovakia, Spain, Sweden and the United Kingdom) - provided that the child is deemed to possess adequate cognitive faculties and the ability to decide. In 14 Member States (Austria, Belgium, Bulgaria, Denmark, Germany, Ireland, Lithuania, Latvia, the Netherlands, Poland, Slovenia, Spain, Sweden and the United Kingdom), the child is presumed to have such abilities after reaching a certain age.

However, there is often flexibility in assessing these abilities, both in Member States that specify a certain reference age (for example, 12 years in Belgium; 14 in Austria, Bulgaria, and Germany; 15 in Slovenia; and 16 in Lithuania and the United Kingdom) and in Member States that require individual assessments (for example, Finland, France and Italy). While such flexibility is necessary in view of variations in cognitive development, it runs the risk that medical procedures are imposed on children against their will.

Assessing a child's cognitive faculties and ability to decide is a broader issue concerning their involvement in decision-making on matters that concern them. While adequate child participation mechanisms are particularly important, in this context the key considerations appear to be:

- the minimum age at which a child is involved in the decision-making process: this is complicated by variations in sex development that arise or are found before or at puberty. From this perspective, requiring consent only if the child is already 15 years of age or older – as in, for example, Denmark, Ireland, Lithuania, Poland, Slovenia, Spain and the UK – may be inappropriate;
- whether intervention is postponed or consent is sought from the parents when a child is deemed unable to decide: in at least six EU Member States – Austria, Germany, Hungary, Malta, the Netherlands and Sweden – current practices or government guidelines indicate a tendency to postpone until a child is considered capable of deciding medical treatments that are not strictly necessary to safeguard health. 'Sex normalising' and/or cosmetic surgeries are, however, still performed on children without their informed consent;
- what happens when a child can decide, but parental or a legal representative's consent is also required, and the child and parents or legal representatives disagree regarding how to proceed: the situation varies among Member States. In Italy and Poland, for example, a guardianship court decides; in Lithuania and Latvia, the relevant medical staff does. In a German Federal Court of Justice case – not directly relating to intersex issues – the parents' right to decide on medical treatment was limited by the child's opposition, given that postponing the intervention did not endanger the child's health.<sup>511</sup>

<sup>511</sup> Germany, Federal Court of Justice (*Bundesgerichtshof*) (2006), VI ZR 74/05, 10 October 2006.



Table 5: Requirements concerning birth certificates and medical interventions on children

Country code	Birth certificates			Medical interventions on children			Comments
	Not required to specify sex identification	Allowed to indicate sex is undetermined or unknown	Postponed in case of doubt	Surgery performed in country	Consent of the child is necessary (from age specified)*	Consent of legal representative is necessary**	
AT			Up to seven days	✓	14 (flexible)	✓	Ministry of Health's tendency recently is to postpone irreversible medical treatments as long as possible
BE			Up to three months	✓	12 (flexible)	✓	No procedures ensure that the child's right to consent to medical treatment is exercised
BG			Up to seven days	✓	16 (flexible)	✓	
CY			Up to 15 days				
CZ				✓		✓	
DE	✓			✓	14 (flexible)	Until child turns 14	The parents' right to consent to medical treatments on a child is limited by the best interests of the child
DK			Up to 14 days	✓	15	Until child turns 15	The parents' decision on medical treatment must be made in the best interests of the child, and the child must be involved in decisionmaking whenever possible
EE				✓	?	✓	Information lacking; only one documented case since 1992
EL			Up to 10 days	?			
ES			Up to eight days	✓	16	Until child turns 16	If a medical intervention entails a serious risk for the child, the parents have to be involved in the process, even if the child is older than 16
FI	✓			✓	Flexible	If child is deemed unable to decide	Patients should always be cared for based on "mutual understanding" between the patient and the patient's legal representatives
FR	✓		Up to three days	✓	Flexible	If child is deemed unable to decide	
HR		?		?			The State Registry Act requires birth certificates to specify the sex, but also stipulates that some entries can be marked 'undetermined' for reasons of <i>force majeure</i>
HU			Up to 30 days	✓		✓	Children over 16 can appoint an adult other than their parents to consent to medical treatment. In practice, the consent of children over 14 is supposedly always sought and irreversible treatments postponed until legal age when possible
IE			Up to three months	✓	16	Until child turns 16	
IT			Up to 10 days	✓	Flexible	If child is deemed unable to decide	The National Committee on Bioethics recommended including a note in birth certificates of children of unclear sex to facilitate subsequently changing the sex in documents if needed

LT				✓	16 (flexible)	Until child turns 16	Birth certificates do not indicate the child's sex; however, names and personal identification codes are gender-specific
LU			Up to five days				Draft Bill No. 6568 would allow dropping the use of sex identifications in birth certificates
LV		✓		✓	14	Until child turns 14	A child's opposition to medical treatment can be overridden by medical decision in accordance with the patient's lawful representatives, even if the child is over 14 years old. Copies of birth certificates do not specify a person's sex
MT				✓		✓	It is reportedly common practice to involve children in the information and decision-making process if they are deemed capable of understanding
NL	✓			✓	12	Until child is 16	The Minister of Education, Culture and Science stated that performing unnecessary medical treatments, or doing so too early, should be avoided. In practice, children are informed of the various medical procedures starting at age 10
PL				✓	16	✓	
PT		✓	Up to 20 days	?			
RO			Up to 14 days	?			The only information available on medical treatments is a statement by the National Health Insurance House, which addresses coverage of the related costs
SE				✓	12	✓	Surgery is generally performed before the child is two years old, and generally avoided between the ages of two and twelve
SI			Up to 15 days	✓	15 (flexible)	Until child is deemed able to decide	
SK			Up to three working days	?			
UK		✓	Up to 42 days / 21 in Scotland	✓	16 (flexible)	Until child turns 16	

Notes: ✓ = applies; ? = doubt

\* Provided the minor is found or presumed to possess adequate cognitive faculties and power of judgment.

\*\* Excluding cases of medical emergency.

Source: FRA, 2015





# 5

## 'Family members' in free movement, family reunification and asylum



### Key development

- EU law regulates the free movement of EU citizens, family reunification for third-country nationals and asylum for those in need of international protection. Specific directives define who can be considered a 'family member' for these specific purposes. All directives include in their definitions of a 'family member' the same-sex partner or spouse.

In EU law, three directives are key when it comes to defining 'family members': the Free Movement Directive<sup>512</sup>, Family Reunification Directive<sup>513</sup> and Qualification Directive (recast).<sup>514</sup> All of them have different scopes of application and define 'family members' slightly differently.

The Free Movement Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member

States by Union citizens and their family members.<sup>515</sup> The latter include, among others, spouses and partners with whom Union citizens have entered into registered partnerships (under certain conditions).<sup>516</sup> The directive also requires Member States to facilitate entry and residence for partners with whom Union citizens have durable, duly attested relationships.<sup>517</sup>

The Family Reunification Directive determines the conditions for third-country nationals residing lawfully in the territory of the Member States to exercise their right to family reunification;<sup>518</sup> it does not apply to third-country nationals who are family members of EU citizens.<sup>519</sup> According to the directive, Member States shall authorise the entry and residence of, among others, the sponsor's spouse.<sup>520</sup> Member States may also authorise the entry and residence of unmarried partners who are third-country nationals and with whom sponsors are in a duly attested, stable long-term relationship, or of third-country nationals who are bound to sponsors by registered partnerships.<sup>521</sup>

The Qualification Directive (recast) lays down rules regarding when third-country nationals or stateless persons qualify as beneficiaries of international protection.<sup>522</sup> According to the directive, family members include, among others: the spouse of the beneficiary of international protection or the unmarried partner with whom the beneficiary is in a stable relationship, if the law or practice of the Member State concerned

512 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77–123.

513 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18.

514 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26.

515 Free Movement Directive, p. 77–123, Article 1(a).

516 *Ibid.*, Article 2(2)(a)-(b).

517 *Ibid.*, Article 3(2)(b).

518 Family Reunification Directive, p. 12–18, Article 1.

519 *Ibid.*, Article 3(3).

520 *Ibid.*, Article 4(1)(a).

521 *Ibid.*, Article 4(3).

522 Qualification Directive (recast), p. 9–26, Article 1.

treats unmarried couples comparably to married couples under its laws relating to third-country nationals.<sup>523</sup>

LGBTI people encounter different problems depending on whether their same-sex partner is an EU citizen or a third-country national. This chapter deals with the possibility of EU citizens who move to a different Member State obtaining entry and residence rights for their same-sex partners, be they EU citizens or third-country nationals; and the possibility of third-country nationals, including beneficiaries of refugee or subsidiary protection status, sponsoring their same-sex partners as family members. Citizenship is not the only relevant aspect, since the formal relationship between same-sex partners can also lead to different treatment in certain Member States. Thus the present chapter considers the position of same-sex spouses, same-sex registered partners and *de facto* couples in long-term same-sex relationships.

It should be noted that, under the above-mentioned directives, children are considered to be 'family members'. Issues concerning children generally involve two circumstances: when both LGBTI partners are legal parents of the child and they move to a Member State where same-sex couples are not formally recognised as parents; and when the legal parent is an LGBTI citizen of a third country (regardless of whether the partners are EU citizens).

## 5.1. Development of a basic legal framework

### Key developments

- The ECtHR has ruled that, like different-sex couples, same-sex couples have the right to family life. If a Member State recognises registered partnerships, it cannot discriminate against people seeking to enter into such partnerships on the basis of their sexual orientation.
- The ECtHR has found that governments that fail to ensure the availability of a specific legal framework providing recognition and protection for same-sex unions violate Article 8 of the ECHR.
- Some EU Member States do not yet recognise same-sex families. This negatively affects same-sex couples' enjoyment of the freedom of movement. To address this issue, the European Commission published Green Papers on the free movement of public documents and mutual recognition of the effects of civil status records, and on the right to family reunification of third-country nationals living in the EU.

Several developments have taken place at the EU level since the 2010 report was published.

In its resolution of 24 May 2012 on the fight against homophobia in Europe, the European Parliament called on the Commission and Member States to ensure that the Free Movement Directive is implemented without discrimination based on sexual orientation (paragraph 4).<sup>524</sup> Moreover, in its resolution of 4 February 2014, the European Parliament specified that the Commission should produce guidelines to ensure that the Free Movement Directive and the Family Reunification Directive 'are implemented so as to ensure respect for all forms of families legally recognised under Member States' national laws'.<sup>525</sup>

In the meantime, the European Commission published two Green Papers: on the free movement of public documents and mutual recognition of the effects of civil status records, and on the right to family reunification of

523 *Ibid.*, Article 2(j).

524 European Parliament (2010), Resolution on the fight against homophobia in Europe, P7\_TA(2012) 0222, Brussels, 24 May 2012.

525 European Parliament (2014a), para. 4H i.



third-country nationals living in the European Union.<sup>526</sup> Both papers touch upon the issues faced by same-sex couples and their children when they move from one EU Member State to another, exercising their freedom of movement as EU citizens, or when they seek to reunite with their family members (see Sections 5.2 and 5.3). Most of the issues the Green Papers attempt to tackle result from EU Member States' differing legal treatment of same-sex couples and their children.

For instance, the free movement of public documents and recognition of the effects of civil status records are problematic for same-sex couples who move to Member States that do not recognise same-sex couples. In such states, their legal family ties are suspended when they cross the border. The different ways of legally recognising families in EU Member States make increasingly difficult the mutual recognition of civil status documents. Family ties that arise within institutions other than marriage become irrelevant in Member States where such institutions do not exist and where such foreign institutions are not recognised. This problem concerns both same-sex and opposite-sex couples. Although the European Economic and Social Committee (EESC)<sup>527</sup> and the Committee of Regions<sup>528</sup> have delivered opinions on the Green Paper on promoting free movement of public documents and recognition of the effects of civil status records, the Commission has not yet taken any legislative initiative in this matter.

The second Green Paper addresses the need to harmonise the interpretation and application of the Family Reunification Directive in Member States and to provide EU citizens with similar protection in different Member States. Following the suggestions received during the public consultation process, the Commission provided guidelines on how to implement the Family Reunification Directive to Member States.<sup>529</sup>

EU developments relating to the recognition of LGBTI families (including CJEU case law, presented in Chapter 2) paralleled those resulting from ECtHR case law. In June 2010, in *Schalk and Kopf v. Austria*, the ECtHR clearly ruled that the relationship of a cohabiting same-sex couple in a stable *de facto* partnership falls within the notion of 'family life', just as such a relationship between a different-sex couple would.<sup>530</sup> The ECtHR confirmed this view in *P.B. & J.S. v. Austria* in July 2010, and in *X. and Others v. Austria* in February 2013.<sup>531</sup> More recently, in *Vallianatos and Others v. Greece*, the Grand Chamber of the ECtHR ruled that, by excluding same-sex couples from the scope of Law 3919/2008 on civil unions, Greece violated Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.<sup>532</sup> Finally, in the ground-breaking judgement in *Oliari and Others v. Italy*, the ECtHR found that, by not ensuring the availability of a specific legal framework providing the recognition and protection of same-sex unions, the government failed to fulfil its obligations under Article 8 of the convention.<sup>533</sup>

## 5.2. Freedom of movement

### 5.2.1. Entry and residence of same-sex spouses

#### Key developments

- Even though the Free Movement Directive does not distinguish between same-sex and different-sex spouses, some EU Member States exclude same-sex spouses from the concept of 'family member' in relation to freedom of movement.
- 11 EU Member States have introduced same-sex marriage and do not distinguish between same-sex and different-sex spouses, including for purposes of freedom of movement.
- In 6 EU Member States same-sex spouses are treated as registered partners for purposes of freedom of movement.

The Free Movement Directive does not distinguish between different and same-sex spouses. Therefore all EU Member States are obliged to treat both in the same

526 European Commission (2010b), *Less bureaucracy for citizens – Promoting free movement of public documents and recognition of the effects of civil status records*, COM(2010) 747 final, Brussels, 15 December 2010; European Commission (2011b), *The right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, COM(2011) 735 final, Brussels, 15 November 2011.

527 European Economic and Social Committee (EESC) (2011a), *Opinion on the 'Green Paper – Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records'* COM(2010) 747 final, OJ 2011 C 248, pp. 113–117.

528 Committee of the Regions (2012), *Opinion on 'Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil status records'*, OJ 2012 C 54, pp. 23–27.

529 European Commission (2014c), *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210 final, Brussels, 3 April 2014.

530 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, para. 94.

531 ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010, para. 30; *X and Others v. Austria*, No. 19010/07, 19 February 2013, para. 95.

532 ECtHR, *Vallianatos and others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013.

533 ECtHR, *Oliari and Others v. Italy*, Nos. 18766/11 and 36030/11, 21 July 2015, para. 185.

manner for purposes of entry and residence. However, same-sex couples who are married do not receive the same treatment in all Member States because of varying national legislation. While some Member States appear to exclude same-sex spouses from the concept of 'spouse', other Member States do not distinguish between same-sex spouses and different-sex spouses for purposes of entry and residence rights. Similarly, while some Member States equate marriages between persons of the same sex entered into abroad with registered partnerships, the situation is unclear or is evolving in others.

At the time of writing, eleven EU Member States allow same-sex couples to marry. In 2010, five did so: Belgium, the Netherlands, Spain, Sweden and Portugal. Between then and October 2015, six others joined the group: Denmark (2012),<sup>534</sup> France (2013),<sup>535</sup> the United Kingdom (2014),<sup>536</sup> Luxembourg (2015),<sup>537</sup> Finland (2014, will enter into force on 1 March 2017),<sup>538</sup> and Ireland (2015).<sup>539</sup> In Slovenia, although a marriage equality bill was adopted by the Parliament on 3 March 2015, it has not come into effect, challenged by a referendum convoked for 20 December 2015.

As of the end of 2014 at least seven Member States (Bulgaria, Cyprus, Greece, Hungary, Latvia, Poland and Slovakia) appeared to exclude same-sex spouses from the concept of 'spouse' in contexts relevant to this analysis. In some of these countries, a same-sex spouse can be granted entry and residence rights as either a registered or unregistered partner (see the following subsection for further details). The FRA 2010 report concluded that any refusal to grant entry and residence rights to same-sex spouses "would constitute a form of direct discrimination on grounds of sexual orientation, in breach of Article 26 of the International Covenant on Civil and Political Rights, the general principle of equality and the prohibition of discrimination as reiterated in Article 21 of the Charter of Fundamental Rights."<sup>540</sup>

As of 2014, 12 Member States (eight in 2010) clearly do not distinguish between same-sex spouses and

different-sex spouses of foreign EU citizens for purposes of entry and residence rights (Belgium, Denmark, France, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). In view of changes at the end of 2014, this number grows to 13, and includes Finland, where same-sex marriage is expected to enter into force in 2017.

The increase in Member States that recognise same-sex marriage creates an additional effect in that Member States that do not protect same-sex married couples may need to take a stand on the matter. In the absence of national laws recognising their status, EU citizens who move to these states with their families will be compelled to apply to national courts and administrative authorities to promote non-discriminatory respect for their family life, as recognised by the EU Charter of Fundamental Rights and the European Convention on Human Rights. This, however, may result in different outcomes, as exemplified by developments in Italy and Cyprus. In Italy, the Tribunals of Reggio Emilia and Pescara<sup>541</sup> ruled that same-sex couples married abroad must be treated in the same manner as different-sex married couples with regard to the right to freedom of movement. These rulings were confirmed by a clarification note of the Ministry of Internal Affairs.<sup>542</sup> In contrast, in Cyprus, the Supreme Court upheld a decision of the Migration Department declining to consider the same-sex spouse of a Cypriot citizen as a family member because Cypriot law does not recognise their marriage.<sup>543</sup>

In four Member States (Estonia, Lithuania, Croatia and Romania), the situation is unclear or developing. In Estonia, according to the Family Law Act, any marriage entered into by persons of the same sex is void

534 Denmark, Act on marriage (*Ægteskabsloven Æ1, lovbekendtgørelse*), Consolidated Act No. 1052, 14 November 2012.

535 France, Law No. 2013-404 opening marriage to same sex couples (*Loi No. 2013-404 ouvrant le mariage aux couples de même sexe*), 17 May 2013.

536 United Kingdom, Parliament (2014b), Marriage (Same Sex Couples) Act 2013, UK Parliament, 15 January 2014.

537 Luxembourg, Marriage Reform Act No. 125 (*Loi du 4 juillet 2014, N° 125, Réforme du mariage*), 4 July 2014.

538 See the legislation section of the Finnish parliament's website: <http://web.eduskunta.fi/Resource.phx/pubman/templates/56.htm?id=7139>.

539 Ireland, Marriage Act No. 35 of 2015, signed by the President of Ireland on 29 October 2015.

540 FRA (2010), *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Legal analysis 2010 update*, p. 46.

541 Italy, Tribunal of Reggio Emilia (*Tribunale di Reggio Emilia*) (2012), *X v. Questore di Reggio Emilia*, Decision 15, 13 February 2012, [www.articolo29.it/decisioni/tribunale-di-reggio-emilia-prima-sezione-civile-decreto-del-13-febbraio-2012/](http://www.articolo29.it/decisioni/tribunale-di-reggio-emilia-prima-sezione-civile-decreto-del-13-febbraio-2012/); Tribunal of Pescara (*Tribunale di Pescara*) (2013), *G. v. Questore di Pescara*, Decision, 15 January 2013, [www.articolo29.it/decisioni/tribunale-di-pescara-ordinanza-del-15-gennaio-2013/](http://www.articolo29.it/decisioni/tribunale-di-pescara-ordinanza-del-15-gennaio-2013/).

542 Italy, Minister of the Interior (*Ministero dell'Interno*) (2012b), Note on same-sex unions – residence permit under Legislative Decree No. 30/2007 (*Circolare sulle unioni tra persone dello stesso sesso – Titolo di soggiorno ai sensi del decreto legislativo n. 30/2007*) No. 8996, 5 November 2012, [www.articolo29.it/wp-content/uploads/2012/11/nota-ministero-interni-5-11-2012.pdf](http://www.articolo29.it/wp-content/uploads/2012/11/nota-ministero-interni-5-11-2012.pdf).

543 Cyprus, Supreme Court of the Republic of Cyprus – Revisional Jurisdiction (Ανώτατο Δικαστήριο Κύπρου – Αναθεωρητική Δικαιοδοσία) (2010), *Thadd Correia, Savvas Savva v. The Republic of Cyprus through the Director of the Civil Registry and Migration Department*, Decision No. 1582/2008, 22 July 2010 (*Thadd Correia, Σάββας Σάββας vs Κυπριακή Δημοκρατία μέσω Διευθυντή Τμήματος Αρχείου Πληθυσμού και Μετανάστευσης*, Αρ. Απόφασης 1582/2008, 22 Ιουλίου 2010), [www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros\\_4/2010/4-201007-1582-08.htm&qstring=1582](http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2010/4-201007-1582-08.htm&qstring=1582).

(Article 10).<sup>544</sup> The Ministry of the Interior (*Siseministeerium*) stated that it sees no reason why same-sex spouses could not be considered spouses within the meaning of the EU Citizen Act (*Euroopa Kodaniku Seadus*), if their marriage was entered into in compliance with regulations applicable in their country of origin.<sup>545</sup> In 2014, however, the Police and Border Guard Board (*Politsei- ja Piirivalveamet*) specified that this approach would be taken only in regard to the EU Citizen Act. The term 'spouse' in the Aliens Act (*Välismaalaste Seadus*) would be interpreted more restrictively and same-sex marriages are not viewed as grounds for legal residence. This means that the term 'spouse' is interpreted differently depending on whether the case concerns a same-sex spouse of a non-Estonian EU citizen or a same-sex spouse of an Estonian citizen. There is no example of actual practice to confirm or contest this interpretation. Meanwhile, on 9 October 2014, the Estonian Parliament adopted the Registered Partnership Act<sup>546</sup>, which will enter into force on 1 January 2016. How this will affect the rules on entry and residence rights of LGBT people remains unclear.

The situation is similarly unclear in Romania, where Art. 277 of the Civil Code, which entered into force in 2011, prohibits same-sex partnership and marriage, and prohibits the recognition of partnerships and marriages concluded in other countries.<sup>547</sup> At the same time, Subsection 4 of the same article explicitly states that the legal provisions on the freedom of movement of EU/EEA citizens remain applicable. The new Civil Code does not clarify the ramifications of the potential conflict between these two provisions. Likewise, in Croatia, the Lifelong Partnership Act was enacted on 15 July 2014. This law makes same-sex couples equal to married couples from a legal point of view, except in the context of adoption. At the same time, the Aliens Act (in Article 162) excludes same-sex couples from the definition of family, based on the definition of civil union provided in the Family Act.<sup>548</sup> However, the Aliens Act does not refer to the Family Act as regards the notion of marriage, potentially making it possible for same-sex marriages entered into in other EU Member States to be recognised for purposes of free movement. Finally, the Lithuanian Civil Code defines marriage as a formalised agreement between a man and a woman. However, according to the Migration Department under the

Ministry of the Interior (*Migracijos departamentas prie Vidaus reikalų ministerijos*),<sup>549</sup> the main governmental institution that grants residence permits to foreigners in Lithuania, a person in a same-sex marriage or same-sex partnership with an EU citizen is considered to be a family member of the EU citizen for the purpose of Article 2 (4) of the Law on the Legal Status of Aliens (*Užsieniečių teisinės padėties įstatymas*).<sup>550</sup>

In five Member States (Austria, the Czech Republic, Finland, Germany, Slovenia), a marriage between persons of the same sex entered into abroad is equated with a registered partnership, and the same-sex spouse is accordingly considered a member of the family. (This will also be true of Finland, where, as mentioned above, same-sex marriage is due to enter into force in 2017). In Austria, the Federal Ministry of the Interior (BMI) issued an order in August 2011, indicating that same-sex couples who marry abroad also have a right to the subsequent immigration of family members (*Familiennachzug*).<sup>551</sup> Marriages of same-sex couples from other countries are described only as registered partnerships according to this order, given that marriages between same-sex couples are not allowed in Austria. Until then, this right was not explicitly provided for such couples.

## 5.2.2. Entry and residence of registered partners

### Key developments

- 19 EU Member States grant entry and residence rights to registered partners.
- 6 EU Member States still appear to deny these rights to same-sex registered partners of EU citizens.
- In 3 EU Member States, the situation is unclear.

Regarding the position of partners with whom EU citizens enter into registered partnerships, the Free Movement Directive states that only when the host state

544 Estonia, Family Law Act (*Perekonnaseadus*), 18 November 2009, section 10.

545 Estonia, Ms Grete Kaju, legal advisor for the Department of the Migration and Border Control Policy, Ministry of the Interior (*Siseministeerium*) (2008), Telephone interview, 8 April 2008.

546 Estonia, Parliament (*Riigikogu*), Partnership Act (*Kooseluseadus*), 9 October 2014.

547 Romania, Law 289/2009 on the Civil Code (*Legea 289/2009 privind Codul Civil*), 17 July 2009.

548 Croatia, Family Act (*Obiteljski zakon*) (2003), *Official Gazette (Narodne novine)* No. 116/03, 16 July 2003.

549 Lithuania, Migration Department under the Ministry of the Interior of the Republic of Lithuania (*Migracijos departamentas prie Lietuvos Respublikos Vidaus reikalų ministerijos*) (2014), Communication from National Focal Point, Lithuania, 19 February 2014.

550 Lithuania, Law on the legal status of aliens (*Įstatymas dėl užsieniečių teisinės padėties*), No. 73-2539, 29 April 2004.

551 Austria, Federal Ministry of the Interior (*Bundesministerium für Inneres*) (2011), Information on registered partnerships which have been concluded abroad prior to the EPG (*Information betreffend (gleichgeschlechtliche) Partnerschaften, die vor Inkrafttreten des EPG geschlossen wurden, im Ausland geschlossene Ehen zwischen gleichgeschlechtlichen Partnern und Namensentragungen von Österreicherinnen in ausländischen Geburtsurkunden*), GZ.: BMIVA1300/0213-III/2/2011, 19 August 2011.

“treats registered partnerships as equivalent to marriage” in its domestic legislation it is under an obligation to grant entry and residence rights to (same-sex) registered partners. The same rule presumably applies to host Member States in which same-sex couples may marry (eleven Member States by October 2015). Regardless of whether they are obliged to do so under EU law, as of 2014, nineteen Member States grant entry and residence rights to registered partners. In 2010, 14 did so (Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland,<sup>552</sup> Luxembourg,<sup>553</sup> the Netherlands, Portugal, Spain, Sweden and the United Kingdom); five more joined this group by 2014 (France,<sup>554</sup> Latvia,<sup>555</sup> Malta,<sup>556</sup> Slovenia<sup>557</sup> and Slovakia<sup>558</sup>). It should be noted that this information is subject to change in light of differing national practices and (a lack of) case law in countries where the legislation is silent on the matter – or unclear.

Among the 19 Member States listed above, the situations in Latvia and Slovakia are of particular interest. As explained below, these Member States do not recognise registered partnerships. However, LGBTI couples who enter a registered partnership abroad qualify as family members (as do long-term *de facto* partners in the case of Latvia<sup>559</sup>) for purposes of entry and residence of citizens of the EU and their family members.<sup>560</sup> However, in both Member States same-sex couples consisting of non-EU citizens are not considered family members. They qualify as family members only if at least one partner is an EU citizen.

The cases of Latvia and Slovakia highlight the complex interrelation of national and EU legislation. In nine Member States (Bulgaria, Cyprus, Greece, Italy, Latvia,

Lithuania, Poland, Romania and Slovakia), registered partnerships and marriage for same-sex couples do not exist in domestic legislation. In Greece and Lithuania, the relevant legislation only allows two people of different sexes to enter into registered partnerships (although this would be discriminatory according to ECtHR jurisprudence<sup>561</sup>; see [Section 4.1](#)). In all of these Member States – except for Latvia and Slovakia, if at least one partner is an EU citizen – same-sex registered partners either do not qualify as family members for purposes of entry and residence, or the situation is unclear.

The situation concerning registered partnerships is particularly unclear in Croatia, Estonia and Romania. It is not possible to predict whether the recently adopted Estonian law on registered partnerships (which will enter into force on 1 January 2016) will affect the right of entry and residence of registered partners of EU citizens.<sup>562</sup> Even though Romania’s domestic legislation does not provide for registered partnerships for same-sex couples, and recognising foreign registered partnerships is forbidden by the country’s Civil Code, the legal provisions on freedom of movement in Romania of EU and EEA member states citizens remain applicable (see [Section 5.2.1](#)).<sup>563</sup> The situation is unclear in the absence of judicial or administrative decisions on this legislation (and in the absence of CJEU rulings on the Free Movement Directive’s Article 2(2)(b) on registered partnerships). In Croatia, the Lifelong Partnership Act and the Aliens Act also appear to convey contradictory messages. Although the Lifelong Partnership Act made registered same-sex couples equal to married couples from all legal points of view, except for adoption, the qualification of the same-sex partner as a member of the family depends on the Aliens Act, which takes no account of a partnership registered abroad (see [Section 4.2](#) for more details concerning Romania and Croatia).

As noted in the previous section, some EU Member States recognise same-sex LGBT registered partners as family members despite the lack of legislation dealing with this issue, because the partner holds an EU Member State citizenship. Two Member States (Latvia and Slovakia) appear to grant entry and residence rights to registered partners of EU citizens, but not to registered partners of third-country nationals. This means that LGBTI EU citizens who enter into registered partnerships with third-country nationals may not be able to fully enjoy their right to free movement in those countries.

552 Ireland, Civil Partnership and Certain Rights and Obligations of Cohabitants Act, allowing for the recognition of same-sex unions, either marriages or civil unions, entered into abroad, Section 5, No. 24 of 2010, 19 July 2010.

553 Luxembourg, Marriage Reform Act No. 125 (*Loi N° 125, Réforme du mariage*), 4 July 2014.

554 France, Law No. 2013-404 opening marriage to same sex couples (*Loi No. 2013-404 ouvrant le mariage aux couples de même sexe*), 17 May 2013.

555 Latvia, Cabinet of Ministers (*Ministru kabineta*) (2011), Regulation No. 675 – Procedures for EU citizens and their family members travelling to and staying in the Republic of Latvia (*Noteikumi Nr. 675, Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā*), 30 August 2011.

556 Malta, Civil Unions Act (*Att tal-2014 dwar l-Unjonijiet Ċivili*), 17 April 2014.

557 Slovenia, Aliens Act (*Zakon o tujcih*), 15 June 2011.

558 Slovakia, Act on residence of Aliens (*Zákon o pobyte cudzincov*) No. 404/2011, 21 October 2011, Art. 2 (5) (g).

559 Latvia, Cabinet of Ministers (*Ministru kabineta*) (2011), Regulation No. 675, Procedures for EU citizens and their family members travelling to and staying in the Republic of Latvia (*Noteikumi Nr. 675, “Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā”*), 30 August 2011.

560 Slovakia, Act on Residence of Aliens (*Zákon o pobyte cudzincov*), No. 404/2011, 21 October 2011, Art. 2 (5) and Art. 43 (1), 21 October 2011.

561 ECtHR, *Vallianatos and Others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013, para. 92.

562 Estonia, Parliament (*Riigikogu*), Partnership Act (*Kooseluseadus*), 9 October 2014.

563 Romania, Law 289/2009 on the Civil Code, (*Lege 289/2009 privind Codul Civil*), 17 July 2009, Article 277.

In conclusion, six Member States appear not to grant entry and residence rights to same-sex registered partners of EU citizens (Bulgaria, Cyprus, Greece, Italy, Lithuania and Poland). It appears that these Member States are not obliged to do so because their domestic law does not recognise registered partnerships.

### 5.2.3. Entry and residence of *de facto* partners

#### Key development

- All EU Member States are obliged to facilitate the entry and residence of *de facto* partners of EU citizens, provided that the partners shared the same household in the country from which they have come or there exists a "durable relationship" between them, which is "duly attested". Since this provision is vague, its level of implementation at the national level varies.

When no form of registered partnership or marriage is available to same-sex couples in the state of origin, or couples choose not to make use of these, their relationships exist purely *de facto*. In such cases, according to Article 3 (2) of the Free Movement Directive, the host Member State is obliged to "facilitate entry and residence" of the partner. This duty applies only (a) if the partners share the same household in the country from which they have come or (b) if there exists a "durable relationship" between them, which is "duly attested". This obligation, which according to the final sentence of Article 3 (2) requires the host state to examine carefully the personal circumstances of each individual seeking entry and residence and to justify any denial, is not conditional upon the existence in the host Member State of a form of registered partnership considered equivalent to marriage.

The 2010 report in the vast majority of Member States found no clear guidelines on how the existence either of a common household or a "durable relationship" may be proven. This has not fundamentally changed. While the uncertainty may be explained by the need to refrain from artificially restricting the means of proof, there is a risk that the criteria relied upon by national administrations will be applied arbitrarily, leading to discrimination against same-sex partners who have been cohabiting or are in lasting relationships. Further guidance on how these provisions should be implemented would facilitate the task of national administrations, contribute to legal certainty and limit the risks of arbitrariness and discrimination. The same is true of what can actually be expected from the "duty to facilitate", a vague expression that does not necessarily translate into practical consequences in the absence of specific

and inclusive yardsticks (apart from the requirements to examine carefully the personal circumstances and to justify any denial).

As noted, in most Member States, there have not been any developments since 2010. In Luxembourg, the immigration law does not recognise unregistered partnerships.<sup>564</sup> However, the Ministry of Immigration can authorise unregistered partners of EU citizens to remain in Luxembourg if in their countries of origin they are dependent on or are members of the EU citizen's household, or if the EU citizen must take care of their partner because of serious health reasons. Thus, the immigration law does not incorporate the directive's wording aimed at partners with whom sponsors are in a "duly attested stable long-term relationship" (Article 12).<sup>565</sup> Similarly, in Latvia, Regulation No. 675 – unlike the Immigration Law – recognises as an extended family member a partner with whom an EU citizen has had a relationship lasting for at least two years.<sup>566</sup>

<sup>564</sup> Luxembourg, Law of 29 August 2008 on the free movement of persons and immigration (*Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*), 10 September 2008.

<sup>565</sup> Luxembourg, Law of 8 December 2011 modifying the amended Act of 29 August 2008 on free movement and immigration (*Loi du 8 décembre 2011 modifiant la loi modifiée du 28 août 2008 sur la libre circulation des personnes et l'immigration*), 3 February 2012.

<sup>566</sup> Latvia, Cabinet of Ministers (*Ministru kabineta*) (2011), Regulation No. 675, Procedures for EU citizens and their family members travelling to and staying in the Republic of Latvia (*Noteikumi Nr. 675, Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieceļo un uzturas Latvijas Republikā*), 30 August 2011.

## 5.2.4. Civil status, circulation of documents and mutual recognition

### Key developments

- The European Commission has published three documents addressing the problem of having different levels of protection of same-sex families in EU Member States: a Green Paper on facilitating the free circulation of documents and two proposals on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property in the area of family law.
- The proposals were last discussed by the Justice and Home Affairs Council on 4 December 2014, and further negotiated under the Italian and Luxembourg presidencies. In 2010, the European Commission published a Green Paper on facilitating the free circulation of documents and launched a broad consultation among interested parties on how to facilitate the recognition in another Member State of documents concerning a person's main life events that are drawn up in their Member State of origin. In 2013, the European Commission submitted a legislative proposal to the European Parliament on this matter. The proposal was adopted with some amendments by the parliament, and as of 15 June 2015 was still under discussion within the Council.

EU action in these fields could have substantial consequences if it succeeds in securing consensus around the principle that the validity of civil status acts should be assessed only according to the law of the country of registration, in accordance with the prohibition of 'double regulation' already established as a foundation of the common market. From the perspective of free movement of LGBTI people, this would imply that the Member State of destination would be prohibited from reassessing the validity of a marriage or partnership that is valid under the law of the Member State where it was constituted. Under such an arrangement, Member States would define the conditions for access to marriage or similar legal institutions in all internal aspects having no concern with EU law. These aspects are highly topical in Member States that currently do not recognise same-sex marriage. For example, in Italy, a recent Tribunal of Grosseto decision was followed by a public awareness campaign – targeted at city mayors – on transcribing certificates of marriages between same-sex couples

entered into abroad.<sup>567</sup> Supported by the legal advice of *Avvocatura per i diritti LGBT – Rete Lenford*, an NGO, a number of mayors decided to transcribe these marriages in their city registrar offices. The Ministry of the Interior contested the mayors' initiative on the ground that same-sex marriage is not allowed in Italy.<sup>568</sup>

Concerning the consequences of marriage and registered partnerships on property, the European Commission on 16 March 2011 tabled two legislative proposals on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property in the area of family law.<sup>569</sup> These proposals outline different rules on jurisdiction, applicable law, recognition and enforcement for married couples and registered partnerships. The Council decided to consult the European Economic and Social Committee (EESC) on these proposals, and the latter adopted an opinion in 2011.<sup>570</sup> The EESC shared the European Commission's view that legal uncertainty and discrimination regarding property rights of international couples must be eliminated. The EESC suggested the creation of an area in which it might be possible to provide the same safeguards to all international couples regarding consequences for their property regimes.

On 25 April 2012, the President of the European Parliament asked FRA to deliver an opinion on the proposed regulation dealing with the consequences registered partnerships have for property matters. In the request, the President noted that, while married couples could choose the applicable law under Articles 16 and 18 of the Commission proposal concerning matrimonial property regimes, the proposal

567 Italy, Tribunal of Grosseto (*Tribunale di Grosseto*) (2014), *X and Y v. Registrar of Grosseto (Ufficiale dello stato civile di Grosseto)*, decision, 3 April 2014, [www.articolo29.it/wp-content/uploads/2014/04/ordinanza-Tribunale-di-Grosseto-3-aprile-20141.pdf](http://www.articolo29.it/wp-content/uploads/2014/04/ordinanza-Tribunale-di-Grosseto-3-aprile-20141.pdf).

568 Italy, Minister of Internal Affairs (*Ministero dell'Interno*) (2014), Note on the transcription of marriages (*Circolare in materia di trascrizione dei matrimoni*), 7 October 2014, [www.articolo29.it/documentazione-giuridica/circolare-ministero-dellinterno-in-materia-dei-trascrizione-dei-matrimoni-7-ottobre-2014/](http://www.articolo29.it/documentazione-giuridica/circolare-ministero-dellinterno-in-materia-dei-trascrizione-dei-matrimoni-7-ottobre-2014/).

569 European Commission (2011c), *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, COM(2011) 126 final, Brussels, 16 March 2011; European Commission (2011d), *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships*, COM(2011) 127 final, Brussels, 16 March 2011.

570 European Economic and Social Committee (EESC) (2011b), *Opinion on the 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' COM(2011) 126 final – 2011/0059 (CNS) and the 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships' COM(2011) 127 final – 2011/0060*, OJ 2011 C 376, pp. 87–91.



on registered partnerships did not allow a comparable choice of law for registered partners. Instead, Article 15 of the proposal on registered partnerships referred to the “law of the State in which the partnership was registered” as the only applicable law. FRA’s opinion concluded that the proposed regulation did not provide convincing reasons for denying registered partners a choice comparable to that offered to married couples. This risked violating equal treatment under EU law.<sup>571</sup> Subsequently, on 17 December 2012, the Council held a public debate on the two proposed regulations. It reached a broad agreement on proposed political guidelines to further advance the work at the expert level.<sup>572</sup> Under a special legislative procedure (Parliament’s consultation), the European Parliament on 10 September 2013 adopted two legislative resolutions on the proposals, approving the Commission proposals with amendments.<sup>573</sup> The parliament took into account FRA’s opinion by introducing to Article 15 of the proposal concerning registered partnerships an amendment that allows registered partners to choose what law applies to the property regime of their registered partnership. The proposals were last discussed by the Justice and Home Affairs Council on 4 December 2014, and further negotiated under the Italian (2014) and Luxembourg (2015) presidencies of the Council.

## 5.3. Family reunification under EU migration law

### 5.3.1. Background

#### Key development

- The Family Reunification Directive must be applied in accordance with fundamental rights – in a non-discriminatory manner.

As mentioned, the European Commission published a Green Paper on the right to family reunification in 2011.<sup>574</sup> The Commission launched a public consultation and held a public hearing at the European Integration Forum in 2012. The consensus of the public consultation was that the Family Reunification Directive did not need redrafting, but that the Commission should ensure full implementation of the existing rules, open infringement procedures where necessary and produce guidelines on certain identified issues.<sup>575</sup>

In 2014, in a communication to the European Parliament and the Council, the Commission provided guidelines to Member States on how to apply the Family Reunification Directive.<sup>576</sup> The Commission underlined that the Court of Justice of the EU confirmed that Article 4 (1):

*“imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation”.*<sup>577</sup>

Member States have a certain margin of appreciation only concerning the following: (a) they may decide to extend the right to family reunification to family members other than the spouse and minor children; (b) they may subject exercising the right to family reunification to compliance with certain requirements, when the directive so allows; and (c) they may retain a certain margin of appreciation

571 FRA (2012b), *Opinion 1/2012 on the Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships*, Vienna, 31 May 2012.

572 Council of the European Union (2012), *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships – Orientation debate*, ST 16878 2012 INIT, Brussels, 30 November 2012.

573 European Parliament (2013a), *Legislative resolution on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011)0126 – C7-0093/2011 – 2011/0059(CNS))*, P7\_TA(2013) 0338, Strasbourg, 10 September 2013; European Parliament (2013b), *Legislative resolution on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)0127 – C7-0094/2011 – 2011/0060(CNS))*, P7\_TA(2013) 0337, Strasbourg, 10 September 2013.

574 European Commission (2011b), *Right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, COM(2011) 735 final, Brussels, 15 November 2011.

575 European Integration Forum (EIF) (2012), *Seventh meeting of the European Integration Forum: Public hearing on the right to family reunification of third-country nationals living in the EU*, Brussels, 31 May–1 June 2012.

576 European Commission (2014c), *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210 final, Brussels, 3 April 2014.

577 *Ibid.* The Commission referred to CJEU, C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 60.

to verify whether or not requirements imposed by the directive are met, and to weigh the competing interests of the individual and the community as a whole in each individual situation.<sup>578</sup> However, derogations must be interpreted strictly. The margin of appreciation allowed to Member States must not be used in a manner that would undermine the directive's objective – to promote family reunification – or its effectiveness.<sup>579</sup>

The Commission has pointed out that the directive must be interpreted and applied in accordance with fundamental rights, particularly the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy, as enshrined in the ECHR and the EU Charter of Fundamental Rights.<sup>580</sup>

### 5.3.2. Position of same-sex spouses

#### Key development

- 12 EU Member States (Belgium, Denmark, Finland, France, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) treat same-sex and different-sex spouses equally for purposes of family reunification.

The Family Reunification Directive requires Member States to authorise the entry and residence of the sponsor's spouse. The directive applies to third-country nationals lawfully residing in EU Member States, including those granted refugee status. The directive does not define the meaning of 'spouse'. However, Member States should take into account their obligations under Article 6 (1) and 6 (3) of the Treaty on the European Union (TEU), and to comply with the EU Charter of Fundamental Rights and with fundamental rights as general principles of EU law.<sup>581</sup> For example, not allowing a same-sex spouse to join the sponsor could disrupt their private and family life. If such a denial prevents

a durable partnership from continuing, for example, because the relationship could not develop elsewhere because LGBTI people are harassed in the countries of which the individuals concerned are nationals or where they could establish themselves, the denial could constitute a violation of Article 8 of the ECHR and Article 9 of the EU Charter of Fundamental Rights.

The directive should be implemented without discrimination on grounds of sexual orientation. The implication is that the same-sex spouse of a sponsor should be granted the same rights as those granted to a different-sex spouse.

In this context, eleven Member States (Belgium, Denmark, France, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) treat same-sex and different-sex spouses equally for purposes of family reunification. It is probable that changes in Finland, where same sex marriage is expected to enter into force in 2017, will raise this number to twelve. Since 2010, the situation has changed, particularly in Member States that allow same-sex partners to marry. According to Luxembourg's law on marriage and adoption of 2014, same-sex spouses coming from countries where same-sex marriage is recognised can be reunited. The law encompasses marriages between a Luxembourg citizen and a foreigner. After the Marriage Act enters into force in 2015, marriages registered in other countries will be recognised in Luxembourg. Earlier, the case law provided that same-sex marriages legally registered outside Luxembourg had the same legal effect as a Luxembourg registered partnership.<sup>582</sup> In the United Kingdom, the Marriage (Same Sex Couples) Act 2013 provides that same-sex marriages cannot be denied recognition as marriage in England and Wales. These provisions came into force on 13 March 2014; in Scotland, equivalent provisions came into force on 16 December 2014. In France, the Law opening marriage to couples of the same sex, adopted on 17 May 2013, expands the concept of spouse, under Articles L. 411-1 and L. 411-4 of the Code of Entry and Residence of Aliens and the Right to Asylum (CESEDA), to include same-sex spouses.

The remaining 17 Member States do not treat same-sex spouses as legal spouses, since they do not allow marriage between same-sex partners (in view of the changes in Finland, where laws allowing same-sex marriage were adopted, this number may fall to 16 by 2017). Three of these Member States (Austria, the Czech Republic, and Germany) are likely to treat same-sex spouses as registered partners for purposes of family reunification.

578 By analogy with CJEU, C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, paras. 54, 59, 61–62.

579 CJEU, C-578/08, *Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 43.

580 European Commission (2014c). The Commission referred to CJEU, C-578/08, *Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, paras. 43, 44.

581 According to Recital No. 2 of the Family Reunification Directive, "Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union".

582 Luxembourg, Administrative Tribunal of the Grand Duchy of Luxembourg (*Tribunal administrative du Grand-Duché de Luxembourg*), Docket No. 19509, 3 October 2005.



It is worth noting the particular situation of Italy, where same-sex couples do not have access to marriage and the right to family reunification is not recognised for persons in same-sex marriages by Legislative Decree No. 5/2007, which implements the Family Reunification Directive. Therefore, a differentiation is established between third-country nationals and EU spouses. Concerning the latter, the Minister of Internal Affairs released a circular clarifying that, when one or both same-sex spouses is an EU citizen, they should be treated as family members.<sup>583</sup>

### 5.3.3. Position of same-sex partners

#### Key developments

- 17 EU Member States grant family reunification rights to same-sex partners of third-country nationals.
- 11 EU Member States appear not to grant family reunification rights to unmarried partners of sponsors – regardless of whether they are of the same or different sex.

Under Article 4 (3) of the Family Reunification Directive, Member States decide whether or not to authorise entry and residence for unmarried or registered partners of sponsors. The principle of non-discrimination (as interpreted by the European Court of Human Rights) implies that, if a Member State decides to extend the right of family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners, this should benefit all such partners, and not only different-sex partners.

Seventeen Member States currently grant family reunification rights to same-sex partners of third country nationals. Ten extend the right to family reunification to same-sex partners in *de facto* relationships (Austria, Belgium, Denmark, Finland, France, the Netherlands, Portugal,<sup>584</sup> Spain, Sweden and the United Kingdom), while seven (the Czech Republic, Germany, Hungary, Ireland, Luxembourg, Malta and Slovenia) restrict this possibility to registered partnerships. Three (Austria,

the Czech Republic, Germany) are likely to treat same-sex spouses as registered partners for purposes of family reunification.

The Family Reunification Directive does not extend to unmarried partners of sponsors the same family reunification rights granted to sponsors' spouses – regardless of whether or not the country of origin of the same-sex individuals concerned allows them to marry. As a result, individuals of different sexes who are allowed to marry enjoy broader family reunification rights than same-sex individuals who do not have this option, raising questions of indirect discrimination.

In some Member States, same-sex partners who have not entered into registered partnerships may still obtain entry and a residence permits, though formally not for family reunification. In France, when the situation of a third-country national does not meet the conditions required for family reunification, it is possible to apply for a temporary residence permit bearing the notice "private and family life".<sup>585</sup>

The remaining 11 Member States (Bulgaria, Cyprus, Croatia, Estonia, Greece, Italy, Latvia, Lithuania, Poland, Romania and Slovakia) appear not to extend family reunification rights to unmarried partners of sponsors, either of the same or of different sexes.

In certain Member States, such as Estonia or Slovakia, this restriction can be circumvented if the partner can prove that he or she is in a position of economic or social dependency. This possibility is afforded by the Family Reunification Directive, which defines minimum standards that EU Member States are free to exceed (Article 3 (5)).<sup>586</sup>

Since 2010, four additional Member States recognise the right to family reunification of unmarried partners living in stable long-term relationships. In France and Portugal, this is because their status, in the context of family reunification, was equalised to the treatment of married same-sex couples; in two other cases, this resulted thanks to the introduction of national laws on registered partnerships (Malta) and to amendments to other national laws (Slovenia).

Table 6 summarises EU Member States' recognition of same-sex family members for purposes of free movement, asylum and family reunification.

583 Italy, Minister of the Interior (*Ministero dell'Interno*) (2012b), Note on same-sex unions – residence permit under Legislative Decree No. 30/2007 (*Circolare sulle unioni tra persone dello stesso sesso – Titolo di soggiorno ai sensi del decreto legislativo n. 30/2007*) No. 8996, 5 November 2012, [www.articolo29.it/wp-content/uploads/2012/11/nota-ministero-interni-5-11-2012.pdf](http://www.articolo29.it/wp-content/uploads/2012/11/nota-ministero-interni-5-11-2012.pdf).

584 Portugal, Law No. 29/2012, first amendment to Law No. 23/2007 of 4 July 2007, which approved the legal framework for entry, permanence, exit and removal of foreigners from Portugal (*Lei n.º 29/2012, primeira alteração à Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 9 August 2012, Arts. 98–108.

585 France, Code of Entry and Residence of Aliens and the Right to Asylum (CESEDA) amended by Act n° 2011-672 of 16 June 2011, Art. 18 (*Code de l'entrée et du séjour des étrangers et du droit d'asile – CESEDA. Modifié par Loi n° 2011-672 du 16 juin 2011, art. 18*), Art. L. 313-11, paras 3, 4 and 7.

586 These countries include Denmark, Ireland and the UK, even though these Member States are not taking part in the Family Reunification Directive.

Table 6: Inclusion of married and unmarried same-sex partners in the definition of ‘family member’ for purposes of free movement, family reunification and asylum.

Country code	Free movement*		Family reunification		Asylum		Comments
	Same-sex spouse	Same-sex partner	Same-sex spouse	Same-sex partner	Same-sex spouse	Same-sex partner	
AT	✓	✓	✓	✓	✓	✓	Same-sex spouses are considered registered partners for purposes of free movement and family reunification
BE	✓	✓	✓	✓	✓	✓	
BG							
CY					?		The Qualification Directive was adopted into national law without incorporating the part of the Directive definition referring to “unmarried couples in a stable relationship”. The definition of ‘family members’ includes only: the spouse of the refugee; the minor children of the refugee, provided they are unmarried and dependent on the refugee; and the parents of the refugee, provided they are his or her dependants. As a result, unmarried couples, whether homosexual or heterosexual, do not fall within this definition. The argument put forward by the authorities in this respect is that there is no discrimination because heterosexual and homosexual couples are treated equally by the law. However, this position ignores the fact that heterosexuals can marry and thus meet the law’s preconditions, while homosexuals cannot
CZ	✓	✓	✓	✓	✓	✓	Same-sex spouses are considered registered partners for purposes of family reunification. Rights concerning family reunification and asylum are restricted to registered partnerships
DE	✓	✓	✓	✓	✓	✓	Same-sex spouses are considered registered partners for purposes of free movement and family reunification. Since 2013, the law on freedom of movement equalises registered partners and spouses. There is equal treatment in terms of family reunification and asylum. Rights concerning family reunification are restricted to registered partnerships
DK	✓	✓	✓	✓	✓	✓	
EE	?	?			?		
EL							In the joint cases of <i>Vallianatos and others v. Greece</i> , delivered on 7 November 2013, the Grand Chamber of the European Court of Human Rights ruled that, by excluding same-sex couples from the scope of Law 3919/2008 on civil unions, Greece violated Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the European Convention on Human Rights
ES	✓	✓	✓	✓	✓	✓	
FI	✓	✓	✓	✓	✓	✓	Same-sex spouses are considered registered partners for purposes of free movement
FR	✓	✓	✓	✓	✓	?	
HR	?	?				?	The Foreigners Act’s definition of family for purposes of free movement and family reunification does not include homosexual spouses or partners. The Asylum Act refers to the definition of family used in the Foreigners Act
HU		✓		✓		✓	While there is no explicit restriction on recognizing same-sex spouses in immigration, because same-sex marriage is generally not recognized, it may (1) not be recognized at all or (2) it may be recognized as a registered partnership, and thus treated similarly to marriage. There is no case law to support either option. Except for partners of Hungarian or EU citizens, only registered partners are recognized, <i>de facto</i> partners are not.
IE	✓	✓	✓	✓	✓	✓	Ireland, Marriage Act No. 35 of 2015, signed by the President of Ireland on 29 October 2015.
IT	✓						
LT	?				✓	✓	
LU	✓	✓	✓	✓		✓	Same-sex spouses are considered registered partners for purposes of family reunification. Rights concerning family reunification are restricted to registered partnerships



Country code	Free movement*		Family reunification		Asylum		Comments
	Same-sex spouse	Same-sex partner	Same-sex spouse	Same-sex partner	Same-sex spouse	Same-sex partner	
LV	✓	✓					Article 3 (4) of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile. The Cabinet of Ministers' Regulation No. 675 (Procedures for EU citizens and their family members travelling to and staying in the Republic of Latvia) specifies that a partner with whom a Union citizen has a relationship lasting at least two years or a partner with whom a Union citizen has a registered partnership qualifies as an extended family member of the Union citizen
MT	✓	✓	✓	✓	✓	✓	Same-sex spouses are considered registered partners for purposes of free movement and family reunification. Rights concerning family reunification are restricted to registered partnerships. Situation likely to change with the introduction of the Civil Unions Act
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓	✓	✓	✓	
RO	?	?					
SE	✓	✓	✓	✓	✓	✓	
SI	✓	✓	✓	✓	✓	✓	Provides a legal scheme for registered partnership in domestic law. The new Aliens Act ( <i>Zakon o tujcih</i> ), adopted in 2011, grants LGBT EU and non-EU nationals the right to be reunited with their registered partners and specified family members (e.g. children, children of one of the registered partners). This Act was modified in 2014 to include the right of LGBT persons who qualify for international protection to be reunited with their registered partners and certain family members. The 2014 amendments took effect in January 2015. Same-sex spouses are likely to be treated as registered partners. Non-registered LGBT partners do not enjoy this right even if they have lived in a durable relationship, because the Slovenian legal order only recognises different-sex cohabitation/durable union. This may change if a draft law proposed by the government in April 2014 is adopted
SK		✓					
UK	✓	✓	✓	✓	✓	✓	
TOTAL	18	19	16	17	15	7	

Notes: ✓ = applicable; ? = doubtful/unclear.

\* In the vast majority of Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a 'durable relationship' may be proven for purposes of Article 3 (2) of the Free Movement Directive.

Source: FRA, 2015

## 5.4. Family members of LGBTI people seeking asylum

### Key developments

- 12 EU Member States treat same-sex spouses of asylum seekers in the same manner as different-sex spouses.
- Same-sex registered partners appear to enjoy the right to residence in 16 EU Member States.

This section deals with the legal framework governing requests for refugee status by LGBTI people in relationships with same-sex partners who have been granted asylum. In this regard, Article 23 of the Qualification Directive (recast) states that Member States shall ensure that family unity can be maintained. The directive did not amend the definition of family member in relation to same-sex unmarried partners. According to Article 2 (j), in the context of asylum and/or subsidiary protection, ‘family members’ include both spouses and unmarried partners in stable relationships, where the legislation or practice of the Member State concerned treats unmarried couples comparably to married couples under its law relating to third-country nationals. This provision may prove too limited for LGBTI asylum seekers, as they frequently originate from countries that do not recognise same-sex marriage or other forms of relationships between people of the same sex, and because there are few Member States that recognise unmarried couples comparably to married couples under their law relating to third-country nationals. This means it is possible that same-sex partners of beneficiaries of international protection will be refused residence permits.

With respect to national law, whether same-sex partners fall within the definitions currently provided in Article 2 (j) remains unclear and inconsistent throughout the EU.

Only 13 Member States (Austria,<sup>587</sup> Belgium,<sup>588</sup> Denmark,<sup>589</sup> Finland,<sup>590</sup> France,<sup>591</sup> Ireland,<sup>592</sup> Lithuania,<sup>593</sup> the Netherlands,<sup>594</sup> Portugal,<sup>595</sup> Slovenia (starting from January 2015),<sup>596</sup> Spain,<sup>597</sup> Sweden<sup>598</sup> and the United Kingdom<sup>599</sup>) treat same-sex spouses of refugees (a rather exceptional status) in the same manner as different-sex spouses. However, only eight did so in 2010 (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) meaning substantial progress has been made on this issue in a relatively short time period.

Whether registered partners are included in the definition of ‘family member’ can be difficult to determine, as there is considerable vagueness and a lack of clear guidelines. Sometimes national laws relating to third-country nationals are not coordinated with rules of international private law, and this causes legal uncertainty. Additionally, national laws may not define ‘family member’, or may not specify whether the definition of partner encompasses same-sex partners. Often no case law exists to confirm either interpretation. This may prove detrimental for involved parties. It appears that

- 587 Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich, Niederlassungs- und Aufenthaltsgesetz, NAG*), 1 January 2006, last modified by BGBl. I No. 144/2013.
- 588 Belgium, Royal Decree relating to access to land, stay, establishment and removal of third-country nationals (*Arrêté Royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*), 8 October 1981, Art. 88.
- 589 According to information provided by the national expert of FRA's research network, LGBTI partners are accepted as family members in the context of asylum and/or subsidiary protection if they are cohabiting partners, on an equal footing with different-sex partners.
- 590 Finland, Aliens Act (*Ulkomaalaislaki/Utlänningslag*), 301/2004, 30 April 2004.
- 591 France, Code of Entry and Residence of Aliens and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile, CESEDA*), 24 November 2004.
- 592 Ireland, Marriage Act No. 35 of 2015, signed by the President of Ireland on 29 October 2015.
- 593 Lithuania, Law on the legal status of aliens (*Istatymas dėl užsieniečių teisinės padėties*), No. 73-2539, 29 April 2004.
- 594 According to information provided by the national expert of FRA's research network, same-sex partners and other family members of a refugee can also qualify for a residence permit on asylum grounds (*verblijfsvergunning asiel*). This concerns the spouse or minor child of the refugee and an alien who, as a partner or adult child, is dependent on the refugee to such an extent that he or she belongs to the refugee's family for that reason.
- 595 Portugal, Law No. 9/2010, 31 May 2010 (*Lei N.º 9/2010 de 31 de Maio – Permite o casamento civil entre pessoas do mesmo sexo*), recognises same-sex marriages. According to this law, married or unmarried same-sex partners are legally recognised as family members.
- 596 Slovenia, Act amending the Aliens Act (*Zakon o spremembah in dopolnitvah Zakona o tujcih*), 3 April 2014.
- 597 Spain, Asylum and Subsidiary Protection Act (*Ley reguladora de derecho de asilo y de la protección subsidiaria*), 30 October 2009, No. 12.
- 598 Sweden, Aliens Act (*Utlänningslagen*) 2005:716, 29 September 2005.
- 599 United Kingdom, Immigration Rules, part 11, para. 349, substituted from 9 October 2006 (HC 28).



same-sex registered partners would be granted a right to residence in 16 Member States (Austria,<sup>600</sup> Belgium,<sup>601</sup> the Czech Republic,<sup>602</sup> Denmark,<sup>603</sup> Germany,<sup>604</sup> Finland,<sup>605</sup> Hungary,<sup>606</sup> Ireland,<sup>607</sup> Lithuania,<sup>608</sup> Luxembourg,<sup>609</sup> the Netherlands,<sup>610</sup> Portugal,<sup>611</sup> Slovenia (starting in January 2015),<sup>612</sup> Spain,<sup>613</sup> Sweden<sup>614</sup> and the United Kingdom<sup>615</sup>). This was the case in only 12 Member States in 2010 (Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Ireland, Luxembourg, the Netherlands, Spain, Sweden and the United Kingdom).

However, in Hungary, where same-sex marriage is not recognised but same-sex couples can enter into registered partnerships, problems could result from legal

inconsistencies: same-sex spouses could either obtain the right to asylum as registered partners of refugees, or not be recognised as family members at all and have their applications dismissed.<sup>616</sup>

In Malta, it is unclear whether the introduction of civil unions will affect the definition of dependent family members in the Refugees Act, which only addresses married couples,<sup>617</sup> given that the Civil Unions Act does not refer to the Refugees Act.

In some cases, national law only grants the right to residence to same-sex partners if a registered partnership already existed in the country of origin. This condition appears problematic given that it is reasonable to assume that the vast majority of asylum seekers flee from countries that persecute LGBTI people, and where registration is not possible. The right to residence for same-sex partners of asylum seekers and refugees is restricted to registered partners and does not include unmarried unregistered cohabitants at least in Austria, Belgium, Croatia, the Czech Republic, Germany, Ireland, Lithuania, Luxembourg and Slovenia.

In Croatia, the Aliens Act (Article 56)<sup>618</sup> explicitly excludes same-sex couples from the definition of family members for purposes of granting a residence permit facilitating family reunification. On the other hand, the Asylum Act<sup>619</sup> provides that couples in stable relationships will be considered family members if they can prove a lasting relationship by means of, for example, a common address where they have lived for at least three years. As a consequence, although the Asylum Act failed to provide for this explicitly, it appears that the definition would allow same-sex partners to be treated as family members for purposes of granting asylum. However, this apparent conflict between the Aliens Act and the Asylum Act may make it possible for authorities to interpret the law as justifying refusing to grant residence permits to same-sex partners of refugees.

As noted above, the Qualification Directive (recast) did not modify the definition of family member relating to the position of (same-sex) unmarried partners, either

600 Austria, Settlement and Residence Act, 1 January 2006, last modified by BGBl. I Nr. 144/2013.

601 Belgium, Royal Decree relating to access to land, stay, establishment and removal of third-country nationals (*Arrêté Royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*), 8 October 1981, Art. 88.

602 Czech Republic, Aliens Act (*Zákon o pobytu cizinců*), 30 November 1999.

603 According to information provided by the national expert of FRA's research network, LGTBI partners are accepted as family members in the context of asylum and/or subsidiary protection if they are cohabiting partners, on an equal footing with different-sex partners.

604 Germany, Asylum Procedure Law (*Asylverfahrensgesetz*), 26 June 1992.

605 Finland, Aliens Act (*Ulkomaalaislaki/Utlänningslag*), 301/2004, 30 April 2004.

606 Hungary, Act No. XXIX of 2009 on registered partnership and related legislation and on the amendment of other statutes to facilitate the proof of cohabitation (2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatáról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról), 1 July 2009, available in Hungarian at: [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=124380.178392](http://njt.hu/cgi_bin/njt_doc.cgi?docid=124380.178392).

607 Ireland, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, 19 July 2010.

608 Lithuania, Law on the legal status of aliens (*Jstatymas dėl užsieniečių teisinės padėties*), No. 73-2539, 29 April 2004.

609 Luxembourg, Consolidated text of the Asylum Act of 5 May 2006 and complementary forms of protection (*Texte coordonné de la loi du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection*), 3 July 2013.

610 According to information provided by the national expert of FRA's research network, same-sex partners and other family members of a refugee can also qualify for a residence permit on asylum grounds (*verblijfsvergunning asiël*). This concerns the spouse or minor child of the refugee and an alien who as a partner or adult child is dependent on the refugee to such an extent that he or she belongs to the refugee's family for that reason.

611 Portugal, Law No. 9/2010, 31 May 2010 (*Lei Nº 9/2010 de 31 de Maio - Permite o casamento civil entre pessoas do mesmo sexo*), recognises same-sex marriages. According to this law, married or unmarried same-sex partners are legally recognised as family members.

612 Slovenia, Act amending the Aliens Act (*Zakon o spremembah in dopolnitvah Zakona o tujcih*), 3 April 2014.

613 Spain, Asylum and Subsidiary Protection Act (*Ley reguladora de derecho de asilo y de la protección subsidiaria*), No. 12/2009, 30 October 2009.

614 Sweden, Aliens Act (*Utlänningslagen*) 2005:716, 29 September 2005.

615 United Kingdom, Immigration Rules, part 11, para. 349, substituted from 9 October 2006 (HC 28).

616 Hungary, Act No. LXXX of 2007 on asylum (2007. évi LXXX. törvény a menedékjogról), Art. 2 j), available in Hungarian at: [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=110729.259725](http://njt.hu/cgi_bin/njt_doc.cgi?docid=110729.259725); Hungary, Act No. XXIX of 2009 on registered partnership and related legislation and on the amendment of other statutes to facilitate the proof of cohabitation, Art. 3.

617 Malta, Refugees Act (*Att dwar ir-Rifugjati*), 1 October 2001, as amended by Act VIII of 2004 and Legal Notice 40 of 2005, Art. 2.

618 Croatia, Aliens Act (*Zakon o strancima*) (2011), *Official Gazette (Narodne novine)* No. 130/11, 16 November 2011, amendment in *Official Gazette (Narodne novine)* No. 74/13, 19 June 2013.

619 Croatia, Asylum Act (*Zakon o azilu*) (2007), *Official Gazette (Narodne novine)* No. 79/07, 13 July 2007, amended by Act (*Zakon o azilu*) No. 143/13, 2 December 2013.

registered or *de facto*. Therefore, Member States can refuse to grant residence rights to same-sex partners of asylum seekers and refugees, albeit only when they treat unmarried partners differently from spouses in their national law relating to third-country nationals. The ECtHR clearly stated that recognising certain rights of unmarried different-sex couples but not of same-sex couples would constitute discrimination against LGBTI people.<sup>620</sup> Therefore, the principle of non-discrimination of unmarried same-sex partners of asylum seekers and refugees *vis-à-vis* unmarried different-sex partners should apply, regardless of comparability with married couples.

The regime thus established may still be problematic in light of the principle of equal treatment: in the overwhelming majority of cases, LGBTI people in need of international protection originate from jurisdictions that do not allow same-sex marriages or registered partnerships; this inability to marry, when combined with EU Member State legislation that does not treat unmarried couples comparably to married couples in its legislation relating to aliens, leads to the family reunification rights of LGBTI refugees being less extensive than those of heterosexual refugees. This may be incompatible with the prohibition of indirect discrimination on grounds of sexual orientation, because same-sex partners are often barred from marriage. The number of Member States allowing same-sex couples to marry or offering an alternative legal scheme to them has continued to grow. The ECtHR, in *Kozak*,<sup>621</sup> *Schalk and Kopf*,<sup>622</sup> *P.B. and J.S.*,<sup>623</sup> and *Vallianatos*,<sup>624</sup> has clarified the need to recognise same-sex couples' right to respect for family life. However, in order to grant substantive rights to unmarried same-sex couples, Member States should implement the Qualification Directive (recast) in accordance with the new Recital No. 38, which specifies that:

*“When deciding on entitlements to the benefits included in this Directive, Member States should take due account [...] of the particular circumstances of the dependency on the beneficiary of international protection of close relatives who are already present in the Member State and who are not family members of that beneficiary”.*

Sweden evaluated a case relating to an unmarried same-sex couple of asylum seekers from Uganda in

2013.<sup>625</sup> The Migration Board first granted asylum to one partner and denied it to the other. A few days later, the couple got married in Sweden, and the second man again filed an application for a residence permit soon thereafter, now on the basis of being married to his husband. He was asked to return to Uganda to apply for family reunion. However, since going back to Uganda would have entailed a risk of persecution owing to his sexual orientation, his asylum request was eventually granted in 2013.

## 5.5. Children of same-sex couples

### Key developments

- Children should grow up in a family environment. EU Member States are to ensure that children of same-sex couples are not separated from their parents against their will and that applications by children or their parents to enter or leave a Member State for the purpose of family reunification are dealt with by the Member States in a positive, humane and expeditious manner.

The Free Movement Directive includes in the notion of family members “the direct descendants” of EU citizens or those of their spouses or registered partners (as defined in art. 2(2)(b)). Such descendants are divided into two categories: those under 21 years of age, and those over 21. To be entitled to family reunification, the latter must demonstrate dependency upon the EU citizen or the citizen’s partner. However, the status of children who are not descendants, such as foster children, raises questions.

In its 2009 guidance for better transposition and application of the Free Movement Directive,<sup>626</sup> the European Commission states that:

*“the notion of direct relatives in the descending and ascending lines extends to adoptive relationships or minors in custody of a permanent legal guardian. Foster children and foster parents who have temporary*

620 ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003; *Kozak v. Poland*, No. 13102/02, 2 March 2010; *Vallianatos and Others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013, para. 92; *P.B. and J.S. v. Austria*, No. 18984/02, 22 July 2010, para 34.

621 ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010.

622 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010.

623 ECtHR, *P.B. and J.S. v. Austria*, No. 18984/02, 22 July 2010.

624 ECtHR, *Vallianatos and Others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013.

625 Landes, D. (2013), ‘Gay Ugandan couple to remain in Sweden’, *The Local*, 1 March 2013, [www.thelocal.se/20130301/46494](http://www.thelocal.se/20130301/46494).

626 European Commission (2009), *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM(2009) 313 final, Brussels, 2 July 2009.



*custody may have rights under the Directive, depending upon the strength of the ties in the particular case."*

It should be recalled that adopted children are fully protected by Article 8 of the ECHR.<sup>627</sup> Furthermore, the Commission added that there is no restriction on the degree of relatedness. This would imply that the notion of descendants includes grandchildren and great-grandchildren. Although the directive does not so specify, the Commission notes that national authorities may request evidence of the claimed family relationships.

The directive covers stepchildren.<sup>628</sup> This is a common situation among LGBTI parents, presumably particularly in Member States that do not allow two people of the same-sex to both be the legal parents of a child. Some male couples use surrogacy to conceive children. Two recent ECtHR cases address whether it is possible to refuse to register a foreign order according to which the members of a different-sex couple who used surrogacy abroad are considered the legal parents of the child. According to the court, Member States' margin of appreciation in such a case is limited by the best interests of the child. In particular, the right to respect for the child's private life must be protected (Article 8 of the ECHR).<sup>629</sup> Since it is necessary to apply the general principle of the best interests of the child, the fact that the parents are of the same sex or of different sexes appears irrelevant in this context.

There are some differences between the Free Movement Directive and the Family Reunification Directive. Article 4 (1) of the latter states that "minor children", including adopted children of the sponsor or the spouse, are entitled to family reunification on condition that the sponsor or spouse has custody over them, and the children are dependent on him or her. This seems to incorporate more restrictions than the Free Movement Directive, according to which 'direct descendants' include non-dependant children up to their 21<sup>st</sup> birthday, and dependant children even if over the age of 21.

Article 4 (2) of the Family Reunification Directive contains optional provisions allowing Member States to authorise the entry and residence of adult unmarried descendants.

In its guidance for application of the Family Reunification Directive,<sup>630</sup> the European Commission noted that under Article 5 (5) the child's best interests must be a primary consideration in all actions relating to children. Member States must take a child's well-being and the family's situation into consideration in accordance with the principle of respect for family life, as recognised by the Convention on the Rights of the Child and the EU Charter of Fundamental Rights. The CJEU has ruled that,<sup>631</sup> under Article 5 (5) and Recital 2, when a Member State administration examines an application, the directive must be interpreted and applied in light of the Charter's provisions on respect for private and family life<sup>632</sup> and the rights of the child<sup>633</sup>.

The CJEU has also ruled<sup>634</sup> that, for the full and harmonious development of their personality, children should grow up in a family environment,<sup>635</sup> that Member States are to ensure that children are not separated from their parents against their will<sup>636</sup> and that applications by children or their parents to enter or leave a Member State for the purpose of family reunification are to be dealt with by the Member States in a positive, humane and expeditious manner.<sup>637</sup>

Furthermore, the CJEU has recognised<sup>638</sup> that the right to respect for private or family life must be read in conjunction with the obligation to have regard for the child's best interests,<sup>639</sup> taking into account the need for children to maintain a personal relationship with both their parents (if there are two) on a regular basis.<sup>640</sup>

A specific concern regarding children of same-sex couples arises in Member States where there is no legal recognition of same-sex partners. In principle, if the child is the registered child of an EU citizen, no problem for his/her exercise of free movement rights should arise. By contrast, registered children of a non-EU citizen in a same-sex partnership with an EU citizen do not uniformly enjoy the same protection. This situation has been reported in Bulgaria, Greece and Estonia.

627 EComHR, *X v. Belgium and Netherlands*, No. 6482/74, 10 July 1975; EComHR, *X v. France*, No. 9993/82, 5 October 1982; ECtHR, *X, Y and Z v. United Kingdom*, No. 21830/93, 22 April 1997.

628 CJEU, C-413/99, *Baubast and R v. Secretary of State for the Home Department*, 17 September 2002, para. 57.

629 ECtHR, *Mennesson v. France*, No. 65192/11, 26 June 2014; ECtHR, *Labassee v. France*, No. 65941/11, 26 June 2014. Both judgments become final under Art. 44 (2) of the Convention on 26 September 2014.

630 European Commission (2014c), Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM/(2014/0210) 210 final, Brussels, 3 April 2014.

631 CJEU, C-356/11, *O. & S. v. Maahanmuuttovirasto*, and C-357/11, *Maahanmuuttovirasto v. L.*, 6 December 2012, para. 80.

632 Charter of Fundamental Rights of the EU, Art. 7.

633 *Ibid.*, Art. 24 (2) and (3).

634 CJEU, C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 57.

635 United Nations (UN), Convention on the Rights of the Child, 20 November 1989, sixth recital of the preamble.

636 *Ibid.*, Art. 9 (1).

637 *Ibid.*, Art. 10 (1).

638 CJEU, C-540/03, *European Parliament v. Council of the European Union*, 27 June 2006, para. 58.

639 Charter of Fundamental Rights of the EU, Art. 24 (2).

640 *Ibid.*, Art. 24 (3).

In other Member States, the situation is changing in light of increasing recognition and protection of same-sex couples. For example, in France in 2012, the Court of Cassation declared that recording in the French register of civil status a foreign adoption certificate acknowledging as parents two unmarried people of the same sex “is contrary to the essential principle of French law dealing with filiation”.<sup>641</sup> Given that same sex marriage was recognised in 2013, this position merits reconsideration, since the new law on marriage provides same-sex couples the possibility to adopt, marking a new general principle on filiation in French law. Nonetheless, where national laws on same-sex couples do not provide specific protection for their children, the latter’s full enjoyment of the right to free movement remains uncertain.

Concerning international protection, the Qualification Directive (recast) does not explicitly include children of same-sex couples or of a single LGBTI parent. However, Article 2 (j) of the directive includes among ‘family members’, in the context of asylum and/or subsidiary protection, “the minor children of the couples or of the

beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law”. A “minor” is defined as a third-country national or stateless person under the age of 18.

The research for this report did not identify any cases where same-sex partners or their children applied for residence permits as ‘family members’. It could be argued that, according to the Qualification Directive (recast), children of same-sex couples or with an LGBTI parent must be granted residence rights when one of their parents receives international protection. At the same time, it seems that international protection ought to be granted to the legal guardian or the adult responsible for the LGBTI child beneficiary of international protection. Recital 38 of the Qualification Directive (recast) makes reference to “the best interests of the child”, which the Member States should duly take into account when deciding on entitlements to the benefits included in the directive.

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<sup>641</sup> France, Court of Cassation (*Cour de cassation*), Decision No. 11-30262, 7 June 2012.



# 6

## International protection and asylum for LGBTI people



LGBTI people seek asylum in European Union Member States because they may suffer persecution and harassment in their countries of origin. This chapter examines the legal situation of LGBTI people who seek international protection. First, it considers the European Union's legal and institutional approach to LGBTI people seeking asylum; second, it examines whether, and to what extent, EU legislation regards sexual orientation and gender identity as grounds for recognising the right to asylum; third, it analyses how the Court of Justice of the European Union interprets the Qualification Directive and reviews the most recent relevant judgments by the European Court of Human Rights; fourth, it analyses some recurring issues – including the assessment of an applicant's credibility and whether an applicant can be expected to conceal aspects of his/her identity to avoid persecution – that are intertwined with the refusal to grant international protection to LGBT people.

### 6.1. Legal and institutional context

#### Key development

- The Qualification Directive (recast) includes sexual orientation and gender identity among the characteristics to be considered when assessing whether an individual is a member of a particular social group in need of international protection.

Currently, the 1951 Refugee Convention<sup>642</sup> and the Qualification Directive (recast)<sup>643</sup> are the main legal texts governing the right to international protection, that is refugee status and subsidiary protection status. The directive's objectives are to establish standards for granting international protection to third-country nationals and stateless persons by Member States, and regarding the content of the protection granted.

The Qualification Directive (recast) confirms the principles underlying Council Directive 2004/83/EC (the Qualification Directive),<sup>644</sup> but contains a number of substantive changes that seek to achieve higher standards on the recognition and content of international protection. The most important innovation concerning LGBTI people is the explicit inclusion of gender identity among the personal characteristics to be taken into account when assessing the reasons for persecution and determining whether or not a person is part of a "particular social group" in need of international protection. Sexual orientation was already explicitly included in the 2004 version of the directive.

Neither the 2004 directive nor the recast directive apply to Denmark.<sup>645</sup> Ireland and the United Kingdom will continue to apply the 2004 directive.<sup>646</sup>

<sup>642</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <http://www.refworld.org/docid/3be01b964.html>

<sup>643</sup> The Qualification Directive (recast) took effect on 21 December 2013.

<sup>644</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304.

<sup>645</sup> Qualification Directive (recast), recital 51.

<sup>646</sup> *Ibid.*, recital 50.

The following legal instruments of the EU Common European Asylum System (CEAS) are also relevant for LGBTI asylum seekers:

- the Asylum Procedures Directive (recast),<sup>647</sup> which has developed the standards for procedures in EU Member States, introduced references to sexual orientation and gender identity in its text. Member States therefore have to treat LGBTI applicants as being in need of special procedural guarantees owing to their sexual orientation or gender identity. LGBTI applicants should be provided with adequate support, including sufficient time, to create the conditions necessary for effective access to procedures and for presenting the elements needed to substantiate their applications for international protection (Article 11). In addition, the Member States are asked to ensure that interviewers are capable of taking into account the personal and general circumstances surrounding an application, including the applicant's sexual orientation or gender identity (Article 15);
- the Reception Conditions Directive (recast)<sup>648</sup> is aimed at respecting the fundamental rights of the applicants concerned, including by outlining material reception conditions and ensuring equal treatment of applicants throughout the EU. According to the directive, Member States must prevent violence in accommodation facilities, including gender-based violence. The definition of 'vulnerable person' in Article 21 can also include LGBT people seeking asylum;
- the Dublin Regulation (recast)<sup>649</sup> establishes the criteria and mechanisms for determining what Member State is responsible for examining applications for international protection lodged in one of the Member States by third-country nationals or stateless persons. It sets out criteria to keep family members who are also LGBTI from being separated when they submit applications for international protection (Recitals 14–16 and Articles 8–11).

In February 2014, the European Parliament adopted a resolution calling on the Commission and relevant agencies to work jointly to ensure that the national laws implementing the Qualification Directive (recast) and the Reception Conditions Directive (recast) include

647 Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180.

648 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180.

649 Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L 180.

certain issues linked to sexual orientation and gender identity.<sup>650</sup>

### 6.1.1. Role of asylum officers, international institutions and NGOs

#### Key development

- Some EU Member States include experts on LGBTI issues among the authorities who process and assess asylum applications filed by LGBTI people.

For instance, in Belgium, an assigned officer in the office of the Commissioner-General for Refugees and Stateless Persons is exclusively occupied with applications for asylum or subsidiary protection based on sex, sexual orientation or gender identity.

A number of international agencies and NGOs provide crucial support in the management of asylum applications submitted by LGBTI people.

The United Nations High Commissioner for Refugees (UNHCR) makes key contributions, including by providing technical assistance. The UNHCR Guidelines on International Protection No. 9 ('Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees') provide legal interpretative guidance on assessing claims to refugee status based on sexual orientation and/or gender identity to governments, legal practitioners, decisionmakers and the judiciary.<sup>651</sup>

At the EU level, Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 established a European Asylum Support Office (EASO) in May 2010.<sup>652</sup> The preamble recalls the "great disparities" between Member States in terms of the procedures for granting international protection and the forms such international protection takes, notwithstanding the development of the Common European Asylum System (CEAS). As noted in [Section 5.4](#), this particularly applies in relation to LGBTI asylum seekers. According to Articles 1 and 2 of the regulation, the role of the EASO is to improve the implementation of

650 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, para. 4 (k) (i).

651 United Nations High Commissioner for Refugees (UNHCR), Guidelines of 23 October 2012, HCR/GIP/12/01, [www.refworld.org/docid/50348afc2.html](http://www.refworld.org/docid/50348afc2.html).

652 Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ 2010 L 132.

the CEAS, strengthen cooperation between Member States, and coordinate the provision of operational support to Member States, including the provision of scientific and technical expertise. The importance of EASO's role is also recognised by the European Parliament resolution, adopted in February 2014, that requires EASO to work with the Commission to ensure that specific issues linked to sexual orientation and gender identity are included in the implementation and monitoring of asylum legislation.<sup>653</sup> EASO has developed a vocational training curriculum that aims to support Member States in developing and building the skills and competencies of their asylum officials. The EASO training curriculum includes a module on gender, gender identity and sexual orientation. The European Parliament requires the Commission and Member States to ensure that asylum professionals, including interviewers and interpreters, receive adequate training to handle issues relating specifically to LGBTI persons.<sup>654</sup> It also requires that EASO, in collecting information on countries of origin of asylum seekers, ensures that the legal and social situation of LGBTI persons in those countries is systematically documented and that such information is made available to asylum decisionmakers as part of Country of Origin Information (COI).<sup>655</sup>

In light of the growing number of persons seeking international protection in the EU, Member States rely on lists of 'safe' countries of origin to speed up asylum procedures. However, these are drawn up without reference to the specific risks of persecution by state bodies or non-state actors on grounds of sexual orientation. For instance, since the decision adopted by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) on 20 November 2009, the list used in France includes 19 states (Albania, Armenia, Benin, Bosnia-Herzegovina, Cape Verde, Croatia, Georgia, Ghana, India, Kosovo, Macedonia, Madagascar, Mali, Mauritius, Mongolia, Senegal, Serbia, Tanzania and Turkey).<sup>656</sup> Persons originating from these countries are not entitled to temporary benefits or residence permits; their claims are fast-tracked and appeals do not have suspensive effect, meaning they can be deported before the National Court for the Right of Asylum (CNDA, formerly the CRR) hears their appeal. However, according to ILGA-Europe, some of these states have

explicitly homophobic legislation that outlaws same-sex activities and relationships. In Ghana, India, Senegal and Tanzania, for instance, applicable penalties include imprisonment.<sup>657</sup>

NGOs are a key resource in this respect. The Weekly Bulletin of the European Council on Refugees and Exiles (ECRE), for instance, provides information about the latest European developments in the areas of asylum and refugee protection.<sup>658</sup> The European Legal Network on Asylum (ELENA), which is a forum of legal practitioners, provides individual counselling and advocacy.<sup>659</sup>

NGOs support LGBTI asylum seekers at national and European levels, providing legal and social assistance and cooperating with public authorities and equality bodies.

In 2014, ILGA-Europe<sup>660</sup> produced guidelines for the transposition of the Qualification Directive (recast) and the Reception Conditions Directive (recast), particularly of the provisions that have an impact on asylum claims relating to sexual orientation and gender identity.<sup>661</sup> The same organisation published a study on good practices relating to asylum applicants in Europe.<sup>662</sup> In Sweden, The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (*Riksförbundet för homosexuellas, bisexuellas och transpersoners rättigheter*, RFSL) designed a work plan for 2012–2014 that prioritises international work addressing LGBTI persons and their fundamental rights, including asylum issues.<sup>663</sup> As part of the work plan, RFSL commits to raising the awareness and sensitivity of staff at the Migration Board (*Migrationsverket*) and the Department of Foreign Affairs (*Utrikesdepartementet*).

Some authorities tend to limit their efforts to lesbian, gay and bisexual persons, excluding trans and intersex persons because they more rarely file asylum applications. However, this also prevents authorities from

653 European Parliament (2014a), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, para. 4 (k) (i).

654 *Ibid.*, para. 4 (k) (ii).

655 *Ibid.*, para. 4 (k) (iii).

656 Albania and Niger were stricken from this list following a judgment of the Council of State in 2008 (France, Council of State, No. 295443 (13 February 2008)). Albania was again added to the list, along with Georgia and Kosovo, on 16 December 2013. See more at: [www.asylumineurope.org/reports/country/france/overview-main-changes-previous-report-update](http://www.asylumineurope.org/reports/country/france/overview-main-changes-previous-report-update).

657 ILGA (2014), *Maps on lesbian and gay rights in the world*, [http://old.ilga.org/Statehomophobia/ILGA\\_Map\\_2014\\_ENG.pdf](http://old.ilga.org/Statehomophobia/ILGA_Map_2014_ENG.pdf).

658 European Council on Refugees and Exiles (ECRE), Weekly Bulletin, <http://www.ecre.org/media/news/weekly-bulletin.html>.

659 ECRE, European Legal Network on Asylum (ELENA), <http://www.ecre.org/topics/elena/introduction.html>.

660 For more information about ILGA-Europe's legal tools and publications, see [www.ilga-europe.org/home/issues/asylum\\_in\\_europe](http://www.ilga-europe.org/home/issues/asylum_in_europe).

661 Tsoardi, E. (2014), *Laying the ground for LGBT sensitive asylum decision-making in Europe: Transposition of the Recast Asylum Procedures Directive and of the recast Reception Conditions Directive*, Brussels, ILGA-Europe.

662 Jansen, S. (2014), *Good practices related to asylum applicants in Europe*, Brussels, ILGA-Europe.

663 Sweden, RFSL, *Work plan 2012–2014 for the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL Versamhetsplan 2012–2014)*, [www.rfsl.se/?p=5368](http://www.rfsl.se/?p=5368).

building capacity regarding TI persons, making it difficult to identify such cases/persons. Consequently, they do not show in the statistics. However, trans or intersex persons' risk of persecution is considerably high in many countries. Member States' asylum authorities lack knowledge about this. The EP Resolution on the Roadmap against homophobia and discrimination on grounds of sexual orientation and/or gender identity specifically includes trans and intersex people in its recommendations.<sup>664</sup>

## 6.2. Sexual orientation and gender identity as grounds for the recognition of refugee status

The general concept of providing protection to individuals who are persecuted due to their being a "member of a particular social group" is contained in Article 10 (1) of the Qualification Directive (recast). In addition to groups identified based on characteristics such as ethnicity, religion and nationality, subsection (d) of the article defines as "particular social groups" those whose members share an innate characteristic, a common background that cannot be changed or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Moreover, the definition states that the group in question has a distinct identity in the country of origin because it is perceived as different by the rest of society. The directive identifies groups based on shared sexual orientation or gender identity as constituting such groups. The new second paragraph of Recital 30 of the directive specifies that:

*"for the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity or sexual orientation, which may be related to certain legal traditions and customs, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution".<sup>665</sup>*

664 European Parliament (2014), Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, para. 4.G.  
665 Qualification Directive (recast).

### 6.2.1. Sexual orientation

#### Key development

- Among the EU Member States, only Estonia appears not to treat sexual orientation as a legitimate ground for granting international protection.

With the exception of Estonia, as of 2014, the laws in all EU Member States explicitly grant refugee status to individuals persecuted based on sexual orientation. The law implementing the 2004 Qualification Directive in Estonia<sup>666</sup> does not specify what is meant by "membership of a particular social group" as a ground for persecution. The Estonian Interior Ministry has noted that the notion of "particular social group" has been interpreted as covering sexual orientation. However, the limited information available on existing practice indicates that this inclusion is, at best, implicit.<sup>667</sup>

As explained in Recital 51 of the Qualification Directive (recast), Denmark has not implemented the Qualification Directive and is not bound by it or subject to its application. However, it is bound by the 1951 Geneva Convention. Prior to 2012, if an applicant claimed to be at risk of persecution or other forms of harm because of their sexual orientation and/or gender identity, the Danish asylum authorities included this in the assessment under Section 7 of the Aliens Act (*Udlændneloven*). However, applicants were granted residence permits under Section 7 (2) (subsidiary protection), on the basis of an assessment of the specific circumstances of each individual case, instead of on refugee status under Section 7 (1), which refers to membership of a "social group" as a ground for persecution. This means that, prior to 2012, Danish authorities generally did not consider applicants' sexual orientation as a ground of persecution for the purpose of granting refugee status. Rather, they evaluated whether or not there was actual individual persecution in the country of origin, and a risk that an applicant would face the death penalty or torture if expelled.

However, following two 2012 Danish Refugee Appeals Board (*Flygtningenævnet*) judgments regarding transgender persons,<sup>668</sup> LGBTI persons are recognised as members of a particular social group because of their

666 Estonia, Act on granting international protection to aliens (*Välismaalasele rahvusvahelise kaitse andmise seadus*), 14 December 2005.

667 Indicated in private conversation with the relevant FRA national expert.

668 Denmark, Refugee Appeals Board (*Flygtningenævnet*) (2014), *Flygtningenævnets beretning 2013*, August 2014, pp. 337-347.

sexual orientation and/or gender identity and have been granted refugee status under Section 7 (1). For instance, in January 2013, the Danish Refugee Appeals Board granted asylum to a gay man from Afghanistan on the basis of an alleged risk of persecution because of his sexual orientation, rather than on the basis of proof of previous persecution. A few months later, the Danish Refugee Appeals Board granted asylum to a lesbian from Uganda on similar grounds,<sup>669</sup> and several other cases that follow the 2012 precedents have been decided since then.

### 6.2.2. Gender identity

#### Key development

- Very little is known about Member States granting international protection based on gender identity. Of the 22 EU Member States that implemented the Qualification Directive (recast), at least 5 have included gender identity in their relevant legislation.

The Qualification Directive (recast) extends the protection offered to individuals who are members of a particular social group to trans persons, since they form a distinctive “social group” whose members share a common characteristic and have a distinct identity owing to perceptions in the society of origin. The current version of Article 10 (1) (d) clearly refers to gender identity, and contains a more clear duty for Member States to explicitly recognise gender identity as a reason for persecution, which could lead to international protection for trans persons. The previous version of the same article in the 2004 Qualification Directive more vaguely referred to gender identity, stipulating that “gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”.<sup>670</sup>

The data collected by FRA so far do not completely clarify how Member States have implemented the new Article 10, which had to be transposed by 21 December 2013, and what effects this has produced on, for example, case law. By the end of 2014, the Qualification Directive (recast) was implemented in 22 EU Member States. Among them, at least Greece, Italy, Luxembourg, Portugal and Slovenia included “gender identity” in the laws transposing the new Article 10. Bulgaria, France

<sup>669</sup> Denmark, Refugee Appeals Board (*Flygtningenævnet*), Decision ugan/2013/4.

<sup>670</sup> Some language versions of the text made it even more difficult to ensure inclusiveness. For instance, the French version spoke of “aspects relatifs à l'égalité entre hommes et femmes”.

and Spain did not transpose the Qualification Directive (recast) by 21 December 2013.<sup>671</sup>

In Croatia, the Asylum Act (*Zakon o azilu*)<sup>672</sup> enacted in 2007 includes the persecution of LGBTI persons as one of the grounds for asylum, refugee status or subsidiary protection. In addition to listing sexual orientation as a specific ground, Article 2 explicitly provides that personal characteristics relating to one's sex or gender identity should be taken into consideration when interpreting the general term “persecution of a particular group based on a common characteristic”.

## 6.3. Sexual orientation and gender identity in European courts' case law

#### Key development

- The CJEU has played a key role in clarifying how asylum claims based on the protected ground of sexual orientation should be assessed.

Various reports have identified recurrent concerns relating to refusals to grant international protection to LGBTI people.<sup>673</sup> The CJEU and the ECtHR have already addressed some of these concerns. Interestingly, the CJEU's and ECtHR's respective approaches to international protection based on sexual orientation contain some discrepancies, including on key issues for LGBTI asylum seekers, such as whether applicants can be required to conceal their sexual orientation to avoid persecution.

The CJEU issued two important judgments that specifically concern the situation of LGBTI asylum seekers in late 2013 and 2014. The first judgment – *X, Y and Z v. Minister voor Immigratie en Asiel*,<sup>674</sup> issued in 2013 – addressed specific aspects of recognising refugee status based on sexual orientation. The case dealt with

<sup>671</sup> Denmark, Ireland and the UK have opted out of this Directive and are therefore under no obligation to implement it. EUR-Lex (2014), *Results of the search on National Implementing Measures of the recast Qualification Directive (72011L0095\*)*, available at: [eur-lex.europa.eu/](http://eur-lex.europa.eu/).

<sup>672</sup> Croatia, Asylum Act (*Zakon o azilu*) (2007).

<sup>673</sup> See for instance, Jansen, S. and Spijkerboer, T. (2011), *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, Amsterdam, COC Netherlands/VU University Amsterdam; Jansen, S. (2014), *Good practice related to LGBT asylum applicants in Europe*, Brussels, ILGA Europe.

<sup>674</sup> CJEU, Joined cases C-199/12 to C 201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013.

(a) the membership of a particular social group; (b) the existence of rules that criminally punish homosexual acts; (c) the requirement of discretion. The second judgment – *A, B, and C v. Staatssecretaris van Veiligheid en Justitie*, issued in 2014 – focused on permissible methods for assessing the credibility of an applicant’s declarations regarding sexual orientation.<sup>675</sup>

In the first judgment, the court ruled that the Qualification Directive must be interpreted as meaning that, when consensual same-sex acts are considered to be a criminal offence in a country of origin, homosexual people should be considered to belong to a particular social group.<sup>676</sup> The court ruled that common features and distinct social perception – the two requirements laid down by Article 10 (1) (d) to identify a particular social group – are cumulative.<sup>677</sup> This interpretation contradicts that of the Geneva Convention in UNHCR guidelines,<sup>678</sup> which treats common features and distinct social perception as alternative, and not cumulative, requirements.

The CJEU also ruled that the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant as to constitute persecution within the meaning of Article 9 (1) of the directive.<sup>679</sup> However, the court specified, that “a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.”<sup>680</sup>

This latter aspect of the CJEU judgment represents a key step forward, as some EU Member States do not consider the existence or application of criminal legislation against homosexual acts to be acts of persecution. The

mere existence of laws criminalising consensual same-sex acts has a social impact, even when not implemented. Such laws encourage homophobic behaviour, and prevent homosexual people from seeking and obtaining legal protection.

The court also addressed what is known as the “requirement of discretion”, under which refugee status was sometimes rejected on the basis that the applicant could avoid persecution by hiding his or her sexual orientation in the country of origin. The CJEU ruled that compelling members of a social group who share the same sexual orientation to hide their identity is contrary to recognising a characteristic that is so fundamental to identity that interested parties should not be forced to give it up.<sup>681</sup> As far as discretion is concerned, no rule requires decisionmakers to take into consideration the possibility for an applicant to avoid persecution by exercising greater restraint than a heterosexual person in expressing his or her sexual orientation.<sup>682</sup>

On 2 December 2014, the CJEU issued a second important judgment. In *A, B, and C v. Staatssecretaris van Veiligheid en Justitie*, the CJEU considered admissible methods of assessing an applicant’s credibility in an asylum application based on sexual orientation. The CJEU emphasised that the assessment must take into account the applicant’s individual situation and personal circumstances.<sup>683</sup> The court added that, during interviews with applicants, their inability to answer questions based on stereotypical notions of the behaviour of homosexual persons cannot constitute sufficient grounds for concluding that an applicant’s statements about his or her sexual orientation lack credibility.<sup>684</sup> Detailed questioning about an applicant’s sexual practices runs contrary to the right to respect for private and family life (Article 7 of the EU Charter of Fundamental Rights) and is equally impermissible.<sup>685</sup> The judgment also established that asylum authorities cannot allow evidence such as the performance by the applicants of acts demonstrating their sexual orientation; or subject asylum seekers to “tests” to demonstrate their sexual orientation, nor can they use any other evidence, such as films, of their intimate acts. Such evidence would infringe human dignity under Article 1 of the EU Charter of Fundamental Rights.<sup>686</sup>

Finally, the CJEU also explained that the mere fact that an applicant does not reveal his/her sexual orientation at the first given opportunity to set out the grounds

675 CJEU, Joined Cases C-148/13 to C-150/13, *A (C-148/13), B (C-149/13) and C (C-150/13) v. Staatssecretaris van Veiligheid en Justitie*, 2 December 2014.

676 CJEU, Joined Cases C-199/12 to C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, para. 49.

677 *Ibid.*, para. 45.

678 United Nation High Commissioner for Refugees (UNHCR) (2012a), *Guidelines on international protection no. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees*, 23 October 2012, HCR/GIP/12/01; United Nation (UN), High Commissioner for Refugees, *Guidelines on international protection no. 2: ‘Membership of a particular social group’ within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees*, 7 May 2002, HCR/GIP/02/02, [www.refworld.org/docid/3d36f23f4.html](http://www.refworld.org/docid/3d36f23f4.html).

679 CJEU, Joined Cases C-199/12 to C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, para. 56. On the issue of the criminalisation of consensual same-sex acts, see UNHCR, *Guidelines on international protection no. 9*, paras. 26–29.

680 CJEU, Joined Cases C-199/12 to C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, para. 61.

681 *Ibid.*, paras. 45–46.

682 *Ibid.*, para. 75.

683 CJEU, Joined cases C-148/13 to C-150/13, *A (C-148/13), B (C-149/13) and C (C-150/13) v. Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, para. 57.

684 *Ibid.*, para. 63.

685 *Ibid.*, para. 64.

686 *Ibid.*, para. 65.



for persecution cannot by itself lead to the conclusion that the applicant's statements about his or her sexual orientation are not credible.<sup>687</sup>

Interestingly, the ECtHR's approach appears to partially differ from that of the CJEU on very similar issues.<sup>688</sup> *M.E. v. Sweden* dealt with a request by Swedish authorities that a homosexual person return to Libya for a short period, to apply for family reunion with his husband, a Swedish citizen. The applicant argued that staying in Libya, even for a few months, would entail a risk of ill-treatment due to his sexual orientation, contrary to Article 3 of the ECHR. The applicant had decided not to reveal his sexual orientation to his family back in Libya. Based on this the ECtHR found that he had made an "active choice to live discreetly" due to "private considerations" rather than fear of persecution. Requiring him to be discreet about his private life in Libya for a period of approximately four months "cannot by itself be sufficient to reach the threshold of Article 3 of the Convention".<sup>689</sup>

Regarding Libya, where homosexual acts are punishable by imprisonment under the Libyan Penal Code, the ECtHR stated that there is insufficient evidence that "the Libyan authorities actively persecute homosexuals". The applicant requested referral of the case to the Grand Chamber of the ECtHR, and this was granted. However, the Migration Board in the meantime issued a permanent residence permit for Sweden to the applicant, and the case was no longer pursued.<sup>690</sup>

The ECtHR position contrasts with both the position of the UN Human Rights Committee<sup>691</sup> and the UN Committee against Torture,<sup>692</sup> which have recognised that, even if there is no evidence of active persecution based on sexual orientation, the mere existence of provisions criminalising same-sex behaviour is sufficient to trigger the non-*refoulement* obligation of the receiving state.

The ECtHR judgment also contrasts with Recommendation CM/Rec(2010)5 to member states,<sup>693</sup> adopted on 31 March 2010 by the Committee of Ministers of the Council of Europe, which in point 43 states

that "Member states should ensure particularly that asylum seekers are not sent to a country where their life or freedom would be threatened [...] on grounds of sexual orientation or gender identity" and not only if "they face the risk of torture, inhuman or degrading treatment or punishment".

In sum, CJEU jurisprudence has played a key role in defining the appropriate implementation of European standards concerning the granting of international protection in connection with sexual orientation. It has also contributed to achieving higher levels of protection for the rights of LGBTI people.

When a person who applies for international protection because of his or her sexual orientation flees from a country that criminalises consensual same-sex acts, that person must be considered a member of a particular social group. When the criminal sanction for same-sex acts is imprisonment and these types of are applied in the country of origin, the sanction in itself can constitute an act of persecution.

Moreover, asylum authorities cannot expect an applicant to conceal his or her sexual orientation in his or her country of origin, nor can they expect an applicant to exercise restraint in expressing his or her sexual orientation. During the asylum procedure, an applicant's individual situation and personal circumstances should be taken into account. Detailed questioning about sexual practices is not allowed. An applicant's failure to answer stereotypical questions cannot in itself be used to conclude that the applicant's statements about his or her sexual orientation are not credible. The asylum authorities cannot 'test' the applicant's sexual orientation. The disclosure of sexual orientation at a late stage of the international protection procedure cannot in itself lead to the conclusion that the applicant's statements about his or her sexual orientation lack credibility.

687 *Ibid.*, para. 71.

688 ECtHR, *M.E. v. Sweden*, No. 71398/12, 26 June 2014.

689 *Ibid.*, para. 88.

690 *Ibid.*, para. 39.

691 United Nations (UN), Human Rights Committee (HRC) (2013), *Communication no. 2149/2012: Human Rights Committee: Views adopted by the Committee at its 108th session, 8–26 July 2013*, CCPR/C/108/D/2149/2012, 26 September 2013, [www.refworld.org/docid/5264f1c74.html](http://www.refworld.org/docid/5264f1c74.html).

692 United Nations (UN), Committee against Torture (2011), *Mondal v. Sweden*, CAT/C/46/D/338/2008, 7 July 2011, [www.refworld.org/docid/4eeb3bdc2.html](http://www.refworld.org/docid/4eeb3bdc2.html).

693 Council of Europe, Committee of Ministers (2010a), Recommendation CM/Rec(2010)5 to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010.

## 6.4. Specific issues relating to the international protection of LGBT people

### Key developments

- The lack of statistics on LGBTI refugee cases is a general problem that should be addressed by Member States and at EU level.
- The lack of official data makes it more difficult to assess and improve the EU asylum system to ensure that fundamental rights of LGBTI people are protected.

The CJEU and the ECtHR have not yet addressed important aspects of international protection, prompting concern. First, relating to protection against discrimination based on sexual orientation, EU Member States may fail to recognise that international protection is needed even in cases where the country of origin does not explicitly criminalise consensual same-sex acts, or does not apply the relevant laws. Failing to recognise this can mean that the social situation in the country of origin and possible acts of persecution of LGBTI people by non-state actors are ignored. Indeed, homophobia and transphobia do not need a legal framework to be rooted and manifested in society. In practice, homophobic and transphobic attitudes may be deeply rooted in people's minds and may prevail long after the law has changed.

Threats, inhuman or degrading treatment, and killings, sometimes perpetrated by the victim's own family, are often socially justified on the grounds of infringement of the perpetrators' 'honour'. This usually makes it impossible for LGBTI people to seek the protection of local authorities because these may share the same understanding of 'shame' and 'honour'. Indeed, such authorities may condone or even facilitate acts of persecution.

During the period covered by this report, EU Member States such as Bulgaria, Denmark, and Spain required persons seeking asylum on grounds of sexual orientation or gender identity to show that they were subject to legal sanctions.<sup>694</sup>

This suggests that asylum authorities may not accept the contention that a claimant's sexual orientation or

gender identity is likely to lead to his/her persecution should this orientation or identity be expressed or revealed. As with other types of claims where the perpetrator is a non-state actor, the focus should be on whether effective state protection is available. In some EU Member States, authorities have concluded that, where same-sex conduct is explicitly criminalised in the country of origin, but such criminalisation concerns only "ostensible" same-sex conduct and does not extend to criminalisation of LGBTI "identity", the fear of persecution is not established. This suggests that homosexual people should lead a life of chastity or secrecy.

The tendency to deny requests for international protection on the ground that there would be no persecution in the country of origin if the applicant had concealed their homosexuality or had abstained from any "external manifestation" should end as a result of the CJEU's 2013 judgment in *X, Y and Z v. Minister voor Immigratie en Asiel*. In that case, the court said that "the fact that [the applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account [...]".<sup>695</sup> It should also be noted that no similar duties have been imposed on claimants who allege persecution on other grounds, such as religion or political opinion.

The judgment also interpreted the Qualification Directive, noting that: "the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution". This, however, does not address the fact that even if irregularly, rarely or never enforced, criminal laws that prohibit consensual same-sex acts could lead to intolerable predicaments for LGBTI persons, rising to the level of persecution.<sup>696</sup> This type of situation often arises when assessing asylum applications by nationals of countries that 'merely' criminalise consensual same-sex acts understood as 'ostensible conduct'.

In contrast with the CJEU, in 2012 the Italian Court of Cassation stated that it is not necessary for a criminal sanction to be effectively applied in the country of origin, and that the assessment should evaluate the level of societal disapproval and homophobia in the country of origin, which is reinforced by the existence of criminal provisions. The case involved a gay man from Senegal, where homosexuality is punishable under criminal law. He was found to have a well-founded fear

694 Jansen, S. and Spijkerboer, T. (2011), *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, Amsterdam, COC Netherlands/VU University Amsterdam, p. 24; Bulgaria, Haskovo Administrative Court (Административен съд Хасково), decision № 224/2013, case file № 254/2013, 22 August 2013.

695 CJEU, Joined Cases C-199/12 to C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013, para. 75.

696 United Nations (UN), High Commissioner for Refugees (2012b), *Guidelines on refugee claims relating to sexual orientation and gender identity*, UNHCR, 23 October 2012, para. 27.

of being persecuted if he returned to his country of origin on the ground of his homosexuality.<sup>697</sup>

The case law analysed for this report shows that in many Member States, the 2013 CJEU ruling has not yet affected the situation of LGBTI people seeking asylum.

In Germany, the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF) denied refugee status or subsidiary protection to a homosexual man from Nigeria. The Administrative Court of Regensburg (*Verwaltungsgericht*) found that Nigerian legislation regarding homosexuals “must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution”, and therefore gives rise to a right to asylum.<sup>698</sup> In this particular case, however, no asylum was granted because the applicant was unable to prove – as required under German legislation – that he entered the country without travelling through a safe third country in which he could have found safety from persecution. In light of the real risk of persecution, however, the applicant was awarded a suspension of deportation.

The difficulties LGB asylum applicants encounter in establishing persecution is illustrated by relevant Member State case law.

For instance, in Bulgaria, the Supreme Administrative Court confirmed the rejection of an application filed by a gay Nigerian citizen, because it gave credence to a report prepared by the State Agency for Refugees. That report claimed that, even though homosexuality was punishable by death in some regions of Nigeria, constitutional guarantees of protection and freedom of movement sufficiently guaranteed the applicant’s safety.<sup>699</sup> In Luxembourg, a 2012 judgment by the Administrative Tribunal of the Grand Duchy of Luxembourg<sup>700</sup> rejected a claim filed by a homosexual man from Serbia, who declared that he suffered physical aggression from family members because of his sexual orientation. The tribunal found that he was unable to prove persecution.

However, in general it should be emphasised that in many Member States the national authorities for refugees lack available statistics on LGBTI refugees’ cases. The lack of statistics is a general problem that should

be addressed by Member States and at EU level.<sup>701</sup> The lack of official data makes it more difficult to assess situations and to improve the EU asylum system to ensure the fundamental rights of LGBTI people are protected. Providing practical guidance, establishing standards for the collection of data at national level and gathering such data are good practices that would facilitate such assessment and improvement.

## 6.5. Issue of concealment

### Key development

- LGBTI people should not be required to have concealed their sexual orientation in their country of origin to have a valid claim for international protection.

In some Member States, the approach towards requiring ‘discretion’ began to change between 2010 and 2014. The UK Supreme Court, in a July 2010 judgement,<sup>702</sup> made clear that the adjudication of asylum claims must be free from bias and stereotyping and must be based on the right to live freely and openly as a homosexual person.<sup>703</sup>

A number of Irish High Court judgments on asylum applications, issued since 2010, have made clear that decisionmakers on applications relating to sexual orientation are not entitled to refuse these on the basis that the individual can avoid persecution by exercising discretion in relation to their sexual orientation in their country of origin.<sup>704</sup>

In Finland, the Supreme Administrative Court (*Korkein hallinto-oikeus/Högsta förvaltningsdomstolen*) in January 2012<sup>705</sup> held that an individual must not be expected to conceal his or her true sexual identity, even if he or she could avoid the risk of persecution by doing so.

697 Italy, Court of Cassation (*Corte di Cassazione*), Case No. 15981, 20 September 2012.

698 Germany, Administrative Court (*Verwaltungsgericht*) Regensburg, case RN 5 K 13.30226, 19 November 2013.

699 Bulgaria, Supreme Administrative Court five-member jury (*Върховен административен съд, пет-членен състав*), Decision No. 2193/2011, Case file no. 12542/2010, 14 February 2011.

700 Luxembourg, Administrative Tribunal of the Grand Duchy of Luxembourg (*Tribunal administratif du Grand-Duché de Luxembourg*), Case No. 30447, 13 June 2012.

701 Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (Text with EEA relevance), OJ L 199, 31.7.2007, p. 23–29, art. 3 and 4.

702 United Kingdom, Supreme Court, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UKSC 31, 7 July 2010. See also the UNHCR’s amicus brief in this case, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department – Case for the first intervener (the United Nations High Commissioner for Refugees)*, 19 April 2010, [www.unhcr.org/refworld/docid/4bd1abbc2.html](http://www.unhcr.org/refworld/docid/4bd1abbc2.html).

703 United Kingdom, Supreme Court, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UKSC 31, 7 July 2010, para. 78.

704 Ireland, *SA v. Refugee Appeals Tribunal*, IEHC 78, 2012.

705 Finland, Supreme Administrative Court (*Korkein hallinto-oikeus/Högsta förvaltningsdomstolen*), KHO 2012:1, 2012, available in English at: <http://www.refworld.org/docid/4f3cdf7e2.html>.

The applicant at issue was a homosexual man from Iran, where homosexual persons face the risk of capital punishment. In the court's opinion, even if an individual had previously concealed his or her sexual identity for social, cultural or religious reasons, once authorities in the person's country of origin became aware of the applicant's sexual orientation, it would not be in accordance with the 1951 Refugee Convention to continue to expect the applicant to hide his/her sexual orientation.

In France, the State Council (the highest French administrative court) clarified some issues in 2012, in a case involving the National Court for the Right of Asylum (CNDA)'s refusal to grant refugee status to a man from the Democratic Republic of Congo because he had not publicly expressed his sexual orientation in his country of origin and because Congolese law does not prohibit homosexuality. The State Council annulled this decision, finding that granting refugee status due to membership in a particular social group based on common sexual orientation should not require the person seeking refugee status to publicly manifest his/her sexual orientation "because the social group [...] is not established by those who compose it, or even because of the existence of objective characteristics attributed to them but by the views held by the surrounding society or institutions on these people". The State Council also stated that the fact that there is no specific criminal legislation against homosexuality in the country of origin does not affect the reality of the risk of persecution.<sup>706</sup>

Other countries have also adopted more sensitive and factual approaches. In the Netherlands, the Aliens Circular specifies that LGB claimants should not be required to hide their sexual orientation in their countries of origin. On 27 June 2009<sup>707</sup> the Aliens Circular was amended to also specify that, when same-sex consensual acts are criminalised in the country of origin, an applicant should not be required to have invoked the protection of the authorities in that country. The Judiciary Division of the Council of State<sup>708</sup> issued two judgments on 18 December 2013 – regarding asylum seekers from Sierra Leone and Senegal – holding that the State Secretary could not require the asylum seekers to observe a certain restraint in their way of life.

706 France, State Council (*Conseil d'Etat*), *M. B.*, No. 349824, 27 July 2012.

707 Netherlands (2009), *Aliens Circular 2000* (*Vreemdelingencirculaire 2000*), Section C2/2.10.2, as amended in 2009. The 2009 amendment (published in *Staatscourant* (2009) 115) was made in response to a suggestion of the national LGBT organisation COC Nederland.

708 Netherlands, Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak Raad van State*), Case Nos. 201109928 and 201012342/1/V2, 18 December 2013, available in English at: [www.refworld.org/docid/53ba91824.html](http://www.refworld.org/docid/53ba91824.html).

In Germany, the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge, BAMF*) changed its migration policy following the CJEU's ruling on the religious persecution case of *Y and Z v Germany*,<sup>709</sup> and stopped requiring discretion.<sup>710</sup>

In conclusion, in line with CJEU jurisprudence, LGBTI people should not be required to have concealed their sexual orientation in their countries of origin to have a valid claim for international protection. They should be able to express a fundamental personality trait (such as sexual orientation), including through conduct and relationships. In terms of the criminalisation of consensual same-sex acts, it is not a requirement for a LGBTI person to have a well-founded fear of persecution, or to prove that LGBTI persons form a "particular social group".

## 6.6. Credibility assessment

### Key development

- Authorities cannot base credibility assessments of asylum applicants on stereotypical questioning, or questioning about details of sexual practices. It is also not permissible 'to test' an applicant's homosexuality.

Whether, and how, a claim for international protection on the ground of sexual orientation can be verified was partially answered in December 2014 by the CJEU in *A (C-148/13)*, *B (C-149/13)* and *C (C-150/13) v. Staatssecretaris van Veiligheid en Justitie*.<sup>711</sup>

The CJEU noted that the Qualification Directive (recast) requires the competent authorities to establish whether or not an applicant's account is credible when assessing applications for refugee status, including those founded on membership of a particular social group based on sexual orientation. In conducting their examinations, the competent authorities must comply with the EU Charter of Fundamental Rights, in particular Articles 1 and 7. As mentioned above, this means that the authorities cannot assess the credibility of an asylum applicant on stereotypical questioning (§ 63) or questioning about details of sexual practices (§ 64). It is also not

709 Court of Justice of the European Union (CJEU), Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y (C-71/11)*, Z (C-99/11), 5 September 2012.

710 Germany, The Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge, BAMF*) (2012), Letter of the BAMF to MP Volker Beck of 27 December 2012, <https://www.lsvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf>.

711 CJEU, Joined cases C-148/13 to C-150/13, *A (C-148/13)*, *B (C-149/13)* and *C (C-150/13) v. Staatssecretaris van Veiligheid en Justitie*, 2 December 2014.

permissible to ‘test’ the homosexuality of an applicant (§ 65). According to this jurisprudence, practices such as ‘phallometric testing’ – identified in the 2010 version of this report – should be considered to be contrary to EU law. The CJEU also clarified that the late disclosure of sexual orientation cannot itself lead to the conclusion that the applicant is not credible (§ 71).

In 2013, the ECtHR addressed the timing of disclosure in the *M.K.N. v. Sweden* case, which rejected an Iraqi national’s claim that he was homosexual.<sup>712</sup> The ECtHR noted that the applicant disclosed his sexual orientation at a very late stage. The applicant mentioned a relationship with a same-sex partner, who was killed in Iraq, and at the same time, in the proceedings, expressed the intention of living with his wife and children. In line with its previous jurisprudence, the ECtHR found that, in consideration of all the circumstances, the applicant’s claim concerning the homosexual relationship was not credible because he did not provide a satisfactory explanation for the delay in making the claim concerning his homosexuality, both in the domestic proceedings and in the proceedings before the ECtHR.<sup>713</sup>

The CJEU’s holdings regarding assessment methods for applications based on sexual orientation are in line with the non-binding UNHCR Guidelines on Refugee Claims relating to Sexual Orientation and Gender Identity, published by the UNHCR on 23 October 2012.<sup>714</sup> The guidelines state that “self-identification as LGBT should be taken as an indication of the individual’s sexual orientation and/or gender identity” (§ 63.i). The existence of a presumption that questions the credibility of claims concerning the homosexuality of the person seeking international protection is in itself a source of concern. In the same document, the UNHCR emphasises that any doubt should benefit the asylum seeker, and that the credibility of his or her testimony should not be questioned merely because the person does not correspond to stereotypical images of LGBT persons (§ 60). The UNHCR adds that “Medical ‘testing’ of the applicant’s sexual orientation is an infringement of basic human rights and must not be used” (§ 65). Finally, it states that a person should not automatically be considered heterosexual merely because he or she is, or has been, married, has children or dresses in conformity with prevailing social codes (§ 63.vi). Enquiries about the applicant’s realisation and experience of sexual identity, rather than detailed questioning regarding sexual acts,

may more accurately assist in assessing the applicant’s credibility (§ 62).

Given that the CJEU’s judgment in *A (C-148/13)*, *B (C-149/13)* and *C (C-150/13)* v. *Staatssecretaris van Veiligheid en Justitie* was delivered on 2 December 2014, it was not possible to assess its impact on national case law and practice.<sup>715</sup> In Hungary, where no changes have occurred since adoption of the relevant legislation in 2007, the Office of Immigration and Nationality (*Bevándorlási és Állampolgársági Hivatal, BAH*) has reportedly requested, in some cases, psychiatric expert opinions on asylum seekers’ sexual orientation. No specific legal regulation requires such expert opinions, but the general rules of administrative procedure do allow the authorities to request one.<sup>716</sup>

The United Kingdom’s courts have repeatedly confronted the question of proving sexual orientation. In this regard, for example, the judgment by a first-tier tribunal rejecting a claim by a man from Cameroon in July 2013 stated:

*There is no evidence in this case that the appellant is gay apart from what he has himself stated and the documents which he has produced from Cameroon. In particular he has had no other relations with men, and there is no evidence from the gay community in the United Kingdom about the fact that he is a homosexual.*<sup>717</sup>

In an Asylum Policy Instruction published on 11 February 2015, the Home Office took note of the CJEU judgments in cases C-148/13, C-149/13 and C-150/13 and explained what methods could – in light of these holdings – be used by asylum authorities when assessing the credibility of asylum claims based on sexual orientation.<sup>718</sup>

In Bulgaria, the authorities deemed not genuine and ill-founded a case filed by a bisexual married man from Lebanon, who was persecuted by his family and his wife after being caught having an affair with another man. He was denied asylum because he had a wife and children.<sup>719</sup>

<sup>712</sup> ECtHR, *M.K.N. v. Sweden*, No. 72413/10.

<sup>713</sup> ECtHR, *M.K.N. v. Sweden*, No. 72413/10, para. 43.

<sup>714</sup> United Nations (UN), High Commissioner for Refugees (2012b), Guidelines on refugee claims relating to sexual orientation and gender identity, UNHCR, 23 October 2012; see also: UNHCR, Written Observations of the United Nations High Commissioner for Refugees in the cases of *A and Others (C-148/13, 149/13 and 150/13)*, 21 August 2013, C-148/13, C-149/13 & C-150/13, <http://www.refworld.org/docid/5215e58b4.html>.

<sup>715</sup> CJEU, Joined cases C-148/13 to C-150/13, *A (C-148/13)*, *B (C-149/13)* and *C (C-150/13)* v. *Staatssecretaris van Veiligheid en Justitie*, 2 December 2014.

<sup>716</sup> Hungary, Act No. CXL of 2004 on the general rules of administrative procedures and services (2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól), Art. 5 (1) a).

<sup>717</sup> United Kingdom, First-tier Tribunal, *Man from Cameroon*, *Hatton Cross*, July 2013.

<sup>718</sup> United Kingdom, Home Office (2015), *Asylum Policy Instruction. Sexual identity issues in the asylum claim*, 11 February 2015.

<sup>719</sup> Jansen, S. and Spijkerboer, T. (2011), *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, Amsterdam, COC Netherlands/VU University Amsterdam, p. 59.

In this case, evidence of previous heterosexual relationships and children born out of these relationships called into question the claimant's credibility regarding his homosexuality. However, when addressing such cases, it should be kept in mind that many lesbians and gay men marry in an attempt to conform to heterosexual norms and thus avoid ostracism and exclusion from their family and communities. They sometimes enter into forced marriages or willingly enter into heterosexual marriages and then later decide to acknowledge their homosexuality. The distinction between sexual orientation as an 'identity' and as 'conduct' is often considered relevant in this regard.

However, in August 2012, a United Kingdom tribunal<sup>720</sup> believed a claimant who indicated that he was gay even though he had been married and had three children. The judgment remarked:

*"There is nothing suspicious about the Appellant not having had sexual relationships in the United Kingdom between 2008 and 2011. Gay men are not required to have sexual relationships in order to 'prove' that they are gay, in the same way as heterosexual men are not so required in order to show that they are 'straight'".*

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720 United Kingdom, Tribunal judgment, August 2012, cited by UK Lesbian & Gay Immigration Group (2013), p. 18.



# Conclusions

This report outlines key trends across the EU during the past five years regarding the protection of fundamental rights of LGBTI persons, which are relevant in considering future actions at the EU and Member State levels.

With respect to legal gender recognition, an increasing number of Member States embrace the notion that gender identity is primarily a question of individual self-determination. Legal and scientific bodies have taken significant steps to depathologise transsexualism and transgenderism during the past four years. There has also been some relaxation of the requirements to change one's name and recorded sex on official documents, such as genital surgery leading to sterilisation or being unmarried, resulting in forced or automatic divorce. Denmark, Malta and Ireland have adopted legislation allowing legal gender recognition for trans people based on their personal self-determination, thus eliminating requirements of medical diagnoses. There has also been progress – admittedly slow – in terms of improving trans children's access to legal recognition of gender.

The requirements and procedures attached to sex reassignment treatments and the legal recognition of sex reassignment have remained obscure, medicalised and burdensome in many Member States. It remains to be seen whether ongoing revisions to major international medical standards will soon change applicable laws and practice.

The number of Member States extending protection against discrimination based on sexual orientation beyond the employment sphere into the areas covered by the Racial Equality Directive has continued to rise. As of 2014, the prohibition of such discrimination covered all areas addressed by the Racial Equality Directive in 13 Member States (it did so in only 10 Member States in 2010). However, seven Member States have not yet extended the prohibition of discrimination to all of these areas (by 2010, 10 Member States had not yet done so). A vast majority of Member States (26) have extended the mandates of their equality bodies to cover discrimination on the ground of sexual orientation.

While these achievements at Member State level have substantially contributed to protecting LGBTI people against discrimination on all grounds, the problem of the 'hierarchy of grounds' remains at the level of general EU legislation. The Council has not yet adopted the Commission's proposal for a 'horizontal' anti-discrimination directive (the 'Equal Treatment Directive') to prohibit discrimination on all the grounds listed in the TFEU across the areas of life covered by the Racial Equality Directive. Progress towards adoption of this directive

remains slow given the difficulty of obtaining unanimity among Council members.

Recognition of gender identity as a ground for discrimination remains uneven among EU Member States. EU law requires that individuals discriminated against as a result of having undergone or intending to undergo gender reassignment be protected under the concept of 'sex' discrimination. Recent developments increasingly point to the establishment of gender identity as an autonomous ground of protection, but at present the protection framework remains diverse in the Member States. First, some Member States protect trans people under the ground of 'sex' discrimination, while others use different grounds, including 'gender reassignment' or 'sexual identity'. Second, in some Member States, legislation explicitly protects against discrimination based on gender identity, while in others, this protection emerges from the practice of courts and equality bodies. Third, in other Member States it is still unclear which protection ground covers trans people. The mandates of equality bodies often remain silent regarding trans people, resulting in gaps in protection. Only 8 Member States have enforced laws protecting against discrimination on the grounds of 'gender identity' and 'gender expression' in addition to gender reassignment. This could be redressed by the explicit inclusion of 'gender identity' as a discrimination ground in future versions of the Gender Equality Directive on Goods and Services, as recommended by the European Parliament's Lunacek Report.

Although EU law does not oblige Member States to extend the institution of registered partnership to same-sex couples, or to introduce marriage for same-sex couples, employment-related partner benefits are increasingly being granted as a result of the jurisprudence of the CJEU and the ECtHR, as well as of courts in a number of Member States. As a result, it has become increasingly difficult to treat same-sex couples less favourably than different-sex couples.

With regard to the freedom of assembly and expression of LGBTI persons, improvements are noticeable across a number of Member States, with pride marches less often interfered with. Since 2010, two types of organised public protests against the rights of LGBTI people have occurred. First, in at least thirteen Member States, homophobic protests against pride marches took place, and in some states, these have increased in size and frequency, and in parallel to increasingly visible expressions of hate by far-right and xenophobic movements and/or religious groups. Second, negative reactions to legislative or administrative measures that recognise the rights of LGBTI people have started to take the form

of one-off demonstrations and protests. Some of these do not express explicitly anti-LGBTI attitudes, but do protest against equal access to specific rights – which could have a particularly negative impact on LGBTI people’s enjoyment of fundamental rights.

Several EU Member States have introduced legislation and practices aimed at promoting education and dialogue to challenge negative attitudes towards LGBTI persons. By contrast, there were also several attempts to introduce legislation that bans the so-called ‘promotion of homosexuality’ and same-sex relations among the public, and among children in particular, in a number of Member States. Legislation of this kind is still in place in Lithuania, despite strong concerns expressed by the European Parliament.

Regarding responses to abuse and victimisation with criminal provisions, by 2010, 13 Member States had explicitly criminalised homophobic hate speech; an additional seven Member States have changed their criminal laws since then. Eight Member States have also criminalised transphobic hate speech. In addition, a growing number of Member States treat homophobic and transphobic motivation as an aggravating factor in criminal offences - as of 2015, 15 EU Member States explicitly consider homophobic intent to constitute an aggravating circumstance.

The number of Member States that allow same-sex couples to marry or enter into registered partnerships has continued to grow, although 9 Member States still do not provide either option. Eleven EU Member States have opened marriage to same-sex partners - only five did so in 2010. The lack of access to either of these two institutions significantly affects the free movement rights of same-sex couples. The Free Movement Directive obliges Member States to allow entry to registered partners as ‘family members’ only where partnerships are treated as equivalent to marriage in the national law of the state of destination. Requests of LGBTI spouses of EU citizens to be recognised as ‘family members’ in countries that do not recognise same-sex marriage highlight the divergence between the national laws of these countries and EU law. Nonetheless, in eleven EU Member States no distinction is made between a same-sex spouse and a different-sex spouse for purposes of entry and residence rights (this was the case in eight Member states in 2010). Similarly, nineteen Member States grant entry and residence rights to same-sex registered partners; 14 did so in 2010. In the remaining Member States, same-sex partners are still not recognised.

Regarding family reunification for third-country nationals, several Member States still appear not to grant entry and residence rights to same-sex spouses of sponsors. Nevertheless, the majority of EU Member States extends the right of family reunification to

same-sex spouses, registered partners or *de facto* partners from outside the EU. Regarding children – as recognised by the CJEU – account must be taken not only of their right to respect for their private or family life, but also of their need of full and harmonious development of their personality. In applying the Free Movement Directive, the Family Reunification Directive and the Qualification Directive (recast), Member States must consider children’s need to maintain a personal relationship with both parents on a regular basis, including if the parents are of the same sex.

Member States have an obligation to protect the child’s best interests, as required by Article 24 (2) of the Charter of Fundamental Rights of the EU. But children of same-sex couples suffer indirect discrimination in EU Member States that do not legally recognise same-sex partners. In some cases, this indirect discrimination becomes direct discrimination on the ground of nationality, because, if a child is the legal or natural child of an EU citizen, the child should not experience restrictions to free movement.

A positive trend can be observed in relation to international protection granted to LGBTI persons. With the exception of Estonia, all EU Member States explicitly include in their legislation sexual orientation as a ground of persecution for which refugee status is granted. However, trans persons do not yet receive the same degree of recognition, even though the Qualification Directive (recast) explicitly includes gender identity among the personal characteristics to be taken into account when assessing asylum applications. Another problem is the approach followed by several Member States in establishing a valid claim of persecution on the ground of sexual orientation. While some EU Member States accept that a risk of persecution exists upon proof that homosexuality is socially stigmatised in the state of origin, others still require homosexuality to be criminalised or that actual sanctions have been imposed in the state of origin. Some Member States still refuse to accept that a risk of persecution exists because they believe applicants can conceal their sexual orientation in their state of origin. CJEU case law has clarified the requirements in this regard. While the mere existence of legislation criminalising homosexual acts does not automatically imply a risk of persecution – meaning the legislation must actually be applied to that effect - LGBTI individuals cannot be lawfully expected to conceal their sexual orientation.

In addition, the CJEU has established important criteria for assessing the declared sexual orientation of asylum seekers. According to the CJEU, the competent national authorities cannot:

- carry out detailed questioning as to the sexual practices of asylum applicants;





- allow evidence such as the performance by applicants of acts demonstrating their sexual orientation;
- subject applicants to ‘tests’ to demonstrate their sexual orientation;
- accept into evidence material such as films of their intimate acts, as such evidence would infringe human dignity.

Similarly, the late disclosure of sexual orientation (as a ground for international protection) cannot in itself justify the conclusion that an applicant lacks credibility.

Finally, the situation of intersex people – analysed by FRA for the first time in this report – is marked by the fact that the legal systems in most EU Member States adhere to a strict sex binary that does not reflect nature, as the sex characteristics of intersex people show. This adherence has important effects on the legal status of intersex people. For instance, parents, legal guardians and medical staff responsible for caring for children are forced to assign to every new-born child one of the two sexes (‘male’ or ‘female’) recognised by law, even though these may not correspond to the child’s sex characteristics. Fortunately, at least four EU Member States already allow registration of a sex-neutral identification in birth certificates. The positive impact of this option, however, may not be felt in practice as long as the sex binary persists in social thinking: even

where legislation does not make binarism compulsory, child carers may feel compelled to adapt to it in light of social expectations and to avoid differentiating intersex children.

The related and common practice of performing medical ‘sex normalising’ treatments, including surgery, on intersex children to adequate their sex to the sex binary continues to cause fundamental rights concerns. Some Member States have raised the minimum age at which such treatments are allowed, with the aim of involving the patients in the decision-making process. However, progress on this issue remains uneven, and sex assignment or sex-related surgery is performed on young intersex children in at least 21 Member States.

To conclude, while encouraging developments towards the better protection of LGBTI people’s rights can be observed across the EU, and in a number of Member States in particular, in others little has changed since publication of the 2010 report, and in others LGBTI people have suffered setbacks. The lack of a harmonised and comprehensive action framework, with clear milestones for the fulfilment of LGBTI people’s rights, is problematic; future activities must be better coordinated at EU level. This should be based on a synergetic approach that mobilises legislative, financial and policy coordination tools – not just in the short-term, but also with a long-term perspective.



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## HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

While awareness of the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is on the rise across the European Union (EU), hurdles to their full enjoyment of their fundamental rights remain. This report updates FRA's 2010 comparative legal analysis of discrimination on the basis of sexual orientation and gender identity, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity*. It outlines trends and developments at national and EU level, focusing on: access to and legal recognition of gender; non-discrimination in employment; freedom of expression and assembly; as well as freedom of movement, family reunification, and asylum, including international protection for LGBTI people and their family members. In addition, this report for the first time addresses in-depth the fundamental rights situation of intersex persons. By identifying areas of progress as well as set-backs and remaining challenges, it provides a thorough overview of the current status of LGBTI rights and serves as a valuable resource for actors at all levels working to eliminate discrimination against the LGBTI community.

