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Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity

2010 Update

Comparative legal analysis

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Luxembourg: Publications Office of the European Union, 2010

ISBN 978-92-9192-631-2
doi:10.2811/83741

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Foreword

Developments over the past years testify to the increasing awareness of the rights of lesbian, gay, bisexual and transgender (LGBT) persons at European Union and international level. At European Union level, the Treaty of Lisbon strengthens the framework of non-discrimination legislation. In particular, the now binding Charter of Fundamental Rights of the European Union is guiding policies to the extent that they have the potential to affect fundamental rights. According to the EU Treaties, the European Union shall combat social exclusion and discrimination and, in defining and implementing all of its policies and activities, it shall also aim to combat discrimination based on sexual orientation. Moreover, 2010 marks the 10th anniversary of the Employment Equality Directive, which has had a significant impact on the harmonisation and strengthening of non-discrimination law in all EU Member States, including LGBT rights.

The international consensus regarding the need to combat discrimination on grounds of sexual orientation and gender identity has been strongly reaffirmed. In the context of the Council of Europe, the year 2010 witnessed the adoption of Recommendation CM/Rec(2010)5 by the Committee of Ministers, and also of a relevant Recommendation and Resolution by the Parliamentary Assembly. In the context of the United Nations, 66 states presented a non-legally binding joint statement at the General Assembly in 2008, reaffirming the right of equal treatment for LGBT persons.

However, in a minority of EU Member States, this component of the European human rights acquis still meets with resistance. Following restrictive legislation on the dissemination of information about homosexuality to minors or the 'promotion' of homosexuality, the European Parliament requested the Agency to examine the situation in depth. FRA has taken up this request in the context of its commitment to update its original 2008 comparative legal analysis of LGBT discrimination. Furthermore, this legal update, and the national background information on which it is based, forms part of a collaborative endeavour that the FRA has undertaken with the Office of the Commissioner for Human Rights of the Council of Europe, in the framework of a study on homophobia and transphobia in all 47 Council of Europe Member States. This cooperation will also foster increased coherence and complementarity in the field of human rights.

This update reveals important trends, highlighting both positive developments as well as areas where much work remains to be done. It ensures the continued value of the original reports and also comes at a crucial time for the rights of lesbian, gay, bisexual and transgender (LGBT) people in Europe. The Agency will continue to provide evidence-based advice in order to support further improvements in legislation in this field.

Morten Kjærum
Director

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Executive summary

This report updates the FRA comparative legal analysis of discrimination on the basis of sexual orientation and gender identity first published in June 2008. It presents the situation as it stood at the end of 2009, though information gathered in 2010 has been incorporated to the greatest possible extent. Five main trends among EU Member States can be noted from the information presented in this report.

First, a few EU Member States have amended their legislation and practice concerning access to gender reassignment treatment, and alteration of the recorded name or sex on official documents for those who have undergone or intend to undergo gender reassignment. In Latvia, a specialised medical institution has been established with the task of approving applications for gender reassignment. In Germany the requirement to divorce in order to alter the recorded sex on official documents has now been abolished, and similar developments are expected in the Netherlands. Ireland is expected to put legislation in place allowing for legal recognition of gender reassignment. Latvian legislation now explicitly permits a change of name following gender reassignment. Finally, in Austria the courts have found that surgery cannot be imposed as a precondition for alteration of an individual's name. The understanding of gender identity as involving a strong element of self-determination, rather than merely a psychiatric disorder, is improving in the EU. However, the conditions attached to gender reassignment treatment and to legal recognition of gender reassignment remain often vague and not determined by law. The approach in most Member States continues to be cumbersome, highly medicalised, and to attract stigma.

Second, the update reveals progress in a number of Member States in relation to the scope of legal protection against sexual orientation discrimination. The Czech Republic and the United Kingdom (UK) have now extended protection beyond the context of employment to prohibit sexual orientation discrimination in all areas covered by the Racial Equality Directive (such as social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing). These developments bring to 10 the total number of Member States that do so. Furthermore, Denmark and Estonia have extended the mandate of their equality bodies to cover sexual orientation discrimination, bringing to 20 the total of Member States that do so. Both of these developments signal a strong trend towards the equal treatment of grounds of discrimination as between those areas covered by the Racial Equality Directive and those covered by the Employment Equality Directive, as well as a trend towards a broad mandate of the equality bodies with respect to multiple grounds of discrimination.

The explicit inclusion of gender reassignment or gender identity in non-discrimination law, either as an autonomous ground or as a form of 'sex' discrimination, has improved in three Member States. The Czech Republic, Sweden, and the UK have moved in this direction. Sweden adopted a particularly broad formula, by referring to 'transgender identity or expression' in order to protect gender identity beyond those who have undergone or intend to undergo gender reassignment. Overall, notwithstanding EU case law, a fragmented situation remains throughout the EU, as well as lack of clarity of applicable standards and definitions in at least 15 Member States.

With regard to the position of religious and ethos-based organisations and the exemptions or exceptions to the principle of equal treatment that they might enjoy, this update finds that in some Member States (Germany, Lithuania, the Netherlands and the UK) the scope of the exemption is still in need of clarification.

Access to employment-related partner benefits is an area where important case law of the Court of Justice of the EU (CJEU) has provided some clarification. A chamber of the ECtHR has also concluded that same-sex couples may benefit from protection of their 'family life' under the European Convention on Human Rights, just as opposite-sex couples do.

Third, the update reveals progress in relation to the enjoyment of freedom of assembly, and expression for lesbian, gay, bisexual and transgender (LGBT) people as well as protection from violence motivated by prejudice, incitement to hatred and expressions of prejudice and discrimination against LGBT people. In Poland, Romania and Bulgaria pride marches were held successfully for the first time. In contrast, in Lithuania the 2010 Baltic pride was threatened with cancellation at short notice, and in Latvia the right to organise marches continues to be challenged by elected officials despite several court rulings annulling attempted bans. In addition, while most EU Member States dispose of legislation authorising the banning of demonstrations that incite hatred, violence or discrimination (on grounds of sexual orientation), there is often reluctance to make use of these powers.

Concerning the ban on the 'promotion' of homosexuality and same-sex relations to minors or in public, Lithuania constitutes the only recent example of such legislation. In contrast, a number of Member States have taken action to foster education and dialogue, with the aim of challenging negative attitudes towards homosexuality and LGBT people, namely: Estonia, France, Germany, the Netherlands, Spain and the UK.

As far as expressions of insult and prejudice against LGBT people and, specifically, incitement to hatred

is concerned, only one Member State has adopted new provisions in this regard (Slovenia), bringing the total number of Member States prohibiting incitement to hatred towards the LGBT population to 13. With respect to hate crime, Lithuania and the UK (Scotland) have enacted new provisions in this area, bringing the total number of Member States having classified homophobic or transphobic intent as at least an aggravating circumstance in criminal law to 11. This update also shows that Scotland is the first European jurisdiction to include protection for transgender persons in its criminal law. In contrast, the legal framework in Lithuania seems to be more ambivalent, since national legislation bans information on homosexuality, while at the same time sexual orientation is included among the criminal provisions on aggravating circumstances in cases of hate crime. Overall, protection against insult, assault, incitement to hatred and violence towards LGBT people remains limited in the majority of Member States.

Fourth, several developments can be noted in relation to the opening up of marriage for same-sex couples. In addition to Belgium, the Netherlands, and Spain, marriage is now permitted in Portugal and Sweden, and similar legislation is in the process of being adopted in Luxembourg and in Slovenia. Austria, Hungary and Ireland have also gone on to adopt a registered partnership scheme for same-sex couples. On the other hand, Bulgaria, Estonia and Romania have consolidated or amended their legislation to specify that marriage is reserved for different-sex couples only, and to deny recognition of same-sex partnerships and marriages concluded abroad. The meaning of the term 'family member' in the context of the law on free movement, family reunification, and asylum, while often remaining vague, has been or will be expanded in Austria, France, Ireland, Luxembourg, Portugal, and Spain to include same-sex couples to differing degrees and in different areas. This situation signals the persistence of an uneven landscape with respect to freedom of movement and family reunification for same-sex couples.

Fifth, concerning the grant of international protection to LGBT people who are victims of persecution in their countries of origin, the 2008 report found that the inclusion of sexual orientation as a ground of persecution had remained implicit in the legislation of eight Member States. This update shows that in Finland, Latvia, Poland and Spain, this recognition has now been made explicit in the legislation. Therefore, the total number of Member States which explicitly consider lesbian, gay and bisexual (LGB) people as a 'particular social group' has now risen to 22, which signals a clear trend towards legislative inclusion of LGB people as potential victims of persecution. As regards gender identity as a ground of persecution, which had remained implicit in the Qualification Directive, the situation remains very unclear at Member State level.

There is variation among the Member States (including as between national judicial bodies) in relation to what is required in order to prove the existence of a well-founded fear of persecution on grounds of sexual orientation. Jurisdictions in the Czech Republic and Spain have been prepared to accept nothing short of the explicit criminalisation of homosexuality in the country of origin and the actual imposition of official sanctions. Moreover, even where this is the case, where an individual is considered to be able to conceal his or her sexual orientation or gender identity in the country of origin, authorities may conclude that there exists no risk of persecution (Belgium, France, Germany, Ireland, Italy). However, in a number of other Member States a more general climate of social intolerance in the country of origin may be accepted as giving rise to a well-founded fear of persecution, and other Member States have clearly recognised that LGB persons should not be expected to conceal their sexual orientation (Denmark, France, the Netherlands). The UK courts have recently moved away from expecting individuals to conceal their sexual orientation towards this fairer approach. Finally, this report shows that the Czech Republic is the only EU Member State to rely on tests assessing physical responses to erotic visual stimuli as a method of assessing the credibility of a person claiming to be a gay man, despite concerns with regard to human rights standards, such as the right to privacy and protection from degrading treatment.

Opinions

The European Union Agency for Fundamental Rights has formulated the following opinions based on the findings and comparative analysis contained in this report.

Right to life, security and protection from hatred and violence

In order to prevent LGBT people being subject to verbal and physical abuse, Member States are encouraged to consider promoting more balanced public opinion on LGBT issues by facilitating dialogue between LGBT groups, the media, political representatives and religious institutions.

Member States and EU institutions, as provided for by the Treaties, should take appropriate practical measures to combat all forms of expression inciting, spreading or promoting hatred or other forms of discrimination against LGBT people, as well as incidents and crimes motivated by prejudice against LGBT persons. Equally, renewed commitment to countering anti-LGBT crimes and violence should lead to more effective action, exploring the potential of the new EU Treaties for the development of legal provisions at EU and national level, which should grant the same level of protection as the one granted to hate speech and crime motivated by racism or xenophobia.

Member States are also 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 the extent and nature of discrimination on grounds of sexual orientation or gender identity and criminal victimisation.

Securing freedom of assembly and expression of LGBT people

Authorities in Member States should not rely on general provisions such as those relating to the preservation of 'public order' to impose undue restrictions on LGBT-related events and other manifestations of LGBT identities or relationships.

Exchanges of good practice that actively promote the public acceptance of LGBT identities, conduct and relationships, among EU Member States, could lead to LGBT experiences being presented in a respectful and understanding way.

The right to receive unbiased information about LGBT persons and their relationships, and to live in an open and inclusive environment needs to be respected, protected, promoted and fulfilled across the EU. This is particularly important for LGBT children.

Renewed commitment to the proposal for a 'horizontal directive'

A substantial number of EU Member States already ban discrimination based on sexual orientation beyond the sphere of employment, to include some or all of those areas covered by the Racial Equality Directive. However, different forms of discrimination are still not equally addressed within the EU. The adoption of the European Commission's proposal for a 'horizontal directive', in order to address the existing 'hierarchy of grounds' in EU Law, would significantly improve equal protection against discrimination on all grounds across the EU.

Stronger and clearer protection against discrimination on the ground of 'gender identity'

Member States are encouraged to ensure that discrimination on grounds of gender identity is effectively addressed in their legislation transposing the Gender Equality Directive (recast), in order to clarify existing definitions and extend protection beyond those who are undergoing or have undergone gender reassignment.

In this context, the European Commission could consider expressly including gender identity among the prohibited grounds of discrimination in the Gender Equality Directive on Goods and Services.

Member States could consider drawing inspiration from recent practices in some Member States abolishing divorce and genital surgery as preconditions to the rectification of the recorded sex or alteration of name on official documents.

'Family member' and mutual recognition of civil status in EU law

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, within the definitions of 'family member'. In particular in the context of free movement, this could be achieved by explicitly adopting the 'country of origin' principle already firmly established in other areas of EU law.

In relevant areas of EU action concerning mutual recognition of the effects of certain civil status documents and on dispensing with the formalities for

the legalisation of documents between the Member States, EU institutions and Member States should ensure that practical problems faced by same-sex couples are addressed, for instance, by considering the conflicts of laws principle of the law of the place where the act was formed, in combination with the prohibition of 'double regulation'.

In addition, with respect to the initiatives foreseen in the European Commission's Action Plan implementing the Stockholm Programme on matrimonial property regimes and patrimonial aspects of registered partnerships, it is important that: legal certainty for same-sex registered partners and unmarried couples is enhanced; citizens' practical needs are addressed; and that the family life of those individuals involved in such unions is acknowledged and recognised.

Improved protection for LGBT people seeking international protection

EU institutions and Member States should consider explicitly recognising gender identity as a ground of persecution in the current reform of the Qualification Directive in the context of the 'asylum package'.

The European Asylum Support Office, in its development of material to assist the Member States, should facilitate the understanding and proper handling of cases raising issues of sexual orientation and gender identity.

The UNHCR Guidance note on Refugee Claims relating to Sexual Orientation and Gender Identity of 2008 is of particular relevance in assessing asylum claims particularly regarding an individual's assertion of orientation or identity, irrespective of marital status, children, or conformity with stereotypes. Current uses of degrading and intrusive assessments of credibility of asylum claims based on sexual orientation and gender identity should be discontinued.

Introduction

This comparative report updates and complements the FRA study *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis of June 2008* (hereafter, the 2008 report). This report provides an updated overview of trends and developments across the EU on legislation and legal practice addressing homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, to the extent that this has evolved since the 2008 report. This report is based on information current to the end of 2009, although more recent information up to June 2010 has been taken into account to the fullest extent possible.

The Fundamental Rights Agency (FRA) is mandated to collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data in the field of fundamental rights in the EU. It carries out scientific research and surveys and, based on its findings, the FRA formulates conclusions and opinions for the EU institutions and the Member States when implementing EU Law. Research projects are developed and discussed with stakeholders in the field and the FRA's reports are then widely disseminated to relevant partners. The present update constitutes one among a number of outcomes of these networking and communication activities. First, the FRA participated in the work of the Committee of Experts of the Council of Europe responsible for drafting Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, which was adopted on 31 March 2010 by the Committee of Ministers. Furthermore, the updated national information collected by the FRA, together with technical expertise, have been made available to the Office of the Council of Europe Commissioner for Human Rights, in the framework of an unprecedented study on homophobia, transphobia and discrimination which will cover all 47 Member States of the Council of Europe. The study is expected to be launched early in 2011. Second, dialogue with key stakeholders has continued with two roundtables organised by the FRA in Riga (2008) and in Dublin (2009), collecting policy makers, professionals, experts, NGOs, trade unions, and others. These have allowed the FRA to disseminate its findings, raise awareness of the key issues, share good practices and collect views on future work. Some of these networking activities also took place on a smaller scale, with participation in conferences or seminars especially dedicated to employment and multiple discrimination, to gender identity, or to better cooperation between NGOs and the police in addressing

hate crime. All of them have allowed the FRA to deepen its understanding of the issues at stake, to contribute to the debate with its knowledge and findings, and to develop a sense of the remaining challenges.

The FRA has also continued more structured dialogue with a number of key partners: ongoing exchange and collaboration has been developed with the informal network of LGBT focal points in national governments, with Equinet specifically on the situation of transgender people, with the LGBT Intergroup in the European Parliament, and with religious organisations. The FRA participates regularly in the meetings of the Non-Discrimination Governmental Expert Group run by the European Commission which, in 2010, organised a seminar for the exchange of good practices in public policies for the combating of discrimination and the promotion of equality for LGBT persons.

In order to build not only on the 2008 report, but also on the complementary social study on homophobia published in 2009 (*Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The Social Situation*), and on the networking activities mentioned above, the structure of the original report has been modified. Relevant developments since June 2008 are presented under new headings to allow developments to be easily identifiable. In this vein the update begins with a discussion of gender identity discrimination, serving to draw attention to and raise the profile of this important issue where some significant changes have occurred.

This update report identifies several good practices that Member States have chosen to develop. They have been integrated into the relevant sections throughout the report, rather than dealt with separately. Additionally, this update includes summaries of data by way of tables and maps. The reader is advised that these maps and tables contain information which was current up to December 2009. Developments up to June 2010 have also been taken into account as far as possible. While every effort has been made to ensure the accuracy of the data contained therein, in some cases the lack of explicit definitions, the internal contradictions or the vagueness of national legislation may create some ambiguities. The tables should therefore be considered as a work in progress, and any comment aimed at improving their accuracy will be welcomed by the FRA.

1. Access to and legal recognition of gender reassignment

This chapter examines two main legal issues relating to the regulations and procedures surrounding gender reassignment, which could not be addressed in other parts of this report. First, it explores access to gender reassignment treatment. Second, it addresses the question of legal recognition of gender reassignment, namely the possibility to rectify the recorded sex and name on official documents, and the ability to enter into or maintain a marriage.

A preliminary note should be made on terminology. The term 'transgender' refers to persons who present themselves as contrary to the expectations of the sex assigned to them at birth, whether through clothing, accessories, cosmetics or body modification. This includes, among many others, transgender persons, transsexuals, transvestites and cross-dressers. The term 'transsexual' is used more specifically to refer to an individual who has undergone or intends to undergo gender reassignment.¹ Terms and concepts surrounding these issues are fluid and under continued debate and, in this sense, note should be made of the broader notion of 'trans people', which is taken to represent a wider category encompassing transsexuals and transgender people as well as those who self-identify in other ways, such as intersex and gender variant people or those who self-identify with concepts existing beyond the binary gender system of male-female.² Finally, according to the Yogyakarta Principles, 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'.³ Thus discrimination on the basis of 'gender identity' can refer to unfair treatment deriving from traditional social and legal settings or received by an individual on the basis that they are a transgender person.

1 See also FRA, *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, 2009, pp. 14-15, 24.

2 See, for example, the Mission Statement of Transgender Europe (<http://www.tgeu.org/node/15>) and the Working Definition used by the ongoing research project of Transgender Europe 'Transrespect versus Transphobia Worldwide' (http://www.transrespect-transphobia.org/en_US/tvt-project/definitions.htm). The position of intersex people is not specifically addressed in this report.

3 Yogyakarta Principles on the Application of Human Rights law in Relation to Sexual Orientation and Gender Identity, 2007. Available on: http://www.yogyakartaprinciples.org/principles_en.htm. The Yogyakarta Principles are a set of principles on the application of International Human Rights Law in relation to sexual orientation and gender identity. The Principles, while not binding in themselves, affirm binding international legal standards with which all States must comply.

1.1. Gender identity and gender reassignment

While there is evidence to suggest that there is (albeit slow) progress towards better understanding of issues surrounding gender identity, this does not necessarily translate into improvements in the position of transgender people. They remain a marginalised and victimised group, which faces a high degree of stigmatisation, exclusion, and violence. In July 2009 the Council of Europe Commissioner for Human Rights published an Issue Paper entitled *Human rights and gender identity*.⁴ The Issue Paper reviews existing practices on gender reassignment and emphasises how transgender people suffer from violations of their human rights as a result of the combination of cumbersome and sometimes vague legal and medical requirements, and lengthy processes of psychological, psychiatric and physical tests, such as genital examinations.⁵ It concludes that often 'transgender people choose not to enter the official procedures at all due to discriminatory medical processes and inappropriate treatment, or due to the fact that only one course of treatment is available. They are then, in turn, denied legal recognition of their preferred gender and name, or gender reassignment treatment that fits their own wishes and personal health needs'.⁶ The paper recommends the enactment of hate crime legislation, expeditious and transparent procedures for changing name and sex, and the abolishment of sterilisation and other compulsory medical treatment as a legal requirement to recognise a person's gender identity. The following paragraphs summarise the prevailing views of the medical community concerning gender identity and present developments that were reported in two Member States.

'Gender identity disorder' is currently listed in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association to standardise the criteria for the classification of mental disorders. Gender identity disorder is also closely related to the diagnosis of 'Transsexualism' in the International Classification of Diseases (ICD). This implies that the majority of Member States still regard variance in gender identity as a psychopathological condition, and treat it as a disorder which requires an approach based (mainly) on medical interventions. The fifth edition (DSM-5) is currently in preparation and to this end a working group on Sexual and Gender Identity Disorders was established. It is entrusted with the task of reviewing the existing criteria for diagnosing

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

5 The Issue Paper uses the term 'transgender' rather than the term 'trans people'.

6 *Ibid.*, p. 16.

sexual dysfunctions, paraphilias and gender identity disorders. The new DSM-5 is due to be adopted in May 2013. The debate so far has focused on whether 'gender identity disorders' should be excluded by the DSM-5 or whether a different, non psychiatric diagnosis is possible. Rejecting the possibility of deleting transsexuality from the list of mental disorders, the working group has suggested moving away from the language of 'gender identity disorder', and has put forward the proposal that the DSM-5 should categorise the diagnosis as one of 'gender incongruence'.

With respect to the debate on gender identity disorder, an interesting development can be observed in France where a government order n° 2010-125 of 8 February 2010 removed transsexuality from the list of 'long term psychiatric conditions' (ALD 23). The process remains attached to the assumption of a severe pathology⁷ and leaves it open to medical and judicial discretion as to how and when to offer patient care and authorise the undertaking of medical, psychological and financial support. The medicalisation of the procedure still imposes a heavy burden on individuals, who often face diversified and inconsistent outcomes depending on medical choices or on the court dealing with the request. There is no indication that other Member States have moved away from the paradigm of gender variance as a psychiatric disorder.

In addition to these general developments, the following sections will explore in greater detail two specific aspects that the 2008 report had already identified as central in the understanding of transgender issues from a fundamental rights angle: access to gender reassignment treatment, and legal recognition of the preferred gender.

1.2. Access to gender reassignment treatment

The 2008 report described the situation in EU Member States with respect to the rules and practices surrounding gender reassignment treatment. The report noted that most EU Member States impose strict requirements on the availability of gender reassignment treatment, generally including waiting periods, and assessment by psychological and medical experts, but also, in certain cases, prior judicial authorisation. It remarked that, while sometimes necessary in order to protect individuals in psychologically vulnerable situations, these obstacles should be carefully scrutinised. In particular it should be asked whether they are justified by the need to protect potential applicants or third persons, or whether they impose a disproportionate burden on those seeking gender reassignment. According to case law of the European Court of Human Rights (ECtHR) the

European Convention on Human Rights (ECHR) obliges all State parties to provide for the possibility, in principle within their jurisdiction, to undergo surgery leading to full gender reassignment.⁸ Recommendation CM/Rec(2010)5 of the Committee of Ministers states in this respect that 'prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.'⁹

The Issue Paper of the Council of Europe Commissioner for Human Rights, maintains 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.'¹⁰

Save for Latvia, there appears to be no evolution among Member States with respect to access to gender reassignment treatment. Here, a change in legislation followed a judgment of the Supreme Court Senate Administrative Case Department of 14 January 2008 concerning the refusal of the civil registry office to change the entry on a person's birth register after the change of gender. It was found that a lacuna existed in the law which was silent on the criteria to be followed to establish whether gender reassignment had taken place.¹¹ Subsequently, on 25 September 2008 the Administrative Regional Court ordered the Registry Office to issue a written apology to the claimant for having refused to enter the changes on the Birth Register and for having forwarded sensitive data to the Ministry of Health; however, a claim for financial compensation for moral damages was refused.¹² On 18 August 2009 the Cabinet of Ministers approved amendments to the laws on Sexual and Reproductive Health and Civil Status Documents aimed at filling the lacuna in the legislation. The Sexual and Reproductive Health Law has now been supplemented by a separate Chapter VII "On Gender Reassignment", designating a competent authority to approve gender reassignment following a medical expert opinion (see also below for further developments in Latvia).¹³

7 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)).

8 ECtHR, *L. v. Lithuania*, No. 27527/03, 11 September 2007.
 9 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, Appendix, para. 20.
 10 Thomas Hammarberg, Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, Issue Paper, CommDH/IssuePaper(2009) 2, 29 July 2009, p. 26.
 11 Latvia/Augstākās tiesas Senāta Administratīvo lietu departaments, case No. A42229505 SKA-5/2008 (14 January 2008).
 12 Latvia/Administratīvā apgabaltiesa, case No. A42229505 (25 September 2008). On 21 May 2009 the Supreme Court Senate Administrative Case Department upheld the ruling of the regional court, as the claimant had not submitted evidence that would support claimant's statements that claimant's rights (right to work, freedom of movement) had been restricted as the result of delay in receiving new identity documents. See Latvia/Augstākās tiesas Senāta Administratīvo lietu departaments, case No. SKA-138/2009 (21 May 2009).
 13 Latvia/Draft Law 'Amendments to the Sexual and Reproductive Health Law', Section 28 para 1, available at: http://www.mk.gov.lv/doc/2005/TMLik_160709_dzim.2765.doc (5 January 2009).

1.3. Legal recognition of gender reassignment

The FRA's 2008 report also discussed a second specific dimension of the protection of transgender persons. It noted that applicable standards require States to grant legal recognition of the gender acquired following complete gender reassignment. Furthermore, the case law of the ECtHR recognises a right for transsexual persons to marry a person of the gender opposite to that of the acquired gender.¹⁴ Both points are reaffirmed by Recommendation CM/Rec(2010)5 of the Committee of Ministers, with particular emphasis on 'full legal recognition of a person's gender reassignment in all areas of life'. This includes a 'change of name and gender in official documents in a quick, transparent and accessible way'; as well as change with respect to 'key documents, such as educational or work certificates' (Appendix, para. 21). The Recommendation also reaffirms 'the right to marry a person of the sex opposite to their reassigned sex' (Appendix, para. 22).

The 2008 report noted that although four EU Member States (Ireland, Luxembourg, Latvia, and Malta) still seemed not to comply fully with this requirement, legal recognition in the other Member States was generally available. However, the approaches vary. In a few Member States, there is no requirement to undergo hormonal treatment or surgery in order to obtain legal recognition of gender reassignment. In other Member States such recognition is possible only following a medically supervised process of gender reassignment sometimes requiring, as a separate specific condition, that the person concerned is no longer capable to procreate in accordance with his/her former sex (Belgium, Germany, the Netherlands), and sometimes requiring surgery and not merely hormonal treatment (Italy, Poland). The following subsections present the main changes taking place in the period 2008-2010, concerning both the rectification of the recorded sex on official documents, and the possibility of changing one's name.

1.3.1. Rectification of the recorded sex on birth certificates and other official documents and the right to marry

With respect to the rectification of the recorded sex on birth certificates and other official documents, there have been developments in Germany, Ireland, and the Netherlands. In the Netherlands, the Civil Code still provides that in order for courts to authorise a person to change the recorded sex on the birth certificate, both gender reassignment (as far as this is possible and sensible from a medical and psychological point of view) and permanent sterilisation are in principle required. However, following the call of the Commissioner for Human Rights of the Council of Europe, based on the Yogyakarta Principles,

for the abolition of both the absolute infertility requirement and the physical transformation requirement,¹⁵ the Minister of Justice has informed Parliament that a bill is in preparation to amend the relevant legislation.¹⁶ Legislation recently adopted in Spain by the Autonomous Community of Navarra¹⁷ is particularly progressive, since it clarifies that services provided by the Autonomous Community are to be secured without discrimination to any individual who has initiated the procedure for changing the recorded sex on the 'Registro Civil' (the official document detailing one's legal personal and family status). This Act provides a broad coverage as its aim is to guarantee that all persons who have socially adopted a gender opposite to the one assigned at birth receive holistic and adequate attention for their medical, psychological, legal and other needs. Furthermore, the Act establishes not only measures in the medical field, but also positive actions for greater integration in the workplace.

The 2008 report noted the decision in the *Lydia Foy* case of the High Court of Ireland, which held that the lack of legal recognition of gender reassignment was incompatible with the ECHR.¹⁸ While the government initiated an appeal before the Supreme Court, this was withdrawn in June 2010, thus accepting the High Court ruling. Proposals for new legislation in compliance with the ECHR are now expected. In Latvia, after the Sexual and Reproductive Health Law was amended in order to authorise gender reassignment, amendments were also proposed to the Civil Status Document Law allowing for the rectification of the recorded sex in the birth registry, but at the time of writing these proposals had not attracted the required majority in Parliament and therefore have not thus far been adopted.

The decision to rectify the recorded sex on birth certificates and other official documents may have implications for the family life of the individual in question. The 2008 report noted that in certain Member States the legal recognition of gender reassignment requires that the person concerned is not married or that the marriage be dissolved. As noted, in the 2002 case of *Christine Goodwin v. the United Kingdom* the ECtHR ruled that marriage with a person of the gender opposite to the gender acquired by the individual should be available.¹⁹

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

15 Thomas Hammarberg, Council of Europe Commissioner for Human Rights, *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to the Netherlands 21-25 September 2008*, CommDH(2009)2, 11 March 2009, p. 33.

16 Netherlands/Parliamentary Documents Lower House (2008-2009) 27017, nr. 53 (1 October 2009).

17 Ley Foral 12/2009, de 19 noviembre, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales [on non-discrimination on grounds of gender identity and recognition of the rights of transsexual persons].

18 Ireland/High Court/2007/IEHC 470 (19 October 2007).

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

However, it is generally considered that this rule does not imply that legal recognition of gender reassignment should be possible for a person who is already married, since such recognition would result in a marriage existing between two persons of the same sex. This situation, the 2008 report noted, obliges the individual to choose between either remaining married or undergoing a change which will reconcile his/her biological and social sex with his/her psychological sex. It has therefore been proposed that the requirement of being unmarried or divorced as a prerequisite for authorisation for change of sex should be abandoned. Indeed, in 2008 the German Federal Constitutional Court (Bundesverfassungsgericht) held that a married transsexual who wanted to legally rectify her gender after a gender reassignment surgery from male to female, but at the same time remain married to her wife, cannot be forced by the Law on Transsexuals to divorce in order to have the gender reassignment legally recognised.²⁰ Such a requirement, the Court reasoned, would be in violation of the constitutionally guaranteed right to recognition of the freely chosen and self-determined gender identity, which needs to be appropriately balanced with the constitutional guarantee of marriage as an institution as enshrined in Article 6, para. 1 of the Basic Law (Grundgesetz). The decision led to amendment of the Law on Transsexuals, removing the impugned provision.²¹ This development, ending forced divorce for married couples in which one of the partners is transsexual, was welcomed by the Council of Europe Commissioner for Human Rights.²²

With respect to the legal requirements of genital surgery leading to sterilisation and other medical treatment, the European human rights network Transgender Europe strongly criticised these requirements as violations of the right to physical integrity, right to form a family and free choice of medical treatment. According to Transgender Europe, the impossibility to procreate finds no parallel in any other population groups.

1.3.2. Change of name

Finally, the ability to change one's forename, with or without gender reassignment, is recognised under different procedures. In most Member States, changing names (acquiring a name indicative of a gender other than the gender assigned at birth) is a procedure available only in exceptional circumstances. It is generally conditional upon medical testimony that the gender reassignment has taken place, or upon a legal recognition of gender reassignment, whether or not following medical treatment.

Positive developments took place in Austria and Latvia. In a judgment by the Austrian Constitutional Court in 2009,²³ as well as a series of judgments between 2008 and 2010 by Austria's Administrative Supreme Court,²⁴ the possibility of name change should be ensured without complete gender reassignment and, in particular, without mandatory surgery. According to the approach of the courts in these cases the only decisive factors are that the applicant is transsexual and that he or she has been living and working as belonging to the opposite gender. The Ministry of Interior has indicated that the practice of requiring genital surgery to proceed with a name change should be modified, but no concrete proposal has yet followed. In Latvia, on 8 April 2009 the Parliament adopted the Law on the Change of a Name, Surname and Ethnicity Entry, which now explicitly provides that the change of name and surname is permitted following gender reassignment.²⁵ Even when positive changes are introduced in legislation, their implementation should be carefully executed to avoid arbitrariness by competent authorities, fragmentation and uneven application, as well as harassment, discrimination, and denial of rights. In general, organisations such as Transgender Europe have welcomed the strong role given to the self-definition of gender identity. Transgender Europe, however, still considers the precondition of a 'real life test' subject to criticism because it both violates transgender persons' privacy and leads to potential discrimination. Transgender Europe maintains that a name change should be made available through a simple administrative procedure. Any person identifying as transgender should be able to determine when they wish to change their name and present themselves socially as transgender persons so as to ensure the protection of their privacy and dignity.

The Table 1 summarises the state of play with respect to the requirements for rectification of the recorded sex or name on official documents. While every effort has been made to ensure the accuracy of the content in this table, the reader is advised that the information contained therein is particularly difficult to access because the subject-matter it is often not regulated by law. While legal regulation may not always be desirable, given the increased burden it may impose on individuals, it does facilitate the accessibility and the comparability of precise information. This table should therefore be considered as a work in progress, and any comment aimed at improving the accuracy of the table will be welcomed by the FRA.

20 Germany/Bundesverfassungsgericht/1 BvL 10/05 (27 May 2008), http://www.bundesverfassungsgericht.de/entscheidungen/Is20080527_1bvl001005.html (26 February 2010).

21 Germany/BGBl I, Nr. 43, p. 1978 (22 July 2009), Article 5; http://www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl (26 February 2010).

22 Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Issue Paper, *Human Rights and Gender Identity*, CommDH/IssuePaper(2009)2, 29 July 2009, p. 23.

23 Austria/Verfassungsgerichtshof/B1973/08 (3 December 2009).

24 Austria/Verwaltungsgerichtshof/2008/17/0054 (27 February 2009); Austria/Verwaltungsgerichtshof/2008/06/0032 (15 September 2009); Austria/Verwaltungsgerichtshof/2009/17/0263 (17 February 2010).

25 Latvia/Law on the Change of Name, Surname and Ethnicity Entry (8 April 2009), Section 2 para 6, available at: <http://www.vestnesis.lv/index.php?menu=doc&id=191209> (5 February 2010).

Table 1: Requirements for rectification of the recorded sex or name on official documents

Country Codes	Intention to live in 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	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation).
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are used by medical committees established under the Law on Health Care.
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision and law		Big solution: rectification of recorded sex
DK	✓	✓				✓	✓	?		Rectification of recorded sex
DK			✓			✓				Change of name
EE	✓	✓				✓	✓	?		
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership.
IE									✓ (name change possible by Deed Poll and under Passports Act 2008)	Further changes expected following court case <i>Lydia Foy</i> (2007)
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.
LU										No provisions in force, praxis varies

Country Codes	Intention to live in 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
LV						✓	✓ Change of name is possible after gender reassignment			Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
MT	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)		Requirements unclear, decided by courts on an ad hoc basis
NL	✓	✓	✓	✓	✓	✓	✓			According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board
SI										No formalities for change of name
SK							✓	?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.
UK										Change of name requires no formalities
UK	✓	✓	✓			✓		✓		Rectification of the recorded sex

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

✓= applies; ?=doubt; ✕=removed; change since 2008

Source: FRA, 2010

2. Non-discrimination and the promotion of equality in employment

This chapter is divided into two sections. The first section deals with substantive legal issues marking developments in the elaboration and interpretation of equality legislation. First, it examines progress made in addressing the existing 'hierarchy of grounds' both at the national and EU levels. Second, it discusses the extent to which gender identity is protected within the legal framework of the Member States and EU Law. Third, it explores the extent to which employment-related benefits are extended to same-sex couples. Fourth, it addresses practice and case law relating to the exemptions and exceptions to the principle of equal treatment available to religious and ethos-based organisations. The second section deals with issues of implementation and enforcement. First, it presents an overview of infringement proceedings by the Commission against the Member States relating to the transposition of the Employment Equality Directive. Second, it details measures taken at national level to simplify the legislative framework, engage in promotional activities and coordinate regional and national action. Third, it discusses the mandates of equality bodies to deal with sexual orientation.

2.1. Substantive issues

2.1.1. Progress in addressing the 'hierarchy of grounds'

Under current EU Law, the prohibition of discrimination on grounds of racial and ethnic origin operates across a wider range of areas than the prohibition of discrimination on any of the other grounds mentioned in Article 19 TFEU (former Article 13 EC), including sexual orientation. However, such a 'hierarchy of grounds' might be difficult to reconcile with the position of the ECHR that any difference in treatment on grounds of sexual orientation must be based on particularly serious reasons. Furthermore, Article 21 of the

EU Charter of Fundamental Rights does not make any distinction in the level of protection afforded to the various grounds mentioned there. It should therefore come as no surprise that, as of 2010, in 18 EU Member States the idea that all discrimination grounds should benefit from an equivalent degree of protection has been influential in guiding the transposition of the Equality Directives.

The 2008 report noted that the enactment of non-discrimination legislation had been variable across the Member States and across the various areas. It divided the EU Member States into three groups according to the extent of areas covered by non-discrimination legislation. The situation has changed slightly in light of developments since the 2008 report was completed. As of 2010 the prohibition of sexual orientation discrimination covers all areas mentioned in the Racial Equality Directive in 10 Member States (Belgium, Bulgaria, Czech Republic, Germany, Romania, Sweden, Slovak Republic, Slovenia, Spain, the UK). In eight other Member States, equal treatment legislation on grounds of sexual orientation extends to at least some of those areas (Austria,²⁶ Finland, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands). With respect to the 2008 findings, the main changes took place in the Czech Republic and in the UK, which, with respect to sexual orientation discrimination, moved from covering some of the areas where the Racial Equality Directive applies to covering all of them. This situation testifies to a sustained trend towards aligning the protection afforded to the various grounds of discrimination, including sexual orientation. As of 2010, only nine Member States have maintained the 'hierarchy' that affords racial and ethnic origin better protection than other grounds (Cyprus, Denmark, Estonia, France, Greece, Italy, Malta, Poland, Portugal).

²⁶ In Austria, seven of the nine provinces cover all areas, but two fail to do so.

Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies

Country Codes	Material scope		Equality body	Comments
	Employment only	Some areas of RED ²⁷		
AT		✓	✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	
BG			✓	
CY	✓		✓	
CZ			✓	New anti-discrimination legislation adopted
DE			✓	
DK	✓		✓	New equality body set up
EE	✓		✓	New anti-discrimination legislation adopted
EL	✓		✓	
ES			✓	
FI		✓		
FR	✓		✓	
HU		✓	✓	
IE		✓	✓	
IT	✓			
LT		✓	✓	
LU		✓	✓	
LV		✓	✓	
MT	✓			
NL		✓	✓	
PL	✓			
PT	✓			
RO			✓	✓
SE			✓	✓
SI			✓	✓
SK			✓	✓
UK			✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	9	8	10	20

Note: ✓ = applies; ? = doubt; ✕ = removed; change since 2008.

Source: FRA, 2010

27 Employment discrimination is prohibited in all EU Member States as a result of the Racial Equality Directive (RED; Council Directive 2000/78/EC). The directive covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

In July 2008 the European Commission published its Communication, Non-discrimination and equal opportunities: A renewed commitment, where it presented a comprehensive approach to step up action against discrimination and promote equal opportunities.²⁸ A focus on implementation and enforcement of the legal framework is accompanied by a commitment to strengthen policy tools for the active promotion of equal opportunities, in an effort to change attitudes and behaviour. The Communication accompanied a proposal for a directive implementing the principle of equal treatment beyond employment, thereby granting better protection against discrimination based on disability, age, sexual orientation, religion or belief. Progress on this 'horizontal' directive has been slow.²⁹ At the June 2010 Council meeting, political agreement was initially sought, but due to the lack of consensus, only a progress report was discussed.

2.1.2. Discrimination and gender identity

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 transgender people in the labour market.³⁰ As is known, the view of the Court of Justice of the European Union (CJEU) is that the instruments implementing the principle of equal treatment between men and women should be interpreted broadly in order to cover discrimination on grounds of the intended or actual reassignment of gender.³¹ Thus EU law clearly protects transgender people under the ground of 'sex'. This approach has also been embraced by the Gender Equality Directive (recast):³² Recital 3 of this Directive introduced an explicit reference to discrimination based on 'gender reassignment'. This is the first explicit mention of gender reassignment by an EU Directive, although it does not feature in the operative part of the legislation. However, EU law is not explicit concerning the right to equal treatment of transgender people who have not undergone and do not intend to undergo gender reassignment surgery. In June 2010, making reference to the above-noted Issue

Paper of the Council of Europe Commissioner for Human Rights, the European Parliament officially acknowledged discrimination on grounds of gender identity, and insisted that future EU gender equality initiatives should address issues linked both to gender identity and gender reassignment more specifically.³³

The 2008 report remarked that, in accordance with this approach, 13 EU Member States treated discrimination on grounds of gender reassignment as a form of sex discrimination (Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Latvia, the Netherlands, Poland, Sweden, Slovak Republic, the UK), although this was generally a matter of practice of the anti-discrimination bodies or courts rather than an explicit stipulation in the legislation. In 11 other EU Member States (Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia), discrimination on grounds of gender reassignment was not explicitly dealt with in legislation or in case law, resulting in a situation of legal uncertainty as to the precise protection of transsexuals and transgender persons from discrimination. Two Member States (Germany and Spain) appeared to treat discrimination on grounds of gender reassignment as sexual orientation or sexual identity discrimination. Finally, the UK treated gender reassignment as a separate ground of prohibited discrimination, as did Hungary though under the ground of 'sexual identity'.

Framing discrimination on grounds of gender reassignment as a form of sex discrimination, as prescribed by the CJEU, means, at a minimum, that the EU instruments prohibiting sex discrimination in the areas of work and employment and in the access to and supply of goods and services, will be fully applicable to any discrimination on grounds of a person intending to undergo or having undergone gender reassignment. Since the presentation of the 2008 report, only two countries have moved to considering transgender people as a group for the purposes of non-discrimination law. First, Sweden has chosen to introduce a prohibition on discrimination based on 'transgender identity and expression' as an autonomous ground (Swedish Code of Statutes 2008:567). The legislation explains this as a situation where 'someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex.' This offers protection to transgender persons more broadly and not merely transsexuals. Further, the legislation specifically states that those who have undergone or intend to undergo gender reassignment will be protected under the ground of 'sex'.³⁴

28 European Commission Communication, Non-discrimination and equal opportunities: A renewed commitment, COM(2008) 420 final, 2 July 2008.

29 European Commission, 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.

30 FRA, *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation*, 2009, p. 117.

31 CJEU, Case C-13/94 *P. v. S. and Cornwall City Council*, [1996] ECR I-2143; CJEU, Case C-117/01 *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, [2004] ECR I-541; CJEU, Case C-423/04 *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, [2004] ECR I-3585.

32 European Parliament and Council Directive 2006/54/EC 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.

33 European Parliament Resolution of 17 June 2010 on assessment of the results of the 2006-2010 Roadmap for Equality between women and men, and forward-looking recommendations (P7_TA-PROV(2010)0232).

34 Section 5. English translation provided by Swedish government: http://www.manskligarattigheter.gov.se/dynamaster/file_archive/090717/938e32b31f6d4029833f80fa1c7486c3/discrimination%20act.pdf.

Second, the UK now covers 'gender reassignment' as an autonomous ground in the Equality Act 2010. A similar, but different approach has been followed in the Czech Republic where the new Antidiscrimination Act now explicitly stipulates that discrimination on grounds of 'gender identification' is covered by laws on equal treatment between men and women. Overall, protection from discrimination could develop into a broader protection from discrimination on grounds of 'gender identity', encompassing not only transsexuals, but also transgender or trans persons, such as cross dressers, transvestites, people who live permanently in the gender 'opposite' to that assigned at birth without any medical intervention, and all those people who wish to present their gender differently from stereotypical conformity with expectations of a 'man' or a 'woman', such as through behaviour, dress, manner of speech or other factors. As noted above, a tendency towards broadening of the protection in this direction is perceptible, insofar as aspects of 'identity' and 'expression' are covered by legislative definitions, as opposed to 'reassignment' only, but this is far from being widely accepted.

Apart from these explicit legislative developments, a number of Member States have seen either Court decisions or proposals to include transgender people more visibly within the scope of non-discrimination law. In Spain, gender identity is not expressly mentioned in Article 14 of the Spanish Constitution, which bans discrimination against any national on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. With its decision 176/2008, adopted on 22 December 2008, the Constitutional Court established that gender identity is to be read in among the prohibited grounds of discrimination.³⁵ In Finland, the Committee charged with revising equality legislation proposed in December 2009 that the Act on Equality between Women and Men be amended with a view to explicitly taking into account that the concept of gender discrimination includes discrimination based on

35 Spain/Tribunal Constitucional/Judgment 176/2008 (22 December 2008). In addition, the Autonomous Community of Catalonia adopted Catalonia/Law 5/2008 of 24 April on the right of women to eradicate macho violence, providing in Article 70 on Transsexuality that transsexuals should be protected from violence like women are.

gender reassignment and gender identity.³⁶ In Germany, where protection from discrimination in the context of employment on grounds of gender reassignment has an unclear status, the current opposition parties in the Federal Parliament proposed an amendment of the Basic Law and introduced a draft law calling for the explicit inclusion of the criterion of 'sexual identity' among the enumeration of forbidden discrimination grounds listed in Article 3(3) of the Basic Law.³⁷

In sum, despite some clarification in three Member States (Czech Republic, Sweden, the UK), inclusion of transgender people within the realm of non-discrimination legislation still appears to be a neglected or problematic step, resulting in lack of clarity and protection in at least 15 Member States. Even when legislation seems to adopt an inclusive approach, thus considering transgender people or 'gender identity' as a ground for discrimination, this does not automatically translate into awareness of the problems, adequate implementation of the legal framework, and improvement in the day-to-day situation of transgender people. The visibility of transgender issues in awareness raising campaigns and public discourse remains low or is linked to stereotypical representations. This situation does not contribute to furthering the fulfillment of transgender people's fundamental rights.

36 Finland/The Report of the Equality Committee, *Proposal for a new Equal Treatment Act* (Committee Reports 2009:4). Available at the website of the Ministry of Justice, at www.om.fi (accessed 1 February 2010).

37 Germany/Draft law amending the Basic Law, BT-Drs 17/88 (27 November 2009): <http://dip21.bundestag.de/dip21/btd/17/000/1700088.pdf>; Germany/Draft law amending the Basic Law, BT-Drs 17/254 (15 December 2009): <http://dip21.bundestag.de/dip21/btd/17/002/1700254.pdf>; Germany/Draft law amending the Basic Law, BT-Drs 17/472 (20 January 2010): <http://dip21.bundestag.de/dip21/btd/17/004/1700472.pdf> (26 February 2010). A similar legislative motion was put forward in the Council of Federal States [Bundesrat] by the governments of the Federal States of Berlin, Bremen and Hamburg but was rejected by the political majority (http://www.artikeldrei.de/dokumente/Bundesrat%200741_09.pdf (26 February 2010)).

Table 3: Discrimination on grounds of gender reassignment or identity in national legislation

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to 'gender identification'.
DE			✓	Constitutional amendment proposal by opposition ('sexual identity')
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to 'other issues related to gender'.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Equal Treatment Commission
PL			✓	
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds 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.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the 'gender reassignment' protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under "medical supervision" and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	10	3	15	

Note: ✓ = applicable; positive development since 2008

Source: FRA, 2010

2.1.3. Access to employment-related partner benefits

The Employment Equality Directive does not clearly specify whether, in a situation where same-sex couples are not allowed to marry, but employment-related benefits are contingent on marriage, the resulting differences in treatment should be considered as a form of (direct or indirect) discrimination based on sexual orientation.³⁸ One judgment of the CJEU clearly rejects the idea that Recital 22 of the Employment Equality Directive would justify any difference of treatment between spouses and registered partners who are in a situation comparable to spouses.³⁹ On the contrary, the CJEU notes that the exercise by the Member States of their competence to regulate matters relating to civil status and the benefits flowing there from ‘must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination’ (para. 59).

It may be relevant to note in this regard that, for example, a number of German states have placed same-sex life partners on an equal footing with spouses for the purposes of survivors’ pensions and the right to family subsidies.⁴⁰ In addition, the relevant inheritance and income tax law was changed in 2009, placing same-sex life partners on an equal footing with married spouses with respect to the threshold for tax exemptions – although the alignment is not complete, particularly as regards the rates of taxation. The Federal Constitutional Court (*Bundesverfassungsgericht*) concluded that registered civil partnership could not be treated less advantageously than marriage in the area of provisions for dependants’ pensions for public employees working in the civil service.⁴¹ The Court found that, in contrast to the compulsory public pension fund insurance, the additional insurance for provision for dependants did not provide for pensions for same sex life partners, and that such a situation was in violation of the principle of equality of Article 3(1) of the Basic Law. Similarly in France, the High Authority for Equality and the Elimination of Discrimination (HALDE) underlined the discriminatory nature of the absence of legal recognition of same-

sex partnerships as regards the right to a survivor’s pension following the death of the registered partner. It concluded that the Social Security Code should not make entitlement to a survivor’s pension benefits subject to marital status.⁴² The HALDE has extended this opinion to the refusal to allow payment of an allowance to the surviving spouse when the persons concerned were not married.⁴³

Equal treatment between 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. The scope of the obligations imposed on State Parties by the ECHR in this regard was the main issue at stake in the case of *Schalk and Kopf v. Austria*.⁴⁴ Although it should be remarked that at the time of writing the judgment is not yet final,⁴⁵ some of the questions it raised, and the conclusions reached by the ECHR should be noted. The case originated from an application by two Austrian citizens of the same-sex who claimed that the impossibility to conclude a marriage violated Article 12 of the ECHR. They also argued that their same-sex relationship (without children) should enjoy protection under the right to ‘family life’ (and not merely as part of the right to ‘private life’) guaranteed by Article 8 of the ECHR. Finally they contended that attaching benefits to marriage, when neither the latter nor other means of proving their relationship are available to same-sex couples, amounted to discrimination in violation of Article 14 of the ECHR. The ECtHR did not rule on whether or not Austria had an obligation to introduce the registered partnership law for same-sex couples that came into force on 1 January 2010; it only ruled that the Austrian legislator cannot be reproached for not having introduced it any earlier, or for declining to grant registered same-sex partners a status that corresponds to marriage in every respect. The ECtHR also noted the ‘rapid evolution of social attitudes towards same-sex couples’. It remarked that ‘certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of ‘family’ (para. 93). Thus overruling its previous case law, the Court considered it ‘artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto*

38 See A. Littler, *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*, 2004. Available on: <https://openaccess.leidenuniv.nl/dspace/bitstream/1887/12587/23/DiscriminatoryPartnerBenefits-Appendix1-12Nov2004.PDF>.

39 CJEU, Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, [2008] ECR I-1757.

40 For a comparative overview showing the lack of a uniform approach across the different Länder, see <http://www.lsvd.de/194.0.html#c1372> (26 February 2010); and for the self-employed liberal professions, see <http://www.lsvd.de/1269.0.html> (26 February 2010).

41 Germany/Bundesverfassungsgericht/1 BvL 15/09 (10 August 2009) http://www.bverfg.de/entscheidungen/lk20090810_1bvl001509.html (26 February 2010).

42 France/Haute autorité de lutte contre les discriminations et pour l’égalité/ Deliberation No. 2008-107 of 19 May 2008.

43 France/Haute autorité de lutte contre les discriminations et pour l’égalité/ Deliberation No. 2009-132 of 30 March 2009.

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

45 According to Article 44 of the Convention, a judgment of a Chamber shall become final ‘(a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.’

partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would’ (para. 94). As already mentioned, at the time of writing the judgment is not yet final.⁴⁶

Previous case law of the ECtHR makes it clear that same-sex partners must be treated on an equal footing with respect to different-sex partners of the same status. After the 2003 *Karner v. Austria* judgment,⁴⁷ in 2010 the Court reiterated that a same-sex partner should be able to succeed to a tenancy held by his/her deceased partner.⁴⁸ In *Kozak*, the Court unanimously held that the blanket exclusion of persons living in same-sex relationships from succession to a tenancy was in breach of Article 14, taken in conjunction with Article 8 (the right to respect for private and family life). It also made a number of significant statements which broaden the 2003 *Karner* decision, recognising that States should acknowledge ‘developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one’s family or private life’ (para. 98). Subsequently, in *P.B. & J.S. v. Austria*,⁴⁹ the Court applied the same principle to a case concerning the extension of a worker’s health and accident insurance to his same-sex partner. The Court reiterated that a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of ‘family life’ (para. 30), and confirmed that the burden falls on the State to prove that there was a ‘necessity’ to exclude certain categories of people from the scope of application of the law in question (para. 42). It concluded that a difference in treatment between same-sex and different-sex partners was not justified.

Some national courts have touched upon issues which go beyond the sphere of employment. The Equality Body in Cyprus, after receiving two complaints regarding the absence of any legal framework enabling same-sex couples to marry or to register a partnership, adopted a report on 31 March 2010 recommending the legal recognition of same-sex cohabiting partners. The Minister of the Interior is currently holding consultations on this issue. In Italy, several courts⁵⁰ raised the question

of whether the failure of the Civil Code (*Codice civile*) to allow same-sex marriage should be considered unconstitutional, in light of various provisions of the Constitution.⁵¹ In decision No. 138/2010, the Constitutional Court declared the question partly inadmissible and partly ill-founded, and concluded that the recognition of same-sex unions was a matter for the Parliament to decide.⁵² The Court, however, stated clearly that same-sex couples enjoy the protection afforded by Article 2 of the Constitution to ‘social groups’, which entails the ‘fundamental right to live freely as a couple’ and the right to obtain legal recognition along with its attendant rights and duties.

2.1.4. The position of churches or other ethos- or religious-based organisations under the regime of the Employment Equality Directive

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 case 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.⁵³ Three specific questions arise. First, the question of whether employees may be dismissed if they enter into a life partnership, even though this may not relate to ‘the nature of these activities or the context in which they are carried out’, as required under Article 4(2) of the Directive. This remains controversial in Germany. Although a decision by the Labour Court of Hamburg had answered this question in the negative,⁵⁴ the second instance Federal State Labour Court of Hamburg later denied the claim of the applicant, arguing that the precondition for discrimination as regards job applications is that the applicant should be objectively qualified for the job, and that since the applicant was not thus qualified the refusal did not amount to discrimination.⁵⁵ The case has been appealed before the Federal Labour Court [*Bundesarbeitsgericht*] where it is pending at the time of writing.

46 Additionally, the case of ECtHR, *Stéphane Chapin & Bertrand Charpentier v. France*, No. 40183/07, currently pending, asks the Court whether Article 12 ECHR (alone or combined with Article 14) requires a State to grant equal access to marriage for same-sex couples; or whether Article 14 combined with Article 8 prohibits the Council of Europe Member States from: (a) attaching rights and obligations to legal marriage, (b) excluding same-sex couples from legal marriage, and (c) providing same-sex couples with no other means of proving their relationships in order to qualify for these rights and obligations.

47 ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003.

48 ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010.

49 ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010. At the time of writing this judgment is not yet final.

50 Italy/Tribunale di Venezia (3 April 2009); Italy/Corte di Appello di Trento (29 July 2009); Italy/Corte di Appello di Firenze (3 December 2009); Italy/Tribunale di Ferrara (3 December 2009).

51 Article 2, protecting inviolable human rights and social groups; Article 3, prohibiting discrimination on grounds of social conditions; Article 29, granting the recognition of marriage; as well as Article 117/1, requiring the exercise of the legislative power of the state and the regions to comply with international law obligations.

52 Italy/Corte Costituzionale 138/2010 (14 April 2010).

53 See K. Waaldijk, M. Bonini Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, T.M.C. Asser Press, The Hague, 2006, p. 50.

54 Germany/Arbeitsgericht Hamburg, Case No. 20 Ca 105/07 (4 December 2007).

55 Germany/Landesarbeitsgericht Hamburg, Case No. 3 Sa 15/08 (29 October 2008).

In Lithuania, Article 3 of the Law on Equal Treatment provides for particularly broad exceptions in favour of religious organisations, including educational establishments, and the goods and services they provide. The wording appears to be such that it would leave room for limiting the freedom of expression of LGBT people, particularly with respect to educational and awareness-raising activities.⁵⁶

In the Netherlands, the *Algemene wet gelijke behandeling (Awgb)* (General Equal Treatment Act (GETA))⁵⁷ does not apply to legal relationships *within* churches and other associations of a spiritual nature. The European Commission has informed the government that this exception is too wide, because it does not respect the boundaries required by Article 4(2) of the Employment Equality Directive. The GETA also contains an exception for institutions founded on religious principles, stating that it does not apply to: '(a) legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature; (b) the office of minister of religion' (Article 3). This *unconditional* exemption has been alleged by some commentators to be incompatible with Articles 2(5), 4(1) and 4(2) of the Directive, and the European Commission considers it is overbroad, maintaining that national legislation should clearly indicate the boundaries required by Article 4(2) of the Directive,⁵⁸ a position the government disagrees with.⁵⁹ In addition, these institutions 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) GETA). The European Commission has criticised the absence of legitimacy and proportionality as conditions for these requirements. In September 2009, the government announced legislation that would bring the wording of this exception slightly more in line with the Employment Equality Directive.⁶⁰

In the UK the European Commission had considered the existing exception as too broad,⁶¹ and thus incompatible with the Employment Equality Directive, and delivered a reasoned opinion to this effect in November 2009. In April 2009 the government introduced an 'Equality Bill' with which it sought to amend the legislation so that exemptions to equality provisions applied only to those whose jobs 'wholly or mainly' involved taking part in services or rituals, or explaining the doctrines of religion. However, the UK government's attempt was defeated in three House of Lords votes on 25 January 2010. Thus, the Equality Act – as finally adopted – preserved the exceptions for religion-based organisations which had been criticised by the European Commission.

2.2. Implementation and enforcement

2.2.1. Infringement procedures for incorrect transposition of the Employment Equality Directive

Although several Member States have made progress as regards implementation of the Employment Equality Directive, which resulted in closing several infringement procedures for incorrect transposition, a number still remain open.⁶² At the time of writing, the European Commission still has 13 outstanding infringement procedures against 11 Member States: Belgium, Germany, Greece (2), Ireland (2), Italy, Latvia, the Netherlands, Poland, Portugal, Sweden, and the UK. Within the framework of those procedures, reasoned opinions have been sent to the following Member States: Germany, Greece (1), Ireland (1), Italy, the Netherlands, Poland, Portugal, Sweden, and the UK. The procedures in question concern various aspects of the directive. As for European Commission's grievances concerning sexual orientation, they have been brought up in the following reasoned opinions:

56 Indications from the *travaux préparatoires* point to the conclusion that the mentioned provisions of Article 3 could be used as a 'self-defence tool for the elimination of 'non-traditional' sexual orientation from schools and the education system in general' (Stenograph of the Parliament sitting of 18 September 2007. Available in Lithuanian at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=304466).

57 Netherlands/General Equal Treatment Act (GETA), *Staatsblad* (2004) 119, amendments to the 1994 General Equal Treatment Act, 1 April 2004 (entry into force).

58 Reasoned Opinion of the European Commission (31 January 2008) 2006/2444, C(2008)0115, pp. 5-6.

59 Netherlands/Parliamentary Documents Lower House (2008-2009) 27017, nr. 6, pp. 3-4.

60 See Netherlands/Parliamentary Documents Lower House (2008-2009) 28481, nr. 6, p. 3.

61 Regulation 7(3) provides: 'This paragraph applies where (a) the employment is for purposes of an organised religion; (b) the employer applies a requirement related to sexual orientation – (i) so as to comply with the doctrines of the religion, or (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; and (c) either - (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it'. Regulation 16(3) contains an almost identical exception for a professional or trade qualification for purposes of an organised religion'.

62 This information reflects the situation as of August 2010 and has been provided by the European Commission, DG Employment, Social Affairs and Equal Opportunities, Unit G2: 'Equality, Action against Discrimination: Legal Questions'.

- 1) Germany (reasoned opinion sent on 3 November 2009): certain restrictions concerning the applicability of non-discrimination law to certain benefits afforded to civil servants in a registered life partnership constitute discrimination on grounds of sexual orientation;
- 2) Poland (reasoned opinion sent on 29 January 2010): the prohibition of discrimination on all grounds set out in the directive (including sexual orientation) is not provided for in regulations on access to certain professions;
- 3) The UK (reasoned opinion sent on 23 November 2009): the possibility of justifying discrimination on grounds of sexual orientation in the case of employment by religious institutions is considered too wide;
- 4) The Netherlands (reasoned opinion sent on 1 February 2008): exceptions provided for legal relations within religious communities and employment by religious institutions are considered to be too wide, e.g. on grounds of sexual orientation.

2.2.2. Simplification and strengthening of the legislation at the national and regional level

Progress made in Member States' legislation has aimed to respond to three main needs: i) simplification of the legal framework; ii) adoption of duties to actively promote equality; and iii) joined-up efforts at the regional or local level.

The Czech Republic adopted the Anti-discrimination Act on 17 June 2009, which transposes both the Racial Equality Directive and the Employment Equality Directive.⁶³ The prohibition of discrimination on grounds of sexual orientation under the new Anti-discrimination Act applies to all major areas covered by the Racial Equality Directive. The Act also gives the Public Defender of Rights (a general ombudsman) the power to act in cases of alleged discrimination. In Lithuania, a number of improvements were made to the 2003 Law on Equal Treatment, most recently by amendments adopted on 17 June 2008.⁶⁴ The amendments include the insertion of a provision on the shifting of the burden of proof, although this may be difficult to invoke in practice. Certain gaps seem to remain, however, as regards, for instance, the right of associations to participate in legal

proceedings. It is noteworthy that sexual orientation is not mentioned among the grounds of prohibited discrimination in Article 1 of the Law, although it does appear in the operative provisions of the legislation. In this context, it is useful to recall that the already existing Article 5 of the Law on Equal Treatment provides for a far-reaching obligation of state and local governmental institutions or agencies, within their sphere of competence, to draft and implement programmes and measures designed to ensure equal treatment regardless of sexual orientation, as well as to provide assistance to the programmes and activities of civil society organisations working for equal treatment. This provision compares with the new 'public sector equality duty' in the UK, which was extended to sexual orientation in 2010, as mentioned below.

New legislation was adopted in the Netherlands, which obliges local governments to provide for independent and accessible non-discrimination offices.⁶⁵ The new anti-discrimination offices are considered part of the system of equality bodies, and will be entrusted with the task of providing independent (legal) advice to people claiming to have suffered discrimination, and to register the complaints formally filed. In Spain, a number of improvements were made to the existing legislative framework against discrimination, both at the national and regional level. Perhaps the most significant change results from Law 25/2009 of 22 December *de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio* [modifying certain laws for their adaptation to the Law on free access to service activities and their performance], which prohibits discrimination on grounds of sexual orientation (among others) in access to and the exercise of any profession which is regulated by a professional body or association.⁶⁶ Some regions have strengthened their equal treatment provision by covering access to housing (Catalonia) and social services (Galicia). Regional developments also took place in Austria, Belgium and Italy. The Austrian province of Vorarlberg extended protection to the provision of goods and services.⁶⁷ The Italian region of Liguria passed regional Law 52/2009 providing for specific actions in favour of LGBT persons in areas such as employment, health and culture, the second in Italy after Tuscany in 2004. As a result of recent changes, Belgium now has 11 legislative instruments in place, which, at various levels of government, seek to ensure the full implementation of the Employment Equality Directive.

63 Czech Republic/Act No. 198/2009 Coll. on equal treatment and on legal means for protection against discrimination and on change of certain acts (Antidiscrimination Act) (17 June 2009), available at: http://portal.gov.cz/wps/portal/_s.155/701?number1=198%2F2009&number2=&name=&text= (in Czech only, accessed on 15 January 2010).

64 Lithuania/Law on Equal Treatment Amendment Act, Nr. X 1602 (17 June 2008), Official publication Valstybės Žinios, 5 July 2008, Nr. 76-2998. Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=323620&p_query=&p_tr2= (1 February 2010).

65 Netherlands/Municipal non-discrimination services Act, Staatsblad (2009) 313 (signed and entry into force: 25 June 2009).

66 Spain/Ley 25/2009 (22 December 2009), Article 5, which amends Ley 2/1974 sobre Colegios Profesionales [on professional associations] (13 February 1974) adding a new Article 15 to the original legislation.

67 Vorarlberg/LGBI 49/2008 (13 August 2008).

Following infringement proceedings brought by the European Commission for failure to adequately implement the Employment Equality Directive as well as other instruments of EU equality legislation, a number of Member States have strengthened their domestic law. In France, Law Number 2008-496 of 27 May 2008 amended the Labour Code to include a definitions of direct and indirect discrimination, moral harassment and sexual harassment. These definitions now appear in Article L. 1132-1 and Article L. 1134-1 of the Labour Code, and they replicate the wording of the relevant directives. Arguably, these amendments broaden the scope of the prohibition of discrimination to situations which previously were not covered by the law. In Italy, a more detailed provision was introduced in June 2008 clarifying the grounds on which differential treatment may be justified. Exceptions made for the armed forces, the police, prison and rescue services were repealed, the provisions on victimisation and collective agreements have been strengthened and the sharing of the burden of proof has been clarified to a certain extent.⁶⁸

In Sweden, the new comprehensive Discrimination Act (Swedish Code of Statutes 2008:567), which entered into force on 1 January 2009, covers working life, education, labour market policy activities, the setting-up or running of business operations, goods, services and housing, public meetings and public events, the social insurance system, health and medical care services. Two discrimination grounds are new: 'age' and 'transgender identity or expression', a remarkably extensive wording which applies to all above-mentioned areas and is likely to capture most forms of discrimination against transgender people. It is noteworthy that protection against discrimination on grounds of 'transgender identity or expression' is now broader in scope than that concerning age discrimination, which is limited to employment and education. The legislation also contains some improvements on redress mechanisms and financial compensation. Because it unites all grounds of discrimination in a single piece of legislation, the Discrimination Act may contribute towards better redress against multiple and intersectional discrimination. The new law also provides for a number of active measures to promote equality, albeit not uniformly for all areas and grounds, which testifies to the need to further refine the understanding and the operationalisation of positive measures for the inclusion of LGBT people throughout the EU.

In the UK, the new Equality Act shall come into force in October 2010 (for the most part).⁶⁹ The Act harmonises

discrimination law across all the protected characteristics including sexual orientation, and further strengthens the law to support progress on equality. The Act brings together and restates all existing provisions of domestic non-discrimination law concerning each of the 'protected characteristics', including the 2003 and 2007 Sexual Orientation Regulations, in order to streamline action through a single instrument. For instance, the 'public sector equality duty' provided for by Section 149 of the Act now also applies also to sexual orientation. It is noteworthy that the UK Equality and Human Rights Commission has recognised that 'since April 2008, the scope of the gender equality duty has been extended to further require public authorities to have due regard to the need to eliminate discrimination and harassment on grounds of gender reassignment in the provision of goods, facilities and services'.⁷⁰ The duty has a broad scope and foresees a monitoring system. Most of the legislation prior to the 2010 Equality Act has been repealed. The Act applies in England, Scotland and Wales. The Northern Ireland Assembly has devolved powers to bring forward its own proposals. The Act aims to simplify, harmonise and consolidate non-discrimination law and to strengthen the legal framework in a number of areas.⁷¹ The Act also contains a new power providing the ability to harmonise the legislation where changes are required as a result of European Law.

2.2.3. The mandate of equality bodies

Twenty Member States (now including Denmark and Estonia) now have an equality body in place that is responsible for dealing with sexual orientation discrimination: an increase of two Member States since 2008. In the other seven (Czech Republic,⁷² Finland, Italy, Malta, Poland, Portugal, Spain) there is no equality body with such a mandate.

68 Italy/Decree-Law No. 59/2008 (8 April 2008), Official Gazette No. 84 (9 April 2008), Article 8 septies, turned into Italy/Law No. 101/2008 (6 June 2008), Official Gazette No. 132 (7 June 2008) amending Italy/Legislative Decree 216/2003 (9 July 2003), Official Gazette No. 187 (13 August 2003).

69 United Kingdom/Equality Act 2010 (c. 15) (8 April 2010), available at: http://195.99.1.70/acts/acts2010/pdf/ukpga_20100015_en.pdf (21 April 2010).

70 UK Equality and Human Rights Commission, *Provision of goods, facilities and services to trans people - Guidance for public authorities in meeting your equality duties and human rights obligations*, available online at: http://www.equalityhumanrights.com/uploaded_files/PSD/psd_trans_guidance.pdf.

71 The Equality and Human Rights Commission has produced a series of guides to explain people's rights and responsibilities under the new Equality Act 2010. The guidance can be accessed via the Commission's website or through the link: www.equalityhumanrights.com/ea2010.

72 In the Czech Republic, the newly adopted Antidiscrimination Act entrusted the Public Defender of Rights with powers to act in cases of discrimination on the grounds of sexual orientation. The main role of the Ombudsman is to ensure the protection of rights and legitimate interests mainly in the areas in which citizens and other entities encounter the offices of state administration. There are no direct means or mechanisms for enforcement at the Ombudsman's disposal. The Ombudsman requests that the state administration body responsible for malpractice or error to remedy the situation and ultimately passes the matter on to government if the remedy is not provided. The Ombudsman cannot change or replace the decision of the state administration body concerned, but it can instruct the supervisory bodies to apply their power. According to the information provided by the Office, no cases of discrimination on grounds of sexual orientation have been dealt with by the Public Defender of Rights (email from the Office of Ombudsman of 24 February 2010).

With respect to gender identity, it follows logically from existing EU case law that those equality bodies which cover (also) discrimination on grounds of gender should address the position of transgender persons. In 2010, Equinet, the European Network of Equality Bodies, has stepped up its efforts to enhance the protection of transgender people and to support new policies and good practice initiatives.

In 2009, Denmark established the *Ligebehandlingsnævnet* [The Board of Equal Treatment] as an administrative body dealing with complaints related to discrimination based on gender, race, colour, religion or belief, political views, sexual orientation, age, disability or national, social or ethnic origin in employment.⁷³ In Estonia, the Equal Treatment Act has transformed the Gender Equality Commissioner into the Gender Equality and Equal Treatment Commissioner, extending its competence to include discrimination on the grounds of sexual orientation. In addition to changes concerning the mandate, some amendments have touched upon either the powers, or the structure of the body. In the Slovak Republic, the 2008 amendment⁷⁴ to the Anti-discrimination Act introduced a form of public interest action (*actio popularis*), which allows the Slovak National Centre for Human Rights⁷⁵ to take action without representing any actual victim if the rights, legally protected interests or freedoms of a large or undefined number of people appear to be violated, or if the alleged violation seriously jeopardises the public interest. The tendency towards unification of equality bodies, already highlighted, was further strengthened following the entry into force in Sweden of the new Discrimination Act on 1 January 2009. The Law established a new government agency entitled the Equality Ombudsman (*Diskrimineringsombudsman*),⁷⁶ as a result of which the Equal Opportunities Ombudsman, the Ombudsman against Ethnic Discrimination, the Disability Ombudsman and the Ombudsman against Discrimination because of Sexual Orientation (HomO) were all phased out on 31 December 2008.

Comparatively, it can be concluded that most 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. This choice is justified primarily by considerations related to economies of scale, the need for consistency in the interpretation of the law, and to the frequency of multiple discrimination. However, due to the reluctance of LGBT people to file formal complaints and to

make use of available mechanisms, fulfilment of these aims may require greater visibility to be given to the work of equality bodies on sexual orientation and gender identity discrimination, and the development of expertise on this issue. As shown by the record of the former Ombudsman in Sweden (HomO), a specialised institution is significantly better able to attract complaints and build a relationship of confidence with LGBT victims of discrimination. In general, however, a report on NHRIs published by the FRA in May 2010 presents a fragmented picture in many Member States with a variety of overlapping institutions and the absence of a more coherent approach to human rights monitoring.⁷⁷ Moreover, the FRA has called upon Member States to ensure that NHRIs and equality bodies enjoy a broad mandate, are properly resourced and can act in full independence. Parallel to this, the FRA EU-MIDIS report shows that mechanisms in place, such as equality bodies, are very rarely relied upon and indeed rather unknown among certain populations that are vulnerable to discrimination.⁷⁸ A similar conclusion was reached in a forthcoming FRA report on the effectiveness of the Racial Equality Directive. With respect to LGBT people, rather than suggesting that there is a low incidence of discrimination, the data suggests that incidents are underreported since filing a complaint and revealing one's sexual orientation or gender identity is still costly, in terms of reputation and risks to privacy. One partial solution to the problem of underreporting would be to allow equality bodies either to act of their own motion, or to act on the basis of anonymous complaints, without the identity of the victim being revealed 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 LGBT issues or staff that openly identify as LGBT themselves, in order to establish trust between the parties.

See Table 2 above for an overview of equality bodies covering discrimination on grounds of sexual orientation.

73 The board was established by Denmark/Act No. 387 of 27 May 2008 on the Board of Equal Treatment.

74 Slovak Republic/Law 384/2008 (23 September 2008).

75 Initially established in 1993: Slovak Republic/Law 308/1993 (15 December 1993).

76 Sweden/Prop. 2007/08:95, bet. 2007/08:AU7, rskr. 2007/08:219 (6 March 2008).

77 FRA, *National Human Rights Institutions in the EU Member States. Strengthening the fundamental rights architecture in the EU, I*, Luxembourg: Publications Office, 2010.

78 FRA, *European Union Minorities and Discrimination Survey (EU-MIDIS) – Survey Results*, Luxembourg: Publications Office, 2009; and *EU-MIDIS Data in Focus Report 3 'Rights Awareness and Equality Bodies – Strengthening the fundamental rights architecture in the EU, III*, Luxembourg: Publications Office, 2010.

3. LGBT people and public spaces: freedom of expression, assembly and protection from abuse and violence

This chapter reviews recent decisions or legislation addressing a variety of phenomena linked to either freedom of assembly, freedom of expression, and the right to life, security, and protection from violence. It begins by describing both remaining difficulties and positive developments in the exercise of freedom of assembly by individuals or organisations gathering or demonstrating in favour of LGBT rights. Furthermore, it provides a comparative overview of domestic legislation concerning the regulation of access to information on homosexuality for minors, and reviews certain proactive initiatives that some Member States have taken to improve the public acceptance of homosexuality and of LGBT people. Finally, this chapter describes various developments concerning the use of criminal law as a way of countering expressions and violence based on prejudice against LGBT people.

3.1. Background

While EU Member States have moved away from the paradigm of criminalisation of consensual 'homosexual acts in private',⁷⁹ the free manifestation of LGBT conduct, identities and relationships, in a broad sense, is not yet evenly granted throughout the EU. For example, in July 2008 the Mayor of Vilnius objected to an EU-wide campaign against discrimination, because it was deemed to 'advertise sexual minorities'.⁸⁰ As the FRA reports have shown, reasons given for the bans include participant safety, the violation of public morals and the preservation of public order.⁸¹ The lack of acceptance of LGBT demonstrations, and of other forms of expressions, may contribute to an environment that is conducive to unfair treatment and discrimination. However, this section also highlights that a number of Member States have addressed these problems and have developed good practices, achieving significant results in ensuring that LGBT people are free and safe when they decide to live their sexual orientation openly, or to express their gender identity.

This chapter discusses legislation and practices that have had a negative impact on LGBT people's right to life, security, protection from violence, assembly and expression. The examples of homo- and transphobic incidents featuring in this chapter evidence the existence of negative attitudes to the effect that LGBT people have no right to exist, to live openly and free from shame and fear, to enjoy equal rights for instance when looking for a job, and to participate fully in the communities they live in. This would appear to be based on the perception that LGBT people are unable to make a meaningful contribution to society and on fear that homosexuality is contagious, posing a particular danger for young people. Such attitudes reinforce tendencies towards the invisibility of LGBT people. For instance, in March 2010 the ECtHR communicated to the Romanian government a case concerning the conduct of the Bucharest police which, according to the complainant, had abused its powers by questioning him at length and taking his fingerprints after finding out that he was gay.⁸²

An analysis of practices and case law collected by the FRA shows that verbal and physical expressions of prejudice not only target particular individuals but also, at a more general level, mark out a 'space', often identified with the 'public space' as a whole, where LGBT people cannot freely express themselves, or information on homosexuality cannot circulate freely. Counter-demonstrations are often called 'Normality Marches' or 'Marches for Tradition and Culture'. They tend to depict LGBT people as abnormal people who deviate from a moral or a socially prescribed norm. This norm is strictly linked with the societal definition of boundaries between the male and the female gender and it may result in a form of hegemony. With respect to experiences of harassment of transsexual and transgender people in public, Press for Change's *Transphobic Hate Crime in the European Union* 2009 study found that 79% of respondents had experienced some form of harassment in public ranging from transphobic comments to physical or sexual abuse.⁸³ Qualitative analysis revealed that attacks on trans women (individuals who may be biologically male but identify themselves as female) by men are implicitly regarded by the authorities as 'male-on-male' attacks rather than male-on female attacks, and that trans women's vulnerability as women and as trans women is often overlooked. It also found that in many cases trans women are often presumed by the police to be the cause of the incident rather than the victim; they may also be

79 ECtHR, *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981, para. 62; ECtHR, *Norris v. Ireland*, No. 10581/83, 26 October 1988, para 46; ECtHR, *Modinos v. Cyprus*, No. 15070/89, 22 April 1993, para 23. See section 3.3 below for the situation in Greece.

80 See 15min.lt (2008), *Imbrasas: Gėjams vietos nėra*, 21 July 2008, available in Lithuanian at: <http://www.15min.lt/naujiena/miestas/vilnius/imbrasas-gejams-vietos-nera-41-672> (2 February 2010).

81 FRA, *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation*, Luxembourg: Publications Office, 2009, p. 51.

82 ECtHR, *Adrian Costin Georgescu v. Romania*, No. 4867/03, communicated to the Romanian government on 31 March 2010.

83 L. Turner, S. Whittle, R. Combs, *Transphobic Hate Crime in the European Union*, May 2009, available at <http://www.pfc.org.uk/>.

implicitly blamed for not responding to attacks as a 'male'. For example, in the case of the murder of a trans woman, the victim was assumed to be in possession of a 'man's strength'. The study concluded that police and the courts need to recognise that trans people are vulnerable to transphobic attacks.

In this context, it is noteworthy that a number of Member States have taken action aimed at improving public knowledge and acceptance of homosexuality and of LGBT people, thus contributing to reducing stigma, challenging stereotypes and negative attitudes. As important as it may be, the use of criminal law might not be sufficient. As this chapter will show, lack of proof of 'intent' during the investigation or prosecution of offences has arisen as a problematic issue in several cases. It has been the approach of some courts to refuse the application of an aggravating circumstance unless convinced that the perpetrator was aware of the victim's sexual orientation with certainty. This high threshold ignores the fact that violent behaviour may be based more often on perceptions derived from stereotyping. Second, the prohibition of 'incitement' to hatred is seldom applied because the offender's behaviour must be of sufficient gravity, or must occur in a public gathering with a minimum number of people present, in order to satisfy the constitutive elements of the offence. In cases involving general statements on homosexuality, it was concluded that LGBT NGOs, or even an individual who identifies as LGBT, cannot act on behalf of an unidentified victim or does not have legal standing to put forward a claim. Other courts have concluded that insulting or offensive expression does not necessarily amount to incitement to hatred or discrimination and therefore deserves no (increased) penalty. Third, the notion of 'hate' is problematic because it implies a high threshold: other insults or demeaning statements, images or publications might not be captured under such an offence. This is particularly so when the conduct of the accused consists in name calling or verbal abuse, or does not involve the use of words, but the display of written material or T-shirts, the public performance of a play, playing recorded media, or the broadcasting of a programme. Even violence might not be captured. LGBT people may be subject to attacks simply because they are perceived as 'easy targets' rather than because of the existence of an element of hate. This might be because they are thought of as more vulnerable, less likely to react, less willing to report, or subject to blackmail and retaliation in case of reporting. Therefore, the promotion of a culture of pluralism and respect for LGBT people calls for an increased commitment to education, awareness raising, acceptance of diversity and proactive and balanced discussion of LGBT expression in all areas of social life.

3.2. LGBT pride marches and freedom of assembly

As regards freedom of expression and peaceful assembly, the Council of Europe's 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 calls for authorities to protect participants in peaceful demonstrations and avoid arbitrary restrictions of the rights to freedom of expression and peaceful assembly. The Recommendation also states that Member States of the Council of Europe should 'take appropriate measures to effectively protect defenders of human rights of lesbian, gay, bisexual and transgender persons against hostility and aggression to which they may be exposed, including when allegedly committed by state agents'. Finally, the Recommendation states that governments should ensure appropriate consultation and participation of LGBT organisations 'on the adoption and implementation of measures that may have an impact on the human rights of these persons' (para. 12).

The 2008 report examined two issues. First, freedom of assembly for LGBT people or organisations demonstrating in favour of LGBT rights; second, the repercussions of demonstrations against LGBT people and their potential for incitement to hatred, violence or discrimination. What follows is a brief update of the situation in the Member States.

3.2.1. Freedom of assembly for LGBT people or organisations demonstrating in favour of LGBT rights

As regards the exercise of freedom of assembly by individuals or organisations demonstrating in favour of LGBT rights, the 2008 report documented certain instances where authorities (particularly at the local level) had imposed arbitrary or disproportionate restrictions on the organisation of events in favour of LGBT rights. The report noted that vague or broad provisions on which authorities may rely upon to prohibit a demonstration may be exercised in an arbitrary or discriminatory manner. Of particular concern was the use of notions such as 'public order', which resulted in a 'veto right' of counter-demonstrators, hostile to LGBT rights and threatening to, or actually disrupting, pride marches or other similar events.⁸⁴

Progress was made in certain States, particularly in Poland where significant improvements were noted and where the 2010 Europride was held without disruption,⁸⁵ and

84 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, Luxembourg: Publications Office, 2009, p. 111 (the report was republished in 2009 which is the version available online).

85 See the news report at <http://www.bbc.co.uk/news/world-europe-10670489>.

in Romania where in 2008 a court dismissed a request for an injunction against a pride march.⁸⁶ The Bucharest Tribunal found that freedom of assembly for LGBT people cannot be limited on grounds that children's moral and spiritual integrity would be undermined. Therefore, it dismissed the argument that an LGBT March would violate the rights of others. Yet recent events show that this remains a potential threat: in Lithuania, the former mayor of Vilnius sought to prohibit a pride demonstration in August 2008.⁸⁷ The LGBT organisation *Lietuvos gėjų lyga* [Lithuanian Gay League (LGL)] filed a complaint with the Equal Opportunities Ombudsperson. It asked for clarification on the compatibility of public statements of the Mayor of Vilnius, as well as of the application of Rules on Disposal and Cleanness (amended prior to the event in order to justify rejecting authorisation to hold the event), with Article 5 of the Law on Equal Treatment. This Law provides for a general duty of the State and municipal institutions to implement equal opportunities. The Ombudsperson refused to investigate the claim, however, taking the view that the LGL could not apply to the Ombudsperson, since only direct victims of the measure were eligible to file a complaint. It also concluded that the case constituted a contentious case which, according to the Law on Equal Treatment, must be litigated in the courts (this is the case regarding the implementation of the Law on Assemblies). Finally, it found that public statements by officials do not fall under the scope of the Law on Equal Treatment.⁸⁸ Although this reasoning was approved by a first instance court, an appeal has been filed and is pending at the time of writing. In May 2010, the Vilnius District Administrative Court ordered the suspension of the permit given by the Vilnius municipality to hold the Baltic Pride March 'For Equality', scheduled for the 8 May 2010. In the event the March did take place on the planned date, but a decision by the Supreme Administrative Court was needed to uphold the permission to demonstrate. As the Council of Europe Commissioner for Human Rights has noted, 'the March took place under heavy police protection and with a significant number of hostile protesters surrounding it. The hostility towards the event meant that the police outnumbered the participants.'⁸⁹ In Latvia, despite several courts rulings annulling the ban imposed on Pride marches, the right to organise such events continues to be challenged by elected officials.

3.2.2. Demonstrations against LGBT people and events

The 2008 report discussed the case law of the ECtHR in detail considering that in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.⁹⁰ While most EU Member States provide for the possibility of banning demonstrations which incite to hatred, violence or discrimination (on grounds of sexual orientation) in their domestic legislation, they may be slow to use these powers. Over the past two years, problems have been reported in particular in Bulgaria, where the *Български национален съюз* [Bulgarian National Alliance (BNA)] regularly seeks to organise counter-demonstrations against pride marches. This resulted, on a few occasions, in organised violence during such marches. The authorities have been building better collaboration with the organisers, especially on the occasion of the March 'Love Equality, Embrace Diversity' held in Sofia on 26 June 2010. The event was attended by approximately 800 people and protected by 300 police officers. A handful of anti-LGBT protesters were arrested during the event, but no other incidents occurred.⁹¹ Nevertheless, on 18 November 2009 the municipal council of Pazardzhik had adopted local public order regulations explicitly banning 'public demonstration and expression of sexual orientation in public places.'⁹² Although this provision contains apparently neutral wording in practice it appears to be aimed at expression by LGBT persons since it seems unlikely that the expression of heterosexual orientation will also be captured by the prohibition. It is important to recall that the possibility to demonstrate peacefully, free from fear and in favour of the advancement of the rights of the LGBT population, is to be considered as a central issue for any EU Member State.

Taken together, counter-protests, violent attacks, and the banning of demonstrations or expressions of LGBT identities in public places testify to the ongoing misconceptions about homosexuality and LGBT people. Perceived as morally unacceptable phenomena belonging only to a dissident 'other', and as an enduring threat to traditional views of gender, sexuality, and family, LGBT people are forced into invisibility. This conceptualisation is problematic in two ways: first, it embodies a very narrow understanding of respect for the personal sphere of the individual, and the development

86 Romania/Tribunalul Bucuresti/Asociația Pro Vita pentru Copii Născuți și Nenăscuți – Filiala București v. Primăria Municipiului București și Asociația ACCEPT, Judgment 2807 in File No.18838/3/CA/2008 (24 October 2008).

87 15min.lt (2008), Imbrasas: Gėjams vietos nėra, published July 21 2008, available in Lithuanian at:<http://www.15min.lt/naujiena/miestas/vilnius/imbrasas-gejams-vietos-nera-41-672> (2 February 2010).

88 Lithuania/Decision of the Equal Opportunities Ombudsperson of 28 November 2009. Excerpts from the reasoning can be found in the Annual report 2008 of the Ombudsperson, available in Lithuanian at: <http://www.lygybe.lt/?pageid=7> (2 February 2010).

89 http://commissioner.cws.coe.int/tiki-view_blog.php?blogId=1&date_min=1275343200&date_max=1277935199 (26 July 2010).

90 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, 2009, p. 108-9.

91 International Gay and Lesbian Human Rights Commission, *Bulgaria Pride 2010 Celebrates Love, Equality and Diversity Free from Threatened Anti-LGBT Violence*, <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1151.html> (26 July 2010).

92 Bulgaria/Regulations for the Public Order in Pazardzhik Municipality, adopted with decision 61 (27 April 2006) and amended with decision 21 (12 November 2009).

of one's personality, insofar as it equates 'personal' with 'in hiding'. Second, it results in unfair and unequal treatment, because public expression of heterosexual orientation is not subject to the same restrictions.

3.3. The bans on dissemination of information on homosexuality to minors or on LGBT expression in the public sphere

On 22 December 2009 the Seimas [Lithuanian Parliament] adopted *Nepilnamečių apsaugos nuo neigiamo viešosios informacijos poveikio įstatymo*, 1, 2, 3, 4, 5, 7, 9 straipsnių pakeitimo ir papildymo (Law on the Protection of Minors against the Detrimental Effects of Public Information).⁹³ Article 4 of this Act addresses sexuality and family relations, stating (*inter alia*) that information is detrimental to minors '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 (...)'.⁹⁴ This wording results from amendments passed to an earlier version, contested both internally and internationally,⁹⁵ which sought to explicitly ban materials that 'agitate for homosexual, bisexual and polygamous relations' from schools, public places and the media, in an attempt to protect children from 'detrimental information'.⁹⁶ Lengthy debates focussed largely on the clauses regarding homosexuality,⁹⁷ and resulted in somewhat inconsistent wording since Article

4, para. 2 (12) classifies as 'detrimental information' such information which mocks or humiliates a human person or a group of persons on the ground of (inter alia) sexual orientation.

While the latest version of the Act still contains vague wording, it does not explicitly mention that information on homosexuality is considered as causing detrimental effect to minors. However, the law might still be problematic insofar as it bans information on same-sex relationships, currently excluded from the concept of marriage and family stipulated in the Constitution and the Civil Code of Lithuania. In general, according to the case law of the ECtHR any difference in treatment based on sexual orientation requires particularly serious reasons by way of justification, and the margin of appreciation of States is narrow.⁹⁸

Parallel to this, a bill was proposed on 9 July 2009 to amend the Penal Code⁹⁹ and the Code of Administrative Offences.¹⁰⁰ First, the amendments suggested to establish a form of administrative liability for the 'propagation' of homosexual relationships and the financing of public propagation of homosexuality; and, second, to criminalise 'public agitation' for homosexual relationships. In part because of the lack of legal certainty in the use of the term 'agitation', doubts arose within the Ministry of Justice over compliance with Lithuania's international obligations.¹⁰¹ The amendments are therefore currently under review. If adopted, the proposed amendments would permit the prosecution of a potentially very wide variety of activities, including seminars and conferences, campaigning on human rights issues relating to sexual orientation and gender identity, providing sexual health information to LGBT people, the organisation of film festivals or pride marches and events. They might also lead to increased discrimination and other human rights abuses, in a range of areas, including employment and access to goods and services. The amendments could potentially criminalise almost any public expression or portrayal of, or information about, homosexuality.

A comparative EU-wide analysis shows that the example of Lithuania is the only recent attempt to sustain the

93 Lithuania/Law on the Protection of Minors against the Detrimental Effects of Public Information [STATYMAS, XI-594, 24 December 2009, Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=361998 (2 February 2010).

94 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."

95 European Parliament 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), available at <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 available at: https://wcd.coe.int/ViewDoc.jspx?Ref=PR132%282010%29&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogo=A9BACE/t/commissioner/News/2010/100217Lithuania_en.asp.

96 The initial version of the Law on the Protection of Minors against the Detrimental Effects of Public Information was passed by the Parliament, overruling Presidents' veto by 87 votes to 6 (25 abstentions), on 14 July 2009. Lithuania/Law on the Protection of Minors against the Detrimental Effects of Public Information, IX-1067, 14 July 2009, Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=349641

97 The stenograph of the Parliament hearings is available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=357210&p_query=Nepilname%EBI.

98 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.

99 Lithuania/Baudžiamojo kodekso papildymo 310(1) straipsniu [STATYMO PROJEKTAS, XIP-668(2), 16 June 2009, Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=346178&p_query=&p_tr2= (2 February 2010).

100 Lithuania/Administracinių teisės pažeidimų kodekso papildymo 214(30) straipsniu ir 224 bei 259(1) straipsnių papildymo [STATYMO PROJEKTAS, XIP-667(2), 16 June 2009, Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=346176&p_query=&p_tr2= (1 February 2010).

101 Lithuania/EUROPOS TEISĖS DEPARTAMENTO IŠVADA Baudžiamojo kodekso papildymo 310(1) straipsniu įstatymo projektui XIP-668(2), 7 July 2000, Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=348021. See also: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=348020&p_query=&p_tr2=.

invisibility of LGBT people through laws which can be said to 'embod[y] a predisposed bias on the part of a heterosexual majority against a homosexual minority',¹⁰² a situation as unacceptable as any differential treatment based on 'similar negative attitudes towards those of a different race, origin or colour'.¹⁰³ A number of Member States have in place legislation that provides for a general protection of minors against certain types of materials, notably those of a pornographic nature. However, the FRA's comparative analysis shows that none of these provisions makes any distinction between heterosexual and homosexual or bisexual erotic material. There are no provisions in the EU Member States which target the diffusion of information on homosexuality as such. The situation is more ambiguous only in Denmark. Section 234 of the Danish Penal Code makes it illegal to sell obscene pictures or items to persons below the age of 16, and the official commentary to this provision states that pictures or film containing nudity or showing sexual intercourse is not considered obscene, unless the material contains pictures with homosexual, sadistic or sexually perverted content.¹⁰⁴ The commentary seems obsolete on this point, however, and it would be highly unrealistic to see courts in Denmark following that opinion. An updating of the official commentary may be recommended in this regard. In Austria, Section 220 of the Criminal Code outlawed the promotion of homosexual activities or sodomy,¹⁰⁵ but this provision was abolished in 1996 by BGBl 1996/762. Apart from bans on the 'promotion of homosexuality', in Greece Article 347 of the Penal Code still criminalises 'sexual abuse against nature' (παρά φύσιν ασέλγεια) between men a) when induced by an abuse of a relation of dependency based on any 'services' rendered, or b) when one party is under the age of 17 through seduction or for financial gain. Article 347, furthermore, criminalises the same behaviour when exercised as a profession, thus making male prostitution illegal.¹⁰⁶ This seems to be incompatible with

Law 2734/99 regulating prostitution.

In clear contrast to the developments in Lithuania, some Member States have chosen to actively promote the public acceptance of LGBT people, by encouraging the distribution of materials that discuss homosexuality in a context of respect and understanding, by monitoring and fighting discrimination and violence, and by recognising and supporting LGBT relationships. This is in line with the United Nations Declaration on a Culture for Peace of 13 September 1999, which states that 'progress in the fuller development of a culture of peace comes about through values, attitudes, modes of behaviour and ways of life conducive to the promotion of peace among individuals, groups and nations' (Article 2). The Declaration encourages States to 'ensure that children, from an early age, benefit from education on the values, attitudes, modes of behaviour and ways of life to enable them to resolve any dispute peacefully and in a spirit of respect for human dignity and of tolerance and non-discrimination' (para. 9 of the Programme of Action on a Culture of Peace).¹⁰⁷

The United Nations Declaration and the accompanying programme of action, as well as Recommendation (2002)12 of the Committee of Ministers of the Council of Europe on education for democratic citizenship (adopted on 16 October 2002), emphasise the need for children to acquire an ability to 'recognize and accept differences'. They have directly inspired the adoption, in Spain, of Law 27/2005 of 30 November 2005 on Education and Culture of Peace,¹⁰⁸ which imposes on government an obligation to 'promote all necessary action to develop the contents of the international agreement on eliminating all kinds of racial discrimination, discrimination against women and discrimination derived from sexual orientation' (Article 4.1). Furthermore, the 2006 Organic Law on Education¹⁰⁹ also provides that the Spanish educational system will promote, inter alia, secondary education allowing children 'to know and appreciate the human dimension of sexuality in its full diversity' (Article 23.k).¹¹⁰

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

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

104 Karnov, Information om LBKG 2009-10-29 nr 1034 Straffeloven, note 929 (available at www.thomson.dk).

105 This was considered a *Medieninhaltsdelikt* [offense constituted by the content of a media] according to sec 1 para 1 subsec 12 *Mediengesetz* [Media Act].

106 According to Article 339 of the Greek Penal Code, the age of consent is 15 years. The different age of consent foreseen by Article 347 in cases of seduction only applies to sex between men, and can thus be deemed to be contrary to ECtHR, *L. and V. v. Austria*, Nos. 39392/98 and 39829/98, 9 January 2003 and ECtHR, *S.L. v. Austria*, No. 45330/99, 9 January 2003 (see also ECtHR, *Sutherland v. UK*, No. 25186/94, 27 March 2001). Insofar as the crime foreseen by art. 347, in its various forms, is explicitly targeting sex between males only, it can also be doubted whether that the crime as a whole runs against ECtHR, *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981; ECtHR, *Norris v. Ireland*, No. 10581/83, 26 October 1988; and ECtHR, *Modinos v. Cyprus*, No. 15070/89, 22 April 1993. To the extent that the various provisions impose a ban on sexual activity between men in the context of employment, self-employment or profession, the ban would fall under the provisions of the Employment Equality Directive which forbids discrimination on grounds of sexual orientation. The ban creates a question of compatibility with the Directive, which has been transposed in Greek law by Law 3304/05.

107 UN General Assembly Resolution 53/243 (UN Doc. A/53/243), 6 October 1999.

108 Spain/Ley 27/2005 Education and Culture of Peace (30 November 2005).

109 Spain/Ley Orgánica 2/2006 (3 May 2006).

110 Reference can also be made to the adoption of legislation on education by the Spanish Autonomous Communities. Particularly noteworthy is Andalusia/Law 17/2007 (10 December 2007), concerning *Educación en Andalucía* [Education in Andalusia], which lists among the principles of the Andalusian educational system: 'coexistence as an objective and necessary condition for the correct development of the work of the pupils and teachers, and respect for diversity through mutual awareness, guaranteeing that there is no segregation of pupils for reasons of belief, sex, sexual orientation, ethnic group or economic and social situation' (Article 4.1.f)).

Other Member States have also moved in this direction. In Germany, for instance, a number of initiatives have been adopted in this respect,¹¹¹ including the distribution by the Federal Centre for Health Education of a manual called 'Heterosexual? Homosexual?';¹¹² or the initiative 'School without Homophobia – School of Diversity' supported by the Land of Nordrhein-Westfalen.¹¹³ In Estonia, the Ministry of Social Affairs considers that the current national study curriculum set by the Ministry of Education and Science should encourage discussions on sexual minorities, as it provides that one of the aims of the human study classes is the increase of pupils' tolerance of other people's differences and their understanding of the nature of sexuality.¹¹⁴ In France, HALDE recommends providing training to teachers and National Education Service staff but also incorporating homophobia in school curricula.¹¹⁵ Furthermore, it considers that the refusal by a local authority to certify an association seeking to organise information sessions for pupils on discrimination linked to sexual orientation to be a form of discrimination.¹¹⁶ This position is approved by the administrative courts, which agreed that providing information about homophobia was in conformity with the principle of neutrality of public education.

In the Netherlands, several teaching materials aimed at making homosexuality the subject of discussion in secondary education have been developed. Following a resolution adopted in December 2009 by the Lower House of Parliament, the Dutch government has announced that sexual diversity will become part of the main objectives of primary and secondary education.¹¹⁷ The Netherlands have also adopted a comprehensive LGBT Policy Document for the period 2008-2011 ('Simply Gay'), which constitutes a national action plan encompassing 60 different measures, including 24 projects sponsored by various government departments to improve the social acceptance and empowerment of LGBT citizens. In the UK, issues relating to discrimination, homosexuality and civil partnership were included in initiatives to improve the National Curriculum. The changes will make it compulsory for all schools to teach 14 to 16 year olds about same-sex relationships.

The Council of Europe strongly encourages making further progress in this direction: Recommendation CM/Rec(2010)5 of the Committee of Ministers states: 'Taking into due account the over-riding interests of the child, appropriate measures should be taken (...) at all levels to promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity. This should include providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity. Furthermore, Member States may design and implement school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Such measures should take into account the rights of parents regarding education of their children' (Appendix, para. 32). This approach, thus, calls for the promotion and strengthening of a culture of respect and of human rights. This perspective is inherently preventive in its conceptualisation, as it seeks to eradicate those misconceptions, stereotypes and implicit assumptions which give rise to intolerance, exclusion, intimidation and violence. As will be seen in the next subsection on anti-LGBT speech and crime, a response based solely on criminal law will not suffice to ensure better living conditions and full participation in society of LGBT people.

In conclusion, against this comparative background, Lithuania appears very isolated among EU Member States in its intention to prohibit dissemination of material that could be seen as 'promoting' (homo)sexual relations or 'expressing contempt for the family'. Only in Denmark there is certain ambiguity created by the official commentary to Section 234 of the Penal Code in its discussion of 'obscenity'.

3.4. Protection from anti-LGBT expression and violence through criminal law

This section examines the extent to which national criminal law protects LGBT persons from anti-LGBT expression (expressions of prejudice such as insults, threats and verbal abuse), as well as incitement to hatred or discrimination on the one hand ('hate speech'), and acts of violence on the other hand ('hate crime'). There is currently no adequate EU binding instrument aimed at effectively countering expression of negative opinions against LGBT people, incitement to hatred or

111 <http://www.kombi-berlin.de/01-start-engl.html>; <http://www.schwulelehrer.de/> (26 February 2010).

112 <http://www.bzga.de/?uid=10e7dba5ff6db8a8c3deaf179e4eeecf&id=medien&sid=71&idx=42> (26 February 2010).

113 <http://www.schule-der-vielfalt.de/index.htm> (26 February 2010).

114 Estonia/Sotsiaalministeerium (01.2010) *Teemauuringu homfoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel vastused* [Answers to Thematic Study on Homophobia and Discrimination on Grounds of Sexual Orientation] no 15.1-1/90.

115 See France/Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE)/Deliberation No. 2009-252 (12 January 2009); HALDE Annual Report 2008 pp. 60-61. Available on: http://www.halde.fr/IMG/pdf/RA_UK_version_integrale.pdf.

116 HALDE *Annual Report 2008*, p. 59.

117 Netherlands/Parliamentary Documents Lower House (2009-2010) 27017, Nos. 59 and 66.

discrimination, as well as abuse and violence.¹¹⁸ As already highlighted by the FRA's reports, data on the prevalence of the phenomenon among the LGBT population are scarce, although some Member States have started to record it in official statistics or crime surveys.¹¹⁹ With respect to data collection, the number of Member States which have taken action with respect to anti-LGBT expression and violence still compares relatively unfavourably with the number of those that officially record racist crime.¹²⁰

A consensus has been affirmed within the Council of Europe concerning the need to ensure the promotion of a culture of tolerance and respect, and to step up efforts towards combating 'hate speech'. Recommendation No. R (97)20 of the Committee of Ministers to member states on 'hate speech' relates to 'all forms of expression which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance' and stigmatises them as undermining 'democratic security, cultural cohesion and pluralism'. The Recommendation contains a set of principles to take appropriate steps to combat hate speech. It 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. The case law of the ECtHR indicates that the exercise of freedom of expression entails corresponding 'duties and responsibilities',¹²¹ and that expressions clearly amounting to hate speech do not enjoy the protection of Article 10 of the ECHR.¹²² With respect to expressions that would fall within the scope of Article 10, the Court places particular emphasis on both the context in which they take place, the circumstances of the case, and the applicant's intentions in order to assess whether any infringement can be justified as necessary in a democratic

society.¹²³ In the recent case of *Féret v. Belgium*, which concerned racist remarks during an electoral campaign, the Court offered an explanation of its understanding of 'incitement to hatred'. It concluded that it was not necessary to demonstrate an actual call for violence or crime; rather, incitement to hatred could be constituted by insult, ridicule and defamation. This would amount to an 'irresponsible' exercise of 'freedom of expression, undermining dignity and security' of certain groups of the population.¹²⁴ The fact that the applicant was a member of Parliament (and thus played an important role in the democratic process) was found to be immaterial, and 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'.¹²⁵

With respect to the role of the media in fuelling inflammatory speech or in disseminating balanced information reflecting the pluralism of society, Recommendation No. R (97)21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance recalls that 'the principle of tolerance is the guarantee of the maintenance in Europe of an open society respecting cultural diversity'. Noting, in particular, that the media 'can make a positive contribution to the fight against intolerance, especially where they foster a culture of understanding', it recommended a number of professional practices conducive to the promotion of a culture of tolerance. These included accurate reporting, sensitivity, avoidance of derogatory stereotypical depiction of members of particular communities, and treating individual behaviour without linking it to a person's membership of such communities where this is irrelevant. The Recommendation also invited States to 'make adequate provision for programme services, also at popular viewing times, which help promote the integration of all individuals, groups and communities'. More recently, Recommendation CM/Rec(2010)5 calls on the Member states of the Council of Europe 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

118 Building on the opinions of the FRA's 2008 report, the European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)) ((P6_TA(2009)0019) called on the Commission, after consulting the Agency, to combat homophobia through legislation similar to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. The deadline for implementation of the Framework Decision 2008/913/JHA on racism and xenophobia will expire in November 2010. The Commission has announced a communication on the fight against racism, xenophobia and discrimination for 2011, and a report on the implementation of the framework decision for 2013.

119 FRA, *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation*, 2009, p. 37.

120 FRA, *Annual Report*, Luxembourg: Publications Office, 2010, p. 37.

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

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

123 ECtHR, *Sürek and Özdemir v. Turkey*, Nos. 23927/94 and 24277/94, 8 July 1999, para 61. See M. Oetheimer, '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*, 17(3), 2009, p. 427.

124 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'.

125 *Ibid.*, para 75.

other forms of discrimination against lesbian, gay, bisexual and transgender persons' (Appendix, para. 6). According to the Recommendation, such 'hate speech' should be prohibited and publicly disavowed whenever it occurs, taking into account the right to freedom of expression in accordance with Article 10 of the ECHR and the case law of the ECtHR. 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' (Appendix, paras. 7-8).

Hate speech and hate crime have been a central concern for the Organisation for Security and Cooperation in Europe (OSCE) for a number of years. In 2009, OSCE's Ministerial Council adopted a Ministerial Decision on combating hate crimes where it acknowledged the bias motive behind such violent acts, and called upon participating States to enact, where appropriate, specific, tailored legislation to combat hate crimes providing for effective penalties that take into account the gravity of such crimes.¹²⁶ Additionally, in 2009 the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) published a resource guide for NGO's entitled *Preventing and responding to hate crimes*, where it clearly stated that hate-motivated crimes and incidents have not only an impact on victims but also on entire communities, sending the message that these communities should be denied the right to be part of society.¹²⁷ In 2009 ODIHR also published the document *Hate Crime Laws: A Practical Guide*, where it stated that factors to consider by lawmakers when deciding which grounds should be included in hate crime legislation encompass historical conditions, contemporary social problems, and the incidence of particular kinds of crime. Concerning specifically crimes against LGBT people, the annual report for 2008 on *Hate crimes in the OSCE region - incidents and responses* reported several examples of discrimination and violence, drawing attention to the lack of data on this important issue.

In the context of its data collection activities on racist and related hate crimes in the EU, in 2010 the FRA has started to collect data on anti-LGBT incidents and crimes. At the time of writing the results are not yet available.

The study is collecting both official and unofficial data and information. The former encompasses incidents and complaints reported by the public, those recorded by the police, and those recorded by the prosecution service and/or courts. The latter embraces such sources as NGOs, academic research reports, the media, surveys, and victim support organisations. In 2011 the Agency will also pilot a survey on anti-LGBT hate speech and hate crime, and discrimination on grounds of sexual orientation and gender identity in selected EU Member States, which will guide the development of a future more extensive survey covering more EU Member States through a diverse range of methodological approaches.

3.4.1. Anti-LGBT expression and incitement to hatred or discrimination

The 2008 report noted that defining incitement to hatred, violence or discrimination against LGBT persons as a criminal offence can coexist with the respect of freedom of expression.¹²⁸ At the time of that report criminal law in 12 Member States contained provisions making it a criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation. This figure did not include the specific case of harassment at the workplace, which under the Employment Equality Directive should be treated as a form of discrimination and should be subjected to effective, proportionate and dissuasive sanctions, which may be of a criminal nature. Moreover, it did not include anti-LGBT expressions not amounting to incitement to hatred or discrimination. In 12 other Member States, by contrast, incitement to hatred, violence or discrimination against LGBT people was not explicitly defined as constituting a criminal offence (Austria, Bulgaria, Cyprus, Czech Republic, Finland, Greece, Hungary, Italy, Luxembourg, Latvia, Poland, and Slovak Republic). Despite the absence of specific and explicit legislation, in most of these Member States generally worded offences may equally serve to protect LGBT persons from anti-LGBT expressions. The 2008 report found that only in four States were the existing provisions of the criminal law against incitement to hatred explicitly restricted to the protection of groups other than LGBT people (Austria (Section 283 of the Criminal Code),¹²⁹ Bulgaria (Article 162 and 164 of the Criminal Code),¹³⁰ Italy (Article 3, Legge [Law] 654/1975),¹³¹ and Malta (Section 82A of the Criminal Code and Section 6 of the Press Act).¹³² In addition, apart from criminal law provisions, protection may be sought under the civil law which protects honour, dignity and the rights of the person.

126 OSCE Ministerial Council Decision No. 9/09, Combating hate crimes, 1 December 2009.

127 OSCE/ODIHR, *Preventing and responding to hate crimes*, 2009, p. 9. Available on: http://www.osce.org/publications/odihr/2009/10/40781_1382_en.pdf.

128 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, 2009, p. 118.

129 Austria/Criminal Code, BGBl1974/60, last amended by BGBl I 2007/112 (28 December 2007).

130 Bulgaria/Criminal Code, Article 162, para.1 and Article 164 (2 April 1968, with numerous amendments, the latest one from 19 December 2006).

131 Italy/Law 654/1975 (13 October 1975).

132 Malta/Press Act, Chapter 248 of the Laws of Malta (23 August 1974).

Some developments have taken place since the original report. Only in Slovenia has the law been explicitly modified to include sexual orientation: Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality now explicitly includes sexual orientation (Slovenia/ Penal Code 55/06 (28 May 2008)). The UK, through the Criminal Justice and Immigration Act 2008,¹³³ amended the existing provisions on incitement to religious hatred in the Public Order Act 1986¹³⁴ to cover hatred on the grounds of sexual orientation. These provisions, which came into force on 23 March 2010, apply in England, Wales and Scotland; Northern Ireland already had similar criminal law provisions in place since 2004. In Austria, the Ministry of Justice sent out a draft amendment of the Criminal Code in December 2009, which proposes to include sexual orientation into protection from incitement to hatred (Section 283 Criminal Code).¹³⁵

As already noted, in other Member States provisions on incitement to hatred do not explicitly refer to sexual orientation, but are worded in general terms. Two new Member States joined this group: Czech Republic and Romania. In the Czech Republic, a new Criminal Code came into force in January 2010.¹³⁶ Contrary to recommendations of the Working Group on the Issue of Sexual Minorities [Pracovní skupina pro otázky sexuálních menšin]¹³⁷ in its report *Analysis of the situation of lesbian, gay, bisexual and transgender minorities in the Czech Republic*, the new code does not explicitly refer to anti-LGBT expression as a criminal offence, although several provisions refer to offences against a 'group of people'. These offences include incitement to hatred against a group of people or to restrict their rights and freedoms (Section 356), apartheid and discrimination against a group of people (Section 402), foundation, propagation and support of a movement aimed at destroying the rights and freedoms of a person (Section 403), or the statement of support of a movement aimed at oppression of rights and freedoms of a person (Section 404). Similarly in Romania, the new Criminal Code adopted in 2009 rephrased the definition of incitement to hatred or discrimination in Article 369, broadening its scope by removing the fixed list of protected groups. It now defines as a criminal offence 'incitement of the public, by any means, to hatred or discrimination against a category of persons'. The current Article 317 of the Criminal Code

sanctioning hate speech as incitement to discrimination already mentions specifically that it protects all grounds of discrimination sanctioned by the Anti-discrimination Law, which includes sexual orientation.

It is noteworthy that, according to an analysis of cases collected by the FRA, in the absence of proper legislation and guidance, criminal law provisions on incitement to hatred or discrimination have a limited impact in dealing with expressions based on anti-LGBT prejudice, verbal threats, abuse and other expressions often directed against LGBT people.¹³⁸ In Bulgaria – where criminal law provisions concerning hate speech do not include homophobic statements as a punishable offence – the Sofia City Court¹³⁹ held on 1 September 2009 that homophobic statements constitute neither harassment nor incitement to discrimination under the legislation implementing the EU equality directives (*Закон за защита от дискриминация (ЗЗД)* [Protection Against Discrimination Act (PADA)],¹⁴⁰ because the element of comparison with other categories was lacking. This decision is currently being challenged before the Court of Cassation. With respect to homophobic statements made by a politician during an interview in a newspaper, the *Cour de Cassation* in France held that, although the statements may have upset certain LGBT people, their specific content did not exceed the limits of freedom of speech.¹⁴¹ Moreover, in some cases dating back a few years, public dissemination of views about LGBT people as 'abnormalities', 'contagious' or 'harmful to society' has been found by courts as not exceeding the limits of acceptability having regard for the 'context' in which they were made. Thus, propagating negative and offensive views on homosexuality, if based on religious beliefs or voiced by religious figures, has been considered by some courts (notably in Belgium,¹⁴² Denmark,¹⁴³ the Netherlands,¹⁴⁴ and Sweden¹⁴⁵) to fall within the right to freedom of expression.

The position varies among the EU Member States and

133 UK/Criminal Justice and Immigration Act 2008 (c.4) (8 May 2008).

134 UK/Public Order Act 1986 (c.64) (7 November 1986), Part 3A.

135 See: http://www.parlament.gv.at/PG/DE/XXIV/ME/ME_00119/pmh.shtml, (15 February 2010).

136 Czech Republic/Act. No. 40/2009 Coll. Criminal Code (entry into force 1 January 2010), available at http://portal.gov.cz/wps/portal/_s.155/702/_s.155/701?l=40/2009 (Czech only, accessed on 12 February 2009).

137 The working group no longer exists after it was replaced by the Committee for Sexual Minorities [Výbor pro sexuální menšiny], set up as part of the government Council for Human Rights in 2009. The composition remains similar.

138 See the data contained in the FRA report *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation*, 2009, p. 41-46.

139 Bulgaria/Софийски градски съд/Civil case No. 285/2007 (1 September 2009).

140 Bulgaria/Protection Against Discrimination Act (PADA) (1 January 2004).

141 France/Cour de Cassation/No. 07-83398 (12 November 2008). French legislation criminalises not only incitement to hatred, but also insults and threats towards unidentified people. The Law of 9 March 2004 amended Article 222-18-1 of the Penal Code, thus allowing specific incrimination for a threat based upon real or supposed sexual orientation. This is punishable by two to seven years of imprisonment and a fine of €30,000 to €100,000.

142 Belgium/Raadkamer Nijvel/Decision of 4 June 2008.

143 Denmark/Western High Court/Ugeskrift for Retsvæsen Ufr 1990.636 V (29 March 1990).

144 Netherlands/Gerechtshof's Gravenhage/No. 2200359302 (18 November 2002); Netherlands/Hoge Raad der Nederlanden/No. 00945/99 (9 January 2001).

145 Sweden/Högsta domstolen/Decision of 29 November 2005.

represents still an unsettled area of law. For instance, in April 2010 the Belgian *Centre pour l'égalité des chances et la lutte contre le racisme* [Centre for equal opportunities and the fight against racism] filed a complaint against the leader of the organisation 'Sharia4Belgium', who had publicly expressed his religiously-based views on LGBT people, declaring that 'they have no place in society and that they would probably be sentenced to death by the learned scholars'.¹⁴⁶ The courts will have to determine whether such statements amount to a form of incitement to hatred or whether they are protected as a legitimate exercise of freedom of expression. Courts have previously considered that 'incitement' is a concept that goes further than just the expression of negative opinions, as it requires stimulation, encouragement, stirring up or provocation. In several instances national courts have upheld the rights of LGBT people to dignity, honour, or reputation, in cases involving negative expressions directed at a specific individual, especially when not voiced by religious figures. In August 2009, the Regional Court in Szczecin (Poland) found in favour of a young gay man who had been repeatedly and publicly insulted by a neighbour. The Court held that using insulting words to depict gay men cannot be considered as commonly accepted and results in humiliation and a threat to 'one of the most sensitive aspects of human life'.¹⁴⁷ In Belgium, the Court of First Instance of Arlon found in January 2010 that insults against a same-sex couple in the street amounted to harassment, threats and incitement to hatred. The defendant was convicted and ordered to pay a fine and compensation.¹⁴⁸ In Sweden, several young men handed out leaflets with right-wing propaganda at a school, containing among other things statements about homosexuality as a disease. The four men have been convicted and given a conditional prison sentence.¹⁴⁹ The case is now pending before the ECtHR, as those convicted argue that the contested conduct falls within the ambit of their freedom of expression.¹⁵⁰ In December 2009, a television programme was broadcast in Hungary featuring the host and guests making remarks about LGBT persons to the effect that the latter were 'decaying' and 'destroying' society, and that the gay community could not coexist with the 'civilisation of white Christians'. The Hungarian Radio and Television Commission found that this was capable of stirring up hatred against LGBT people and violating their human rights.¹⁵¹ It subsequently ordered the television company to suspend broadcasting for a period of 90

minutes, during which it was obliged to screen the Commission's main findings. In the Netherlands, the Amsterdam Court of Appeal found that a statement published on a self-defined 'satirical website' that even the death sentence was a mild penalty for gay people was 'unnecessarily offensive'. The defendant was sentenced to a week in prison (suspended) and a fine.¹⁵² Furthermore, the *Consiliul National pentru Combaterea Discriminarii* [National Council on Combating Discrimination] in Romania found that a press article depicting homosexuals as a source of debauchery and danger had created a degrading and humiliating environment which was hostile to homosexuals, and concluded that the author had misused his freedom of expression.¹⁵³ One potentially significant development took place in the Czech Republic where, on 17 February 2010, the Supreme Administrative Court adopted a judgment dissolving an extremist right wing party, *Dělnická strana* [Workers' Party].¹⁵⁴ The Workers' Party openly espoused racist, homophobic, xenophobic, and anti-Semitic views. The Court stated that while the program and speeches of the members of the party did not constitute sufficient grounds on which to dissolve the party, this measure would be justified once the party started to harm the rights of other persons and develop into a real danger for democracy. The Workers' Party included homophobic statements in its political program and led demonstrations which, even if not openly announced as homophobic, contained homophobic undertones.

In conclusion, 13 Member States (Belgium, Denmark, Estonia, France, Ireland, Lithuania, the Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, and the UK) explicitly criminalise incitement to hatred or discrimination on grounds of sexual orientation. Since 2008, only Slovenia has joined this group. However, in several Member States only negative expressions amounting to 'incitement to hatred' are captured by existing criminal law provisions. Furthermore, case law collected by the FRA shows that in some Member States the courts might have a tendency to apply the law narrowly, especially when negative or biased statements are based on religious views. In other Member States, however, such a defence is less readily accepted.

See table 4 below for an overview of criminal law provisions on 'incitement to hatred' explicitly covering sexual orientation.

146 See the Centre's website at http://www.diversite.be/index.php?action=artikel_detail&artikel=350 (27 July 2010).

147 Poland/Regional Court in Szczecin/Decision of 4 August 2009.

148 Belgium/Tribunal de première instance d'Arlon – criminal court/Decision of 11 January 2010.

149 Sweden/Högsta domstolen [Supreme Court], 6 July 2006.

150 ECtHR, *Vejdeland and others v. Sweden*, No. 1813/07, communicated to the Swedish government on 27 November 2008.

151 Hungary/Országos Rádió és Televízió Testület (ORTT)/No. 2005/2009 (XII.16) (16 December 2009).

152 Netherlands/Gerechtshof Amsterdam/No. 23-000547-06 (17 November 2006).

153 Romania/Consiliul National pentru Combaterea Discriminarii/, *Asociatia Attitude v. Silviu Manastire*, *Gazeta de Cluj*, Decision No. 207 (14 July 2003).

154 Czech Republic/Supreme Administrative Court/No. Pst 1/2009-348 (17 February 2010).

3.4.2. Homophobic or transphobic intent as an aggravating circumstance in criminal offences

The second important issue examined by the 2008 report concerned homophobic intent as an aggravating factor in the commission of common crimes, such as violence against the person and damage to property. Recommendation CM/Rec(2010)5 of the Committee of Ministers calls upon the Member States of the Council of Europe to 'ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator'. It notes that particular attention should be paid to the 'investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity' with a special emphasis on the need to avoid impunity (Appendix, para. 1). They should also ensure that 'when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance' (Appendix, para. 2). Victims and witnesses of sexual orientation or gender identity related hate crimes and other hate-motivated incidents should be encouraged to report these crimes and incidents. To this end States 'should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses' (Appendix, para. 3). The Recommendation also contains provisions on the need to 'ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons', and on the collection and analysis of relevant data on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on hate crimes and hate-motivated incidents related to sexual orientation or gender identity.

The 2008 report noted that 10 EU Member States considered anti-LGBT intent as an aggravating circumstance, either for all common crimes, or for a closed set of criminal offences. In 17 other Member States, such intent was not an aggravating circumstance in the commission of criminal offences. The notion of 'hate crime' was known in six of the States in this category, however, and in at least four Member States – which do not explicitly restrict the notion of 'hate crimes' to crimes committed with a racist or xenophobic intent – the report noted that the general formulations in the legislation might allow for the inclusion of crimes committed with a homophobic motivation.

There are a few changes to be reported in Lithuania, Hungary, and the UK (Scotland). Some progress was made in Lithuania, with the inclusion of homophobic

motivation in the list of aggravating circumstances of crime in June 2009.¹⁵⁵ As already reported by the FRA,¹⁵⁶ in 2009 Lithuania was among the few Member States which collect official data about court cases on hate speech. This compares rather contradictorily with the less positive developments discussed above (subsection 3.3.). In the UK, the Offences (Aggravation by Prejudice) (Scotland) Act, came into force in Scotland on 24 March 2010. It requires the aggravation of an offence by prejudice on the grounds of disability, sexual orientation or transgender identity to be taken into account in sentencing. This development is particularly noteworthy because it is the first in the EU to make explicit mention of 'transgender identity'. For hate crime legislation to be efficient, Transgender Europe holds that a broad understanding of transgender identity needs to be adopted to cover those most vulnerable to transphobia. In Hungary, in 2009 Article 174/B of the Penal Code was altered so as to protect members of 'certain groups of society'. Criminal proceedings initiated on the basis of Article 174/B against violent counter-demonstrators in the 2009 Gay Pride March suggest that the LGBT community is regarded as a 'certain group of society' and thus enjoys the protection of that Article. Finally, in the Netherlands the 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects, thus raising the increase from the 25% previously foreseen for certain crimes.¹⁵⁷

In two other Member States there have been legislative changes, which however did not result in any modification with respect to homo- and transphobic crime. Although, as noted above, the Czech Republic adopted a new Criminal Code in 2009, it did not include homophobic intent as an aggravating circumstance that could lead to the imposition of heavier sentences. Romania adopted a new Criminal Code in 2009, but this does not modify the situation presented in the 2008 report: Romania maintained the aggravating circumstances in case of offences perpetrated with discriminatory intent, including those based on sexual orientation, in Article 77.¹⁵⁸ On the contrary, in Italy, an attempt to introduce an aggravating circumstance for crimes motivated by hate against LGBT people was defeated in Parliament in October 2009. The reasons put forward by the ruling majority were that such an amendment would violate the equality clause of the Constitution. The Lower Chamber concluded that the bill

155 Lithuania/Baudžiamojo kodekso 60, 129, 135 ir 138 straipsnių papildymo ĮSTATYMAS, Nr. XI-303, 16 June 2009, Available in Lithuanian at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=347281 (2 February 2010)

156 FRA, *Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The social situation*, 2009, p. 37.

157 See http://www.om.nl/organisatie/beleidsregels/bos_polaris_0/.

158 Romania/Law 286/2009 on the Criminal Code (17 July 2009).

would be unconstitutional to the extent that victims of homophobic crimes would receive ‘privileged protection’ as compared to other victims.¹⁵⁹

In conclusion, 11 Member States (Belgium, Denmark, Finland, France, Lithuania, the Netherlands, Portugal, Romania, Spain, Sweden, and the UK) provide for an explicit aggravating circumstance for crimes

committed with a homophobic motivation. Scotland in the UK is the only example which also includes prejudice on grounds of transgender identity. Lithuania and Scotland in the UK joined this group since 2008. In Italy, attempts by Parliament to approve a proposed bill were unsuccessful. Table 4 provides an overview of the legislation in force.

159 Joint Bills No. 1658-1882-A have been defeated by a vote of the Lower Chamber on 13 October 2009 [Testo unificato delle proposte di legge n. 1658 e 1882, recante l'introduzione nel codice penale della circostanza aggravante inerente all'orientamento o alla discriminazione sessuale].

Table 4: Criminal law provisions on ‘incitement to hatred’ and ‘aggravating circumstances’ covering explicitly sexual orientation

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category ‘group of people’, but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL			
ES	✓	✓	
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category ‘comparable group’. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category ‘groups of society’. Penal Code was amended to include hate motivated crimes against ‘certain groups of society’. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.

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Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people.
PT	✓	✓	
RO	✓	✓	Article 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation.
SK			LGBT people could fall under the category 'group of people'.
UK (N-Ireland)	✓	✓	
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, come into force on 23 March 2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓ = applicable; positive development since 2008

Source: FRA, 2010

4. 'Family members' in free movement, family reunification and asylum

This chapter examines the interpretation of 'family member' and the position of same-sex families under three EU instruments: the Free Movement Directive, the Family Reunification Directive, and the Qualification Directive. Three key questions arise, respectively as regards the position of same-sex spouses, same-sex civil or registered partners, and, finally, as regards durable relationships of *de facto* partners. This chapter concerns both the possibility of EU citizens moving to a different Member State to obtain entry and residence rights for their same-sex partner, and the possibility of third country nationals, including beneficiaries of refugee or subsidiary protection status, to sponsor their same-sex partner as a family member.

4.1. The general framework

The 2008 report examined three key questions related to the definition of 'family member' contained in various Directives, notably the Free Movement Directive,¹⁶⁰ the Family Reunification Directive,¹⁶¹ and the Qualification Directive.¹⁶² With respect to the definition of 'family member' for the purposes of these Directives, the three issues were: the inclusion of same-sex spouses that are legally married in one Member State (Belgium, the Netherlands, Spain, and now Portugal and Sweden) or even outside the EU; the position of same-sex civil or registered partners; and finally, the position of same-sex *de facto* partners. The three directives foresee three different regimes, which will be briefly summarised before analysing developments in Member States' laws.

In the EU context, several developments took place. In its December 2008 report to the European Parliament and the Council on the application of Directive 2004/38/EC (Free Movement Directive),¹⁶³ the Commission took the view that, while the interpretation given to 'family

member' by the Member States during transposition of Article 2(2) was satisfactory, the transposition was 'less satisfactory' with regard to the rights of other family members under Article 3(2) of the directive. The European Parliament, citing the report by the FRA in its Resolution of 2 April 2009 on the application of Directive 2004/38/EC,¹⁶⁴ expressed its concern about the 'restrictive interpretation by Member States of the notion of 'family member' (Article 2), of 'any other family member' and of 'partner' (Article 3), particularly in relation to same sex partners, and their right to free movement under Directive 2004/38/EC' (Preamble, para. 5). The resolution called upon the Member States to 'fully implement the rights granted under Article 2 and Article 3 of Directive 2004/38/EC not only to opposite sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognised by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life' (para. 2). The European Parliament also called upon the Commission 'to issue strict guidelines, drawing on the analysis and conclusions contained in the Fundamental Rights Agency report and to monitor these issues' (Preamble, para. 5).

In addition, the international context has significantly evolved since June 2008. In the case of *Kozak v. Poland*,¹⁶⁵ concerning the succession to a tenancy by a same-sex partner, the ECtHR reiterated the now well established view that Article 14 of the ECHR covers sexual orientation. It affirmed that particularly weighty reasons are needed for any justification of distinctions based on sexual orientation, and that the margin of appreciation is narrow, meaning that the difference in treatment must be proven to be strictly necessary in the circumstances. Therefore, when a difference in treatment is based solely on the applicant's sexual orientation, there can be no justification for it. States should take into account developments in society and changes in the perception of families and relationships, the ECtHR added. Even more importantly, in June 2010 a chamber ECtHR reversed previous case law and explicitly ruled that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of family life, 'just as the relationship of a different-sex couple in the same situation would.'¹⁶⁶

160 European Parliament and Council Directive 2004/38/EC 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.

161 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

162 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.

163 Report from the Commission to the European Parliament and the Council on the 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(2008) 840 final, 10 December 2008, p. 4.

164 European Parliament Resolution of 2 April 2009 on the 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 (2008/2184(INI)) (P6_TA(2009)0203).

165 ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010.

166 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, para 94. At the time of writing this judgment is not yet final. See also above, section 2.1.3.

In July 2010, the ECtHR confirmed this view and, moreover, found a violation of Article 14, in combination with Article 8 of the ECHR, in a case concerning a difference in treatment between a same-sex and a different-sex couple with respect to health and accident insurance.¹⁶⁷

Both the narrowing of the margin of appreciation and the expansion of the notion of ‘family life’ in the case law of the ECtHR could open avenues for further developments in the future, both at the EU and national level. The Communication from the Commission Delivering an area of freedom, security and justice for Europe’s citizens. Action Plan Implementing the Stockholm Programme¹⁶⁸ mentions that follow-up of the implementation of Directive 2004/38/EC remains ongoing. The second report on implementation and application of Directive 2004/38/EC is scheduled for 2013. Furthermore, the Action Plan announces a Green Paper on the right to family reunification in 2010, and a proposal for a modification of Directive 2003/86/EC on the right to family reunification in 2012.

4.2. Freedom of movement

4.2.1. Entry and residence of same-sex spouses

At the time of writing, five EU Member States allow same-sex couples to enter into a marriage. In June 2008 these were only three: Belgium, the Netherlands, and Spain. Two more joined the group: Sweden¹⁶⁹ (which already provided for registered same-sex partnerships¹⁷⁰) and Portugal.¹⁷¹ Similar legislation is in the process of being adopted in Luxembourg and Slovenia.¹⁷²

The 2008 report first examined whether the same-sex spouse of an EU citizen moving to a different Member State should be granted entry and residence rights; according to Article 2(2)(a) of the Free Movement Directive, ‘family member means... the spouse.’ It concluded that any refusal to do so would constitute a form of direct discrimination on grounds of sexual orientation, in violation of Article 26 of the International

Covenant on Civil and Political Rights, the general principle of equality, and of the prohibition on discrimination as reiterated in Article 21 of the Charter of Fundamental Rights. However, despite this requirement of non-discrimination on grounds of sexual orientation, at least 11 Member States (Estonia, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovak Republic, Slovenia) appeared at the time to exclude the same-sex spouse from the concept of ‘spouse’ used in domestic law. The report therefore noted that a clarification of the obligations of the EU Member States under the Free Movement Directive, as regards the enjoyment of entry and residence rights by same-sex spouses, would be desirable, and this conclusion must be reiterated.

Keeping in mind the lack of clarity of national law in this field, in 2010 the situation appears to be the following: eight Member States would not distinguish between a same-sex or an opposite-sex spouse for the purposes of entry and residence rights (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden, and the UK). In the remaining 19 Member States, the same-sex spouse would not be treated as a spouse (Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg,¹⁷³ Malta, Poland, Romania, Slovak Republic, Slovenia). In some of these, the same-sex spouse might be granted entry and residence rights as a (registered or unregistered) partner (see the following subsection for further details).

Except for Portugal, where marriage was opened up to same-sex couples, some trends in the opposite direction can be observed. In Estonia, the new Family Law Act, which entered into force on 1 July 2010, states that any marriage contracted between persons of the same sex is invalid. It is therefore rather unlikely that under Estonian law same-sex spouses who have validly contracted a marriage in another State will be recognised as spouses, even if the Citizen of European Union Act refers more broadly to ‘a spouse of the citizen of the European Union.’¹⁷⁴ In Romania, the new Civil Code adopted in 2009 contains a prohibition on same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.¹⁷⁵ In Bulgaria, Article 7 of the new Family Code (1 October 2009)

167 ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010. At the time of writing this judgment is not yet final. See also above, section 2.1.3.

168 European Commission Communication, *Delivering an area of freedom, security and justice for Europe’s citizens. Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, 20 April 2010.

169 Sweden/Åktenskap för par med samma kön – Vigsselfrågor (SOU 2007:17), 21 March 2007.

170 Same-sex marriage entered into force on 1 May 2009. The Act on Registered Partnership (SFS 1994: 1117) was repealed, so that it is not possible to register a new partnership. An already registered partnership continues to be a partnership until the partnership is dissolved or converted into a marriage.

171 Portugal/Lei n° 9/2010 Permite a casamento civil entre pessoas do mesmo sexo, *Diário da República* (31 May 2010). The law entered into force on 5 June 2010.

172 Among the Council of Europe Member States, also Norway (2009) and Iceland (2010) have opened up marriage.

173 While the law is silent as to whether a spouse can also be of the same-sex, it appears that in the past same-sex marriages have been recognised by courts. See Luxembourg/Tribunal administrative du Grand-Duché de Luxembourg/Docket No. 19509 (3 October 2005).

174 The Ministry of Interior did state that it would see no reason why same-sex spouses could not be considered as spouses within the meaning of the EU Citizen Act, if their marriage was contracted according to the regulations in place in their country of origin. This should currently be considered as a general policy of Estonian authorities, which is yet to be confirmed by actual practice. It is worth noting, however, that the former Citizenship and Migration Board (currently the Police and Border Guard Board) responded that same-sex spouses would likely fall under the category of ‘members of a household’, discussed below, rather than that of ‘spouses’.

175 Romania/Law 289/2009 on the Civil Code (17 July 2009).

confirms that marriage is a mutual agreement between a man and a woman.¹⁷⁶

In conclusion, the main changes occurred in Portugal, and in Bulgaria, Estonia, and Romania. The former opened up marriage to same-sex couples, whereas the latter three amended their domestic law to define marriage as an opposite-sex institution only and further, in Romania, to prohibit the recognition of partnerships and marriages concluded elsewhere. These developments will have converse repercussions on the free movement of EU citizens who are in a same-sex marriage.

4.2.2. Entry and residence of registered partners

The 2008 report also examined the position of the partner with whom the EU citizen has contracted a registered partnership. In this case, the Free Movement Directive states that only when the *host* State 'treats registered partnerships as equivalent to marriage' in its domestic legislation, is it under an obligation to grant entry and residence rights to (same-sex) registered partners. The same rule would seem to be imposed on host Member States where same-sex couples may marry (five Member States to date). Regardless of whether they are under an obligation to do so under EU Law, at the time of writing 13 Member States seem to grant entry and residence rights to registered partners: Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Ireland,¹⁷⁷ Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the UK. Once again, the reader should note that the information is subject to changes due to various practices and (lack of) case law at the national level, in cases where the legislation is silent or unclear. The above-mentioned list is longer than in June 2008, but the situation is still unsettled. It now includes Ireland, even if the situation still needs to be clarified,¹⁷⁸ and Luxembourg.¹⁷⁹ Austria

introduced a form of registered or civil partnership in 2009; although differences with marriage still remain, Austria was already found to be in this group, even before the adoption of the Registered Partnership Act.¹⁸⁰ The situation in France is still unclear, since it remains to be seen how the changes introduced in the Civil Code¹⁸¹ will play out with the narrower provisions of the Immigration Law.¹⁸²

In contrast, in 11 other Member States, there exists no registered partnership in domestic legislation (Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, and Slovak Republic). In these Member States, either registered partners do not qualify as family members for the purposes of entry and residence, or the situation is unclear. The new entry in this group of Member States is Romania. Far from consolidating the initial form of recognition of foreign registered partnerships introduced in 2006,¹⁸³ the new Civil Code

180 In Austria, Article 59 of the Registered Partnership Act (Austria/Registered Partnership Act, BGBl I, No. 135/2009 (30 December 2009)) modifies Article 9 of the Settlement and Residence Act (Austria/Settlement and Residence Act, BGBl I 157/2005 (30 December 2005)), which now stipulates that the definition of 'family member' includes a registered partner.

181 As a result of the entry into force on 14 May 2009 of a new Article 515-7-1 of the French Civil Code, inserted by Law 2009-526 of 12 May 2009. The new Article stipulates the recognition in France of foreign registered partnerships by making reference, as to the conditions of validity, its effects, and the conditions for the dissolution, to the material law of the country of registration. Following from this law, the tax authorities have adopted two 'fiscal instructions' on income tax and on inheritance tax, in order to clarify the effects of foreign registered partnerships in France (see France/Instruction du 29 décembre 2009, *Impot sur le revenu. Modalités d'imposition des personnes liées par un partenariat enregistré par une autorité étrangère. Commentaires des dispositions de l'article 1er de la loi du 12 mai 2009* (29 December 2009); and France/Instruction du 30 décembre 2009, *Mutations à titre gratuit. Tarifs et liquidation des droits. Situation des personnes ayant conclu un partenariat civil à l'étranger* (30 December 2009). On 8 June 2010, the Tribunal de Grande Instance de Bobigny has applied for the first time Article 515-7-1 of the Civil Code (France/Tribunal de Grande Instance de Bobigny - Chambre 9/ section 3/RG 09/3968 (not yet reported), in a tax case involving the recognition of a British civil partnership, concluding that such scheme 'fully generates its legal and fiscal consequences in France'. Even before these developments, France/Circular No. 2008-024 of the Department of Family and Social Policies of the National Family Allowances Fund on the right of residence of European citizens (18 June 2008), which proceeded from the assumption that the residence rights recognised to European citizens extended to partners living in a *Pacs*, even if the applicable Immigration Law did not provide for such an extension.

182 Article 12 of France/Law No. 2007-1631 relating to the control of immigration and asylum in France (20 November 2007) stipulates that a temporary 'private and family life' residence visa shall be issued to the foreign national 'whose personal and family ties, notably appreciated in consideration of their intensity, their duration and their stability, the living conditions of the person, his or her insertion in French society and the nature of his or her links with his/her family, stayed in his/her country of origin, are such that refusal to grant a residence visa would disproportionately infringe his/her right to respect of his/her private and family life with regard to the rationale for refusal'.

183 Romania/Law 500/2006 on amending and approving Ordinance 30/2006 (28 December 2006) defines as a partner 'a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved'.

176 Bulgaria/Family Code (1 October 2009), available in Bulgarian at: <http://lex.bg/bg/laws/ldoc/2135637484> (last accessed on 12 February 2010).

177 At the time of writing, the situation in Ireland is still unclear, for the Civil Partnership Act has been adopted, but not the Immigration, Residence and Protection Bill. However, the Minister for Justice, Equality and Law Reform has indicated that civil partners will be treated in the same way as spouses for the purposes of this bill.

178 See note above.

179 In Luxembourg, the Law of 29 August 2008 on free movement and immigration (Luxembourg/Law on free movement and immigration (29 August 2008)), which implements Directive 2004/38/EC, allows Luxembourg residents (EU Member State Citizen or thirdcountry national) to be joined by their partners, whatever their nationality, if they have a registered partnership under the conditions set forth in Luxembourg's registered partnership law (Luxembourg/Registered Partnership Law (9 July 2004)). A pending amendment to the partnership law provides that 'partners having registered their partnership in a foreign country can send a request to the general prosecutor's office for registration of their partnership in the civil status registry, provided that on the date of entering into the partnership abroad, both parties fulfil the conditions in Article 4' (Luxembourg/Projet de loi 5904 portant modification de la loi du 9 juillet 2004 relative aux effets légaux de certains partenariats (15 July 2008)).

adopted in 2009 not only prohibits same-sex partnerships (and marriages), but also excludes the recognition of same-sex partnerships (and marriages) concluded in other countries.¹⁸⁴ The new Civil Code does not modify the existing Ordinance 30/2006 on the freedom of movement of EU/EEA citizens in Romania. Therefore, it remains unclear how the conflict between the express provisions recognising the partnership status of EU citizens as granted by their country of origin, on the one hand, and the recent prohibition on the recognition of same-sex (marriages and) partnerships entered into abroad by same-sex couples on the other hand, will be resolved. This situation is deeply at odds with the principle of legal certainty and most probably implies a decrease in the level of protection of free movement rights of EU citizens. Moreover, this might also constitute an instance of indirect sexual orientation discrimination. The remaining two Member States, Hungary¹⁸⁵ and Slovenia,¹⁸⁶ are in the special situation of providing a legal scheme in domestic law, but without granting entry and residence rights to registered partners as such. Insofar as these registered partnership schemes can be considered equivalent to marriage, this situation appears to be incompatible with the provisions of the Free Movement Directive.

In conclusion, 13 Member States currently seem to grant entry and residence rights to the same-sex registered

partner of an EU citizen. That does not necessarily imply that practical and legal obstacles have been fully removed. Thirteen other Member States do not grant registered partners of an EU citizen entry and residence rights; 11 of these appear not to be under such an obligation, whether this is because they have no such institution in their domestic law, or because the partnership scheme is not equivalent to marriage. In the group of States which do not grant registered partners of an EU citizen entry and residence rights, however, the prohibition of (indirect) discrimination on grounds of sexual orientation would seem to forbid attaching only to marriage the possibility of gaining entry and residence rights as family member, and then banning a class of people defined by sexual orientation from entering into marriage. This was also the view adopted on 23 April 2008 by the Cypriot Equality Body when it issued its report on the first complaint submitted to it concerning sexual orientation discrimination. The complaint was directed against the immigration authorities. It was submitted by a third country national who had entered a civil partnership in the UK with a UK national. The complainant had applied to the immigration authorities claiming entry and residence rights as a family member of an EU citizen. The application was rejected on the ground that national legislation did not recognise same-sex marriages. The equality body found, however, that the obligation to secure enjoyment of legally guaranteed rights without discrimination, in accordance with Article 14 of the ECHR and Article 28 of the Cypriot Constitution, should apply, and that the immigration authority's decision to exclude same-sex partners of EU citizens from the rights afforded to opposite-sex partners amounted to discrimination on the ground of sexual orientation.¹⁸⁷ The equality body referred the law transposing the Free Movement Directive to the Attorney General for revision. Although the immigration authorities have granted a permit on an *ad hoc* basis allowing the third country national to stay in Cyprus, legislation governing free movement has not yet been revised at the time of writing.¹⁸⁸

4.2.3. Civil status, circulation of documents, and mutual recognition

In Poland, local and regional authorities have attempted to prevent their own citizens having access to a partnership scheme in another Member State, even where recognition of the partnership in Poland is not

184 Romania/Law 286/2009 on the Criminal Code (17 July 2009).

185 The revised Registered Partnership Act was adopted by Parliament on 20 April 2009 (Hungary/Act XXIX. on Registered Partnership (20 April 2009)). It contains the same regulations as had the former Registered Partnership Act for same sex couples. Following a constitutional challenge, it was declared constitutional on 23 March 2010 by the Constitutional Court (Hungary/Alkotmánybíróság/533/B/2009 (23 March 2010)). Article 3 of the new Act on Registered Partnerships stipulates that members of a same-sex registered partnership have the same rights as spouses unless they fall under certain enumerated exceptions; however, it would appear that the Act applies only to registered partnerships created in Hungary. Therefore, same-sex partners of EU (or for that matter, Hungarian) citizens contracting a registered partnership anywhere else cannot be regarded as 'family members' for the purposes of entry and residence in Hungary. The alternative provision of the Act they can rely upon includes a number of conditions that may be seen as problematic.

186 The Constitutional Court held, in its decision U-I-425/06, that Article 22 of the Registration of Same-Sex Partnership Act was unconstitutional and had to be amended by the Parliament in the subsequent six months: the Court found that the difference of treatment between spouses in marriage and partners in the registered same-sex partnership regarding the right to inherit after the deceased partner was a form of discrimination, and thus in violation of Article 14 of the Constitution (Slovenia/Constitutional Court/U-I-425/06 (2 July 2009)), available at: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/2D889887E4205F81C1257604003479FC> (12 February 2010). The result is that civil partnership shall evolve to become closer to marriage in the future. Indeed, the Ministry of Justice and the Ministry of Labour, Family and Social Affairs proposed a new Družinski zakonik [Family Code], which shall equalise the existing legal scheme, as well as extra-marital partnerships, with marriage in all family matters. It will also grant same-sex partners the possibility to apply for adoption. Marriage shall be defined as a life community of two persons whose conclusion, legal consequences and dissolution is regulated by the Family Code Slovenia/Draft Family Code, Article 3.

187 Cyprus/The Office of the Commissioner for Administration (Ombudsman)/Case Ref. No. A.K.R. 68/2008 (23 April 2008).

188 The Cypriot Equality Body adopted a similar conclusion when another complaint was submitted, this time by a Cypriot national, against the decision of the immigration authorities to deny his Canadian same-sex spouse the right to stay in Cyprus, on the ground that national legislation does not recognise same-sex marriages. (Cyprus/The Office of the Commissioner for Administration (Ombudsman)/Ref. No. A.K.R. 213/2008 (10 December 2008)). At the time of writing, the case is pending before the Supreme Court.

requested. The *Wojewódzki Sąd Administracyjny* [Regional Administrative Court] in Gdańsk delivered a judgement in June 2008 concerning the issuance of a certificate to confirm that no known impediments existed that would bar her from entering into marriage.¹⁸⁹ The case was lodged by a woman of Polish nationality who wished to register a partnership with a German woman, in Germany. The requested certificate was refused by the Head of the Civil Status Office claiming that she did not have any legal interest in obtaining such a certificate; subsequently, the Governor of the Voivodship approved of the denial. The Regional Administrative Court overruled these decisions, on the basis that the law does not allow authorities to examine with whom or where an applicant wishes to contract a marriage, nor to test authenticity of her/his intentions. The sole task of the issuing body is to examine whether a person fulfils conditions stipulated by Polish law which are necessary to be fulfilled in order to get married. This case led a Polish member of the European Parliament to address a question to the Commission, in which it was claimed that the behaviour of the Polish authorities seemed to imply 'a breach of the basic human right to found a family and of a fundamental principle of the European Union, the free movement of persons'.¹⁹⁰ In its answer, the Commission stated that its aim is to 'simplify the citizens' lives by implementing the programme for the mutual recognition of laws, acts and decisions'. It recalled that 'the Commission intends to begin work on the recognition of civil status acts and public acts legislation in the European Union, with a view in particular to enabling citizens' marriages and partnerships to be taken into consideration in countries other than the one where these marriages or partnerships were entered into'.¹⁹¹ According to the Stockholm Programme, the Commission is currently preparing a Green Paper on facilitating the free circulation of documents. The aim of the Green Paper, planned for the second half of 2010, is to launch a broad consultation among interested parties on how to make it easier for citizens to have documents concerning one's principal life events drawn up in one Member State recognised in another. In this field, two actions are planned by the Stockholm Action Plan for 2013: a legislative proposal on mutual recognition of the effects of certain civil status documents (e.g. relating to birth, affiliation, adoption, name); and a legislative proposal for dispensing with the formalities for the legalisation of documents between the Member States. EU action in all of these fields might have substantial consequences if it actually succeeds in securing consensus around the principle that the validity of civil status acts should only be assessed 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. In short, this means that the Member State of destination should be prohibited from reassessing the validity of a marriage or a partnership already considered valid according to the law of the Member State where it was formed. It is worth clarifying that, even under this regime, any Member State would still be free to define the conditions for access to marriage or similar legal schemes in a 'purely internal' situation, having no link with EU Law.

With respect to matrimonial property regimes and patrimonial aspects of registered partnerships, the Commission is also preparing initiatives for 2011. These future proposals will provide common rules on jurisdiction, applicable law, recognition and enforcement, for both married couples and couples who have registered a partnership. In this respect, it will be important to ensure that legal certainty for same-sex registered and *de facto* partners is enhanced, that citizens' practical needs are addressed, and that the family life of those individuals involved in such unions is acknowledged and recognised. Without seeking to impose any particular choice on Member States when it comes to the regulation of family matters, EU action would be needed to make it explicit that a 'spouse' or 'partner' includes a person of the same sex, and to encourage Member States to take steps to address the obstacles faced by same-sex spouses, registered and *de facto* partners when moving from one State to another. Member States will remain free to decide in full autonomy the treatment that their own nationals should enjoy in purely internal situations, including the possibility of equalising the protection of their own nationals to the same levels that may be enjoyed by other Member States' nationals.

4.2.4. Entry and residence of unmarried same-sex partners

A third question arises in the situation where no form of registered partnership is available in the State of origin or where cohabitants choose not to make use of it; in this case, the relationship between two partners of the same sex remains purely *de facto*. According to Article 3(2) of the Free Movement Directive, the obligation of the host member State is to 'facilitate entry and residence' of the partner. This duty only applies (a) if the partners share the same household in the country from which they have come from, or (b) there exists between them a 'durable relationship' that is 'duly attested'. This obligation, which requires the host State to carefully examine the personal circumstances of each individual seeking entry and residence, is not conditional upon the existence, in the host Member State, of a form of registered partnership considered equivalent to marriage.

189 Poland/Wojewódzki Sąd Administracyjny/Judgment No. III SA/Gd 229/08 (6 August 2008).

190 Oral question of 10 July 2008, No. H-0575/08.

191 Written answer of 4 September 2008, No. H-0575/08.

The 2008 report found that in the vast majority of Member States, no clear guidelines were available concerning the means by which the existence either of a common household or of a 'durable relationship' may be proven. This situation has not changed fundamentally since the 2008 report, although in the Netherlands, where the relationship previously could be attested by the partners signing a *relatieverklaring* [declaration of relationship],¹⁹² the partners are now (since 31 January 2009) expected to produce evidence either that they have or recently had a joint household for at least six months, or that they have a child together.¹⁹³ While the vague situation in Member States may be explained by the need to refrain from artificially restricting means of proof, the risk is that the criteria relied upon by national administrations may be arbitrarily applied, and lead to discrimination against same-sex partners, who have been cohabiting or are engaged in a durable relationship. 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 against same-sex households or relationships. The same is true for what can actually be expected from the 'duty to facilitate', a vague expression which does not necessarily translate into practical consequences in the absence of specific and inclusive yardsticks. The hardship created by a restrictive interpretation of the notion of 'family members' was highlighted recently by judgment No. 6441 adopted by the Italian Court of Cassation on 17 March 2009, although this case falls outside the scope of application of EU Law as it concerns the impossibility for an Italian citizen and a New Zealand national to continue to reside together in Italy. A residence permit was refused to the New Zealand partner on grounds of a restrictive definition of 'family member' in the applicable Italian legislation.¹⁹⁴

4.3. Family reunification

4.3.1. The position of same-sex spouses

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ('Family Reunification Directive') requires Member States to authorise the entry and residence of the sponsor's spouse. This Directive

¹⁹² Netherlands/Aliens Circular 2000, Staatscourant (2001) 64 (1 April 2001), B10/5.2.2.

¹⁹³ Netherlands/Aliens Circular 2000, Staatscourant (2001) 64 (1 April 2001), A2/6.2.2.2.

¹⁹⁴ In Italy/Corte di Cassazione/Judgment No. 6441 (17 March 2009), the Constitutional Court (in paragraph 4) found that 'family member' (*familiare*) is defined in Article 29(1) of *Decreto Legislativo* 286/1998 (25 July 1998) as including only an individual's (a) spouse, (b) minor children, (c) adult children who are not independent for reasons of health, and (d) dependent mother or father who does not have adequate family support in their country of origin. An application has been filed before the ECtHR, alleging a violation of Article 14 ECHR in combination with Article 8 (ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09).

applies to third country nationals residing lawfully in EU Member States, including those granted refugee status. As already mentioned, a Green Paper on the right to family reunification will be launched in 2010, and a proposal for a modification of the Family Reunification Directive in 2012. The Directive does not define the meaning of 'spouse' in Article 4. However, the Member States should take into account their obligations under Articles 6(1) and 6(3) of the Treaty on European Union (TEU), to comply with the EU Charter of Fundamental Rights and with fundamental rights as general principles of EU Law.¹⁹⁵ Where, by denying the possibility for the same-sex spouse to join the sponsor, a Member State does not allow a durable partnership to continue, this would result in a disruption of private and family life and could constitute a violation of Article 8 ECHR where the relationship could not develop elsewhere, for instance due to harassment against LGBT people in the countries of which the individuals concerned are nationals or where they could establish themselves. In addition, the Directive should be implemented without discrimination on grounds of sexual orientation. The implication is that the same-sex spouse of the sponsor should be granted the same rights as would be granted to an opposite-sex spouse. In 2008, however, at least 13 Member States appeared not to grant entry and residence rights to the sponsor's same-sex spouse, such as a Canadian or a South African citizen.

As already observed above, in 2010, while in Portugal marriage was opened to same-sex couples, some developments in the contrary can be observed in Bulgaria, Estonia and in Romania. These developments will make it harder for a same-sex spouse to reunite with his/her sponsor in these countries. Only eight Member States would not distinguish between a same-sex or an opposite-sex spouse for the purposes of family reunification (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden, and the UK).

4.3.2. The position of same-sex partners

According to the current framework, it is for each Member State to decide whether it shall authorise entry and residence to unmarried or registered partners of the sponsor (Article 4(3) of the Directive). A first implication is that if a Member State decides to extend the right to 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

¹⁹⁵ According to Recital No. 2, '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.'

only opposite-sex partners. Currently, 12 Member States grant family reunification rights to same-sex partners: nine of them have decided to extend the right to family reunification to both registered and unmarried same-sex partners (Austria, Belgium, Denmark, Finland, Ireland,¹⁹⁶ the Netherlands, Spain, Sweden, the UK), whereas three of them restrict this possibility to registered partnerships only, thus excluding unmarried partners in a *de facto* cohabitation (Czech Republic,¹⁹⁷ Germany, Luxembourg). Furthermore, it can be noted that five Member States (Austria, Czech Republic, Germany, Ireland, and Luxembourg) are likely to treat same-sex spouses, validly married abroad, as registered partners for the purposes of family reunification. This group includes Luxembourg, whose recently amended immigration law confirmed that the interpretation of 'family member' includes the registered partner.¹⁹⁸ Overall, in the period considered, the main changes took place in Austria, with the Registered Partnership Act,¹⁹⁹ and in Spain, with the Organic Law 2/2009.²⁰⁰

Fifteen Member States, forming a second group, have chosen not to provide for the extension of family reunification rights either to registered, nor to unmarried (same-sex or different-sex) partners (Bulgaria, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovak Republic, Slovenia). In certain Member States this restriction can be compensated by the possibility of joining the sponsor where the partner can prove that he/she is in a position of economic or social dependency (Estonia, Slovak Republic), or where sufficient stability of the relationship

can be shown (France).²⁰¹ This is a possibility allowed by the Family Reunification Directive, which only defines minimum standards which the EU Member States are free to exceed (Article 3(5)).²⁰²

As noted, the Family Reunification Directive implicitly assumes that it is not discriminatory to grant family reunification rights to the spouse of the sponsor, without extending the same rights to the unmarried partner of the sponsor, even where the country of origin of the individuals concerned does not allow for two persons of the same sex to marry. The result of this regime is that family reunification rights are more extensive for opposite-sex couples, who may marry in order to be granted such rights, than they are for same-sex couples, to whom this option is not open. This may be questioned, as it might generate a form of indirect discrimination: even though, in the current state of development of international human rights law, it is acceptable for States to restrict marriage to opposite-sex couples, reserving certain rights to married couples, where same-sex couples have no access to marriage may be seen as a form of (indirect) discrimination on grounds of sexual orientation.

4.4. Family members of LGBT people seeking international protection

According to Article 2(h) of Council Directive 2004/83/EC of 29 April 2004 (the 'Qualification Directive'),²⁰³ family members in the context of asylum and/or subsidiary protection include both spouses and unmarried partners in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens. Currently, the amendments proposed by the Commission to the Qualification Directive and to a number of other instruments in the field of asylum are being discussed by the European Parliament and the Council in the context of what is known as the 'asylum package', which should lead to a recast of existing legislation and to the creation of the Common European Asylum System (CEAS). The proposed amendments do not seek to modify the definition of family member relating to the position of (same-sex) unmarried partners.

196 At the time of writing, the situation in Ireland is still unclear, for the Civil Partnership Act has been adopted, but not the Immigration, Residence and Protection Bill. However, the Minister for Justice, Equality and Law Reform has indicated that civil partners will be treated in the same way as spouses for the purposes of this bill.

197 Under the Czech Aliens' Act however, partners who live in a stable and durable relationship without registering/marriage would nevertheless obtain a different type of visa pursuant to the provisions of the Aliens' Act allowing for a visa for 'another reason'.

198 Luxembourg/Law on free movement and immigration (29 August 2008), Article 12.

199 In Austria, Article 59 of the Registered Partnership Act (Austria/Registered Partnership Act, BGBl I, No. 135/2009 (30 December 2009)) modifies Article 9 of the Settlement and Residence Act (Austria/Settlement and Residence Act, BGBl I 157/2005 (30 December 2005)), which now stipulates that the definition of 'family member' includes a registered partner.

200 The position of Spain in this matter remains to be clarified. Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11 December 2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification, as well as immediate access to the job market. Since implementing regulations to this law still have not been adopted, the significance of the requirement that the 'affective relationship' be 'duly attested' remains to be clarified.

201 France/Circular NOR/INTD00134/C of the Ministry of the Interior, adopted on 30 October 2004, and France/Circular NOR/INTD0700005C (16 January 2007) on the right to reside in France of foreign citizens having concluded a Pacs. Administrative case law shows that the competent authority (Prefecture) is not required by law to grant a residence visa based only upon the existence of a Pacs, but it may impose additional conditions (France/Nantes Administrative Court/No. 05NT00206 (3 March 2006); France/Council of State/No. 265178 (21 September 2007)).

202 These countries, it might be recalled, include Denmark, Ireland, and the UK, despite the fact that these Member States are not taking part in the Family Reunification Directive.

203 Council Directive 2004/83/EC, 29 April 2004.

With respect to national law, the inclusion of same-sex partners within the definitions provided by the current formulation of Article 2(h) is far from clear and consistent throughout the EU. As regards same-sex spouses of refugees (a rather theoretical case), eight Member States would not distinguish between a same-sex and an opposite-sex spouse (Belgium, Denmark, Finland, the Netherlands, Portugal, Spain, Sweden, and the UK). The only new development in this respect is Portugal, which opened up marriage to same-sex couples. Spain was already mentioned in the 2008 report among the Member States of this group, where spouses of refugees or individuals benefiting from subsidiary protection would include same-sex spouses.

As regards unmarried cohabitants or registered partners, there seems to be a considerable vagueness and lack of clear guidelines in the definition of ‘family member’. Sometimes, the law relating to aliens is not coordinated with private international law, and this causes a considerable lack of legal certainty. Additionally, the law does not offer a definition of family member, or does not specify whether the partner can be taken to encompass the same-sex partner, and no case law exists to confirm one solution or the other. This situation is likely to result in considerable detriment for the parties involved. Notwithstanding this situation, it would seem that same-sex unmarried cohabitants or registered partners would be granted a right to residence in 12 Member States: Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Ireland,²⁰⁴ Luxembourg, the Netherlands, Spain, Sweden, and the UK. In the Czech Republic, Germany, and Luxembourg this right is restricted to registered partners, whereas no information on France was made available to the FRA by the national member of its network of legal experts. New developments took place in Austria,²⁰⁵ and in Spain.²⁰⁶ In some cases, national law subordinates the right to residence of the same-sex partner to the condition that a registered partnership already existed in the country of origin. This condition appears problematic in light of the fact that it is reasonable to assume that the vast majority of asylum seekers would be fleeing from countries which persecute LGBT people, and where a registration mechanism is not available.

With respect to Member States that do not grant residence rights to the same-sex partners of asylum seekers and refugees, the refusal to grant residence rights to *de facto* partners is currently allowed under the Qualification Directive, albeit only when Member States treat unmarried partners differently from spouses in their law relating to aliens. However, where the legislation or practice of the Member State concerned treats opposite-sex unmarried couples in a way comparable to married couples under its law relating to aliens, the exclusion of same-sex partners would be contrary to the prohibition on discrimination on grounds of sexual orientation, as made clear by the ECtHR in the cases of *Karner v. Austria*²⁰⁷ and *Kozak v. Poland*.²⁰⁸ The regime thus established might still be problematic in light of the principle of equal treatment: in the overwhelming majority of cases, LGBT people in need of international protection originate from jurisdictions which do not allow for same-sex marriages or registered partnerships, and such inability to marry, combined with the legislation of an EU Member State which does not treat unmarried couples in a way comparable to married couples in its legislation relating to aliens, leads to a situation where the family reunification rights of LGBT refugees are less extensive than those of heterosexual refugees. This might be incompatible with the prohibition of indirect discrimination on grounds of sexual orientation, because same-sex partners are barred from marriage. The number of Member States which allow for marriage or a legal scheme open to same-sex couples has continued to grow, and the ECtHR, both in *Kozak*,²⁰⁹ in *Schalk and Kopf*,²¹⁰ and in *P.B. and J.S.*²¹¹ has clarified the need to respect the right to respect for family life of same-sex couples. It is therefore important that ongoing discussions on the ‘asylum package’ within the EU institutions can lead to greater clarity and fairness in this field, with an explicit inclusion of same-sex unmarried partners and with the deletion of the reference to the legislation or practice of the Member State concerned and the connected criterion of comparability.

Table 5 summarises the state of play concerning recognition of same-sex family members for the purposes of free movement, asylum and family reunification.

204 At the time of writing, the situation in Ireland is still unclear, for the Civil Partnership Act has been adopted, but not the Immigration, Residence and Protection Bill. However, the Minister for Justice, Equality and Law Reform has indicated that civil partners will be treated in the same way as spouses for the purposes of this bill.

205 Austria/Registered Partnership Act, BGBl I, No. 135/2009 (30 December 2009), Article 57 modifies Article 2/1 of Asylum Act (Austria/Asylum Act, BGBl I Nr. 100/2005 (1 January 2006)), which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin.

206 Article 40 of Spain/Law 12/2009 on the right to asylum and subsidiary protection (30 October 2009) replaces Spain/Law 5/1984 (26 March 1984) and, by transposing the EU *acquis*, confirms the notion that a family member includes the *de facto* partner having an affective relationship similar to marriage.

207 ECtHR, *Karner v. Austria*, No. 40016/98, 24 July 2003.

208 ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010.

209 *Ibid.*

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

211 ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010.

Table 5 - Definition of 'family member' for the purposes of free movement, asylum and family reunification

Country Codes	Free movement ²¹⁰		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of family member' includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of family member' includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the 'affective relationship' be 'duly attested' remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU <i>acquis</i> , confirms the notion that a family member includes the <i>de facto</i> partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities' discretion, which may require additional conditions. No information available on refugees.
HU		✓					It would appear that the Act on Registered Partnerships applies only to registered partnerships concluded in Hungary. Entry and residence rights for free movement are granted to the unmarried <i>de facto</i> partner, subject to conditions.
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.
IT							
LT							
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.

212 In the vast majority of the 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 the purposes of Article 3 (2) of the Free Movement Directive.

Country Codes	Free movement ²¹⁰		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	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.
MT							
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners.
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
TOTAL	8	15	8	12	8	12	

Note: ✓ = applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.

Source: FRA, 2010

5. Asylum and subsidiary protection for LGBT people

This chapter examines the legal situation of persons who are seeking international protection from persecution or harassment resulting from their sexual orientation or gender identity. First, it reviews whether sexual orientation and gender identity are explicitly mentioned in national law as recognised grounds for persecution. Second, it examines some difficulties with both the conditions that must be fulfilled in order to establish a claim of persecution on grounds of sexual orientation, and with the duty to conceal one's sexual orientation in the country of origin. Third, it discusses questions of proof that can emerge when persons seeking international protection allege that they have reason to fear persecution or harassment because of their homosexual orientation. This issue is examined following reports that at least one EU Member State relies on 'phallometry' or 'phalometric testing' during the asylum procedure, which tests the physical reaction to heterosexual pornographic material of those who file a claim for asylum on the basis of their homosexual orientation.

5.1. Background

Council Directive 2004/83/EC of 29 April 2004 (the 'Qualification Directive')²¹³ provides a definition of 'refugee' which builds on the 1951 Convention on the Status of Refugees (hereafter the 1951 Geneva Convention). It clarifies that the notion of 'particular social group' in need of international protection 'might include a group based on a common characteristic of sexual orientation'. Furthermore, it stipulates that 'gender related aspects might be considered' (Article 10(d)). As mentioned, discussions are ongoing in the EU with respect to the proposed amendments both to this Directive and other instruments in the area of asylum. The FRA will publish two thematic reports on asylum in 2010, the first on the duty to inform asylum seekers on relevant procedures, and the second on access to effective remedies. These reports present asylum seekers' experiences on the information they receive on the asylum procedure, as well as their experiences in submitting an appeal against a negative decision by national asylum authorities.

The 2008 report compared national legislation implementing the Qualification Directive. It identified three main areas where this instrument was not interpreted uniformly and might therefore result in unfair treatment of LGBT people in need of international protection. First, the definition of a 'particular social group' and the inclusion of LGBT people. Second, the definition of 'persecution' and the rejection of claims in the absence

of explicit criminalisation of homosexuality in the country of origin or, even when such criminalisation exists, when the applicant may be expected to tolerate a life in hiding. Third, the credibility of the applicant and proof of homosexuality. With respect to the latter item, this report discusses the practice of 'proving' homosexuality through exposure of the claimant to heterosexual pornographic material.

5.2. Sexual orientation and gender identity as grounds for the recognition of refugee status

5.2.1. Grounds for persecution

Although none of the EU Member States explicitly objected to considering sexual orientation as a source of persecution for the purposes of granting the status of refugee,²¹⁴ as of 2010 the inclusion of that ground of persecution remains only implicit in the legislation of five Member States (Estonia, Greece, Malta, Portugal, and the UK²¹⁵). This means that the definition of a 'particular social group' does not explicitly mention the ground of sexual orientation. Since 2008, four additional Member States have made it explicit that a 'particular social group' includes a group defined by the sexual orientation of its members: Finland,²¹⁶ Latvia,²¹⁷ Poland,²¹⁸ and Spain.²¹⁹ The total number of Member States which explicitly refer to sexual orientation is now 21. It is noteworthy how Latvia has legislated positively in this area, despite the ongoing problems with freedom of assembly noted in chapter 3.

As explained by Recital No. 40 of the Directive, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of the Qualification Directive and is not bound by it or subject to its application. It is bound, however, by the 1951 Geneva Convention. Yet, the term 'sexual orientation' is not generally considered by the Danish authorities

²¹⁴ See however the position of Denmark, referred to below.

²¹⁵ In the UK, the inclusion of sexual orientation among the grounds of persecution that could lead to recognition as a refugee has been confirmed by the courts.

²¹⁶ Finland/Aliens Act 301/2004 (01 May 2004) amended by new Article 87b (1 June 2009).

²¹⁷ Latvia/Asylum Law (15 June 2009), Article 22 para (1), 4), b) available at: <http://www.vestnesis.lv/index.php?menu=doc&id=194029> (4 February 2010).

²¹⁸ Article 14(2) of Poland/Law on Granting Protection to Aliens on the Territory of the Republic of Poland (13 June 2003). The amendment came into force on 29 May 2008.

²¹⁹ Spain/Ley 12/2009 (30 October 2009), Article 3.

²¹³ Council Directive 2004/83/EC, 29 April 2004.

to be covered by Section 7(1) of the *Udlændingeloven* (Aliens Act), which refers to membership of a 'social group' as a ground for persecution.²²⁰ Therefore, those persecuted on this basis are not considered 'refugees' according to the understanding of the term as stipulated in the 1951 Geneva Convention. Practice in Denmark suggests that such an individual may obtain a B-status (Protection Status) residence permit if he/she risks the death penalty or torture if expelled. It is noteworthy that the reform of the Danish legislation in 2009 did not lead to an amendment with regard to the conferral of refugee status. Therefore sexual orientation continues to be regarded – due to the interpretation developed in case law – as a characteristic which does not describe a 'particular social group' within the meaning of the 1951 Geneva Convention.

The protection thus offered to gays and lesbians under the Qualification Directive should logically extend to transsexual and transgender people as well, since they too form a distinctive 'social group' whose members share a common characteristic and have a distinct identity due to perceptions in the society of origin. However, this interpretation is not uniformly recognised. The current version of Article 10(1)(d) of the Qualification Directive stipulates that 'gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article'. This provision is very vague in its meaning and about the possibility of accepting transsexual and transgender refugees, a vagueness exacerbated in some language versions.²²¹ The recast of the Qualification Directive, currently under negotiation, promises some improvements. According to the Commission's proposal, 'gender related aspects should be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.²²² Ensuring that transsexual and transgender people being persecuted on grounds of gender identity can rely on Article 10 is essential for guaranteeing the respect of rights and liberties of this often victimised population.

5.2.2. International protection of LGBT people and the European Asylum Support Office

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (EASO) was adopted

in May 2010.²²³ Despite the CEAS, the Preamble of this Regulation recalls that the granting of international protection and the forms that such international protection takes show 'great disparities' between the Member States. As noted below, this is certainly the case for LGBT asylum seekers. According to Articles 1 and 2 of the Regulation the role of the EASO shall be to improve the implementation of the CEAS, strengthen cooperation between the Member States, and coordinate the provision of operational support to Member States, including the provision of scientific and technical expertise.

A first problematic aspect is that, in the absence of explicit criminalisation of homosexuality in the country of origin, some Member States fail to see the need for international protection. Thus conceived, the system remains oblivious to the social situation in the country of origin and possible persecution by non-state actors. In practice, homophobic attitudes may be deeply rooted in people's minds and may prevail long after the law has changed. Threats, torture, or killings, sometimes perpetrated by the victim's own family, are often done so on grounds of an infringement of their 'honour'. This in turn will normally lead to the impossibility for LGBT people to invoke the protection of local authorities should these share the same sense of 'shame' and 'honour'. Indeed such authorities will tend to condone or even facilitate those acts of persecution. It is still the approach among several Member States to require the person seeking asylum on grounds of sexual orientation or gender identity to show that they were subject to legal sanctions. Under this approach, authorities will not accept the contention that the claimant's sexual orientation or gender identity may lead to persecution in the future by non-state actors should this be expressed or revealed. As with other types of claims, where the persecutor is a non-state actor, the focus should be on whether effective State protection is available. When same-sex conduct is criminalised, the State is less likely to extend protection to an LGB person from violent private actors. On the other hand, when same-sex conduct is explicitly criminalised in the country of origin, it has been concluded in some Member States (see below) that if such criminalisation only concerns 'ostensible' same-sex conduct, but does not extend to criminalisation of LGBT 'identity', the fear of persecution might not be established. This is obviously linked with the next point about tolerability of a life in chastity or secrecy.

220 Denmark/Consolidated Act No. 785 - Aliens Act (10 August 2009).

221 The various language versions are not consistent enough to ensure inclusiveness. For instance, the French version speaks of 'aspects relatifs à l'égalité entre hommes et femmes'.

222 See Commission Proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast), COM(2009) 551 final/2, 23 October 2009.

223 European Parliament and Council Regulation (EU) No. 439/2010 of 19 May 2010 establishing a European Asylum Support Office.

The problem of establishing persecution is illustrated by the case law of several Member States. In Spain the Supreme Court decided on 28 November 2008²²⁴ to uphold the rejection of a claim for asylum due to the lack of persecution as a gay man. The Court held that ‘the claimant insists that Cuban legislation punishes homosexual conducts, but against this the dossier includes a report from the instruction which says that there is currently a greater tolerance of such practice, so it is not possible to consider that the mere fact of having this tendency might generate a persecution of those which give rise to recognition of refugee protection. Against these considerations, the truth is that the actor put forward no detention or sanction derived from his sexual orientation, nor did he expose any other kind of specific injuring consequence which might have been derived from this, only explaining in general terms that he was fearful of being pursued as a homosexual; and still further, he has not developed the slightest proof to challenge the considerations on which the refusal of asylum was based.’ In Romania, in July 2009 a Court quashed the decision by the Romanian Office for Immigration which had rejected the claim of a person already arrested for homosexuality in Cameroon, on grounds that the applicant was not a public person and could possibly relocate to another city where he was not known. In the Czech Republic, the Supreme Administrative Court found that sanctions from six months to three years of confinement could not be counted as sufficient for the existence of persecution.²²⁵ Furthermore, case law collected by the FRA shows that in some Member States there is a tendency to deny requests for international protection on grounds that there would be no persecution in the country of origin if the applicant had concealed his/her homosexuality or had abstained from any ‘external manifestation’ of it. Several decisions consider that by living openly as a LGB person, the applicant takes upon him/herself the risk of the negative consequences of his/her conduct, and cannot claim international protection. The Italian Court of Cassation in two instances instructed a lower judge to assess whether in the country of origin the crime consists in homosexuality ‘as such’, and in this case persecution would be established, or only in the ‘ostentation’ of homosexual practices, thus implying that refraining from any conduct would be both possible and tolerable, as homosexual identity without

‘external manifestation’ would not be captured by the prohibition.²²⁶ This duty to live in chastity, or to ‘practice’ in hiding, also became an important element for some decisions in Belgium,²²⁷ France,²²⁸ Germany,²²⁹ and Ireland,²³⁰ where persecution was not established since the applicants had not sought to ‘ostensibly manifest’ their homosexuality and it was deemed possible for them to live their sexual orientation ‘discreetly in the private sphere’ in the country of origin. This situation is problematic as it appears disproportionate and discriminatory. In particular it should be noted that no such duty has been imposed on claimants alleging persecution on other grounds, such as religion or political opinions. In the UK, the courts’ test of ‘tolerability’ has resulted in severe detriment for lesbian and gay claimants.²³¹ If the claimant has previously lived in the country of origin in a state of hiding, it is assumed that he or she will continue to live the same way. ‘Discretion’ is only assumed to be persecutory if it reaches a level that the individual could not ‘reasonably be expected to tolerate’.²³² However, sexual orientation is a personal characteristic protected under the ECHR, not a shameful condition to be hidden. Any failure to appreciate the specific burden of forced invisibility and of the duty to hide a most fundamental aspect of one’s personality such as sexual orientation or gender identity, is a severe misconception of the real situation of LGBT people. This gap has been acknowledged by the judgment of the UK Supreme

224 Spain/Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 5)/Judgment of 28 November 2008.

225 Czech Republic/Supreme Administrative Court/No. 5 Azs 50/2007-71 (23 November 2007).

226 Italy/Corte di Cassazione (First civil section)/Judgment of 25 July 2007; Italy/Corte di Cassazione (First criminal section)/Judgment of 18 January 2008.

227 Belgium/Permanent Appeals Commission for Refugees/X. v. the Commissioner-General for Refugees and Stateless Persons (4 December 2006).

228 France/Commission de recours des réfugiés/No. 555672 (12 May 2006) (subsidiary protection granted instead).

229 Germany/Administrative Appeals Court of Sachsen/A2B 273/04 (20 October 2004).

230 The *Irish Times* of 12 July 2010 reports on a letter from the Minister for Justice and Law Reform of 6 February 2009 stating that ‘if Nigerian homosexuals practice discretion, they are not likely to run foul of the law’. Appeals against a decision of rejection by the Refugee Applications Commissioner were turned down by the Refugee Appeals Tribunal. The case is now under review before the Irish High Court.

231 United Kingdom/England and Wales Court of Appeal (Civil Division)/Z v Secretary of State for the Home Department [2004] EWCA Civ 1578 (2 December 2004); United Kingdom/England and Wales Court of Appeal (Civil Division)/J v Secretary of State for the Home Department [2006] EWCA Civ 1238 (26 July 2006); United Kingdom/England and Wales Court of Appeal (Civil Division)/HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2009] EWCA Civ 172 (10 March 2009).

232 See United Kingdom/J v SSHD [2006] EWCA Civ 1238, para 10, 11; United Kingdom/Z v SSHD [2004] EWCA Civ 1578, para 15-16; United Kingdom/HJ (Iran) and HT (Cameroon) v SSHD [2009] EWCA Civ 172 at para 31; United Kingdom/England and Wales Court of Appeal (Civil Division)/OO (Sudan) and JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432 (18 November 2009) at para 17.

Court of 7 July 2010,²³³ which has made it clear that adjudication of asylum claims must be free from bias and stereotyping and must be based on the right to live freely and openly as an LGBT person.²³⁴

Other countries have also adopted more sensitive and factual approaches. Decisions of the French *Cour nationale du droit d'asile* (National Court for the Right of Asylum) (CNDA), which replaced the *Commission de recours des réfugiés (CRR)* in 2007, in examining appeals from the decisions of asylum claims adopted by the Office for the Protection of Refugees and Stateless Persons (OFPRA), appear more hospitable to claims by people that originate from countries where homosexuality is either criminalised²³⁵ or leads to severe forms of social or religious disapproval against which the State is unable to offer effective protection.²³⁶ Importantly, in these cases the applicant was not required to prove that specific sanctions had been inflicted. In February 2009, the Danish Refugee Appeals Board established that the applicant had been the victim of threats and violent abuse by his family and religious groups on grounds of his homosexuality and 'Western lifestyle', thereby acknowledging that a well-founded fear of persecution does arise in light of the social and family context of the applicant, regardless of any explicit criminalisation by legislation. In the Netherlands, the Aliens Circular specifies that LGB claimants should not be required to hide their sexual orientation in their country of origin. On 27 June 2009 an addition was made to the Aliens Circular the effect that whenever homosexual acts are criminalised in the country of origin, the applicant should not be required to have invoked the protection of the authorities there.²³⁷

It has been reported that a number of EU Member States fail to take the situation of LGBT people in Iraq

into consideration properly.²³⁸ Since November 2008 the Dutch Aliens Circular has also specified LGB people from Afghanistan and Iraq to constitute a 'risk group'; consequently a lesser degree of evidence regarding the gravity of their persecution is required of them.²³⁹ This is a welcome development in light of the fact that in April 2009 the UNHCR identified LGBT people from Iraq as a group at risk.²⁴⁰ Furthermore, the Qualification Directive specifies that 'sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national law of the Member States' (Article 10(1)(d)). While implicit, it is clear that this exception could not be invoked by reference to any legislation which constitutes a violation of the right to respect for private life, or which constitutes discrimination in the enjoyment of the right to respect for private life, under the ECHR. However, this is an area where domestic legislation appears ambiguous and cautious.

In conclusion, it can be observed that any practice susceptible to impose a duty to conceal one's homosexuality in the country of origin should be aligned to the same requirements used for assessing persecution on grounds of religion or political opinion, and should be based on the possibility expressing a fundamental trait of one's personality (as sexual orientation is) freely, including through one's conduct and relationships. The same argument may also be made with regard to the requirement by some Member States that for persecution to arise, same-sex relations must be criminalised in the country of origin. This is not required for the other grounds in the 1951 Geneva Convention or for any other 'particular social group'. For instance, a political dissident may well be considered persecuted even though it is not a criminal act to have an opposing political opinion.

5.3. The practice of 'phallometric testing' of gay men

A third important question that has come to surface since the 2008 report is whether and how the claim by a person seeking international protection that he or she is homosexual can (and should) be verified at all. Available administrative decisions and case law concern gay men exclusively, but this does not imply that lesbians enjoy a lesser degree of scrutiny. In Hungary, the *Bevándorlási és Állampolgársági Hivatal (BÁH)* [Office of Immigration and Nationality (OIN)] reportedly requested psychiatric

233 United Kingdom/Supreme Court/*HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] 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, available at <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>.

234 Lord Rodger explained somewhat ironically that 'what is protected is the applicant's right to live freely and openly as a gay man. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates'.

235 France/*Cour nationale du droit d'asile*/Mlle D. – Afghanistan, 535997 (2 November 2007).

236 France/*Cour nationale du droit d'asile*/G. – Algeria, 571886 (11 April 2008).

237 Netherlands/*Aliens Circular* 2000, *Staatscourant* (2001) 64 (1 April 2001), amendment *Aliens Circular* C2/2.10.2. The 2009 amendment (published in *Staatscourant* (2009) 115) was made in response to a suggestion of the national LGBT organisation *COC Nederland*.

238 P. Hojem, UNHCR Research Paper No. 181, *Fleeing from Love: asylum seekers and sexual orientation in Scandinavia*, *New Issues in Refugee Research*, December 2009, <http://www.unhcr.org/4b18e2f19.pdf> (12 July 2010).

239 Netherlands/*Aliens Circular* 2000, *Staatscourant* (2001) 64 (1 April 2001), C24/1.3.7 and C24/11.3.13.

240 UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers*, April 2009.

expert opinions upon asylum seekers' sexual orientation, even though there is no specific legal regulation that would require obtaining such expert opinions and even though the practice of the OIN is not consistent in this regard. The UK courts have been regularly confronted with the question of proving sexual orientation. Evidence, for example, of previous heterosexual relationships and children born of those relationships brought the claimant's credibility as a homosexual into question.²⁴¹ However, many lesbians and gay men marry as an attempt to conform to heterosexual norms and thus avoid severe ostracism and exclusion from their family and communities, enter into forced marriages or enter willingly into heterosexual marriage and then later decide to acknowledge their homosexuality. The distinction between sexual orientation as an 'identity' or as 'conduct' has been considered relevant in this regard.²⁴² In Finland the Aliens Act, which entered into force in June 2009, provides that when assessing if an applicant has a well-founded fear of persecution it is immaterial whether he/she actually identifies as LGBT, provided that the actor of persecution attributes such a characteristic to the applicant.²⁴³

It has also been reported that at least one EU Member State relies on 'phallometry' or 'phallometric testing' during the asylum procedure. This consists in testing the physical reaction to heterosexual pornographic material of gay men who filed a claim for asylum on the basis of homosexual orientation. The discussion on 'phallometry' stems from a decision adopted on 7 September 2009 by the German Administrative Court in Schleswig Holstein granting an interim measure and ordering the stay of transfer under the Dublin II Regulation²⁴⁴ of an Iranian gay man because of the possible use of 'phallometry' in the Czech Republic.²⁴⁵ According to information provided by the Czech Ministry of the Interior to the national expert of the FRA's research network, phallometric testing may be proposed for an individual seeking international

protection in order to assess the credibility of his claim to be homosexual, where inconsistencies appear in his interview. The test is performed by a professional sexologist and, in principle, only with the person's written consent, and once that person has been informed about the technique of the examination. Although a refusal to undergo the test may result in questioning the claim made by the person concerned about his homosexuality, conversely, where a person passes the test and shows no reaction to visual representations of heterosexual sex, his allegations about his homosexuality are considered proven. There are a number of problems with this situation, even apart from the fact that the reliability of 'phallometric testing' is questionable, since it is dubious whether it reaches sufficiently clear conclusions to be used as evidence in the processing of claims and in possible subsequent legal proceedings. This oblique practice would in any case not be appropriate as regards people who are bisexual.

As concluded by the German Court, 'phallometric testing' is difficult to reconcile with existing human rights standards. First, the practice raises doubts in light of Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment. According to the ECtHR, treatment has been considered degrading when it was such as to arouse in its victims 'feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.²⁴⁶ Furthermore, 'in considering whether treatment is 'degrading' within the meaning of Article 3, one of the factors which the ECtHR will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3'.²⁴⁷ While in the case of 'phallometry' no such explicit intention of humiliation can be found on the part of the authorities, it might be inferred that an element of humiliation and debasement characterises the mere examination process, since it involves great exposure of very intimate sexual feelings. Moreover, since the outcome of the test might give rise to a certain result on the asylum application, the test is equally likely to trigger fear, pressure and distress. For these reasons, it may reach a certain level of severity, being an intrusive examination bound to interfere with the person's psychological integrity and with the core of his intimacy, likely raising feelings of shame and suffering, despite the lack of inflicted physical pain. This exam is particularly inappropriate for asylum seekers, given the fact that many of them might have suffered abuse due to their sexual orientation and are thus specifically constrained by this kind of exposure.

241 United Kingdom/England and Wales High Court (Administrative Court)/ *SB (Uganda) v Secretary of State for the Home Department* [2010] EWHC 338 (Admin) (24 February 2010), para. 6.

242 United Kingdom/*J v SSHD* [2006]; United Kingdom/*HJ (Iran) and HT (Cameroon) v SSHD* [2009]; United Kingdom/England and Wales High Court (Administrative Court)/*R (on the application of SB (Uganda)) v Secretary of State for the Home Department* [2010] EWHC 338 (Admin) (24 February 2010); United Kingdom/England and Wales Court of Appeal (Civil Division)/*NR (Jamaica) v Secretary of State for the Home Department* [2009] EWCA Civ 856 (5 August 2009). Also see United Kingdom Lesbian and Gay Immigration Group, *Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum*, available at: <http://www.uklgi.org.uk/docs/Failing%20the%20Grade%20UKLGI%20April%202010.pdf> (17 April 2010).

243 Section 87b, subsection 5, of the Aliens Act.

244 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

245 Germany/Verwaltungsgericht Schleswig-Holstein/Judgement of 7 September 2009.

246 ECtHR, *Jalloh v. Germany*, No. 54810/00, 11 July 2006, para. 68; see also ECtHR, *Labzov v. Russia*, No. 62208/00, 16 June 2005, para. 41 and 46.

247 ECtHR, *Jalloh v. Germany*, No. 54810/00, 11 July 2006, para. 68.

Second, the practice raises doubts as to its compatibility with Article 8 of the Convention: since this procedure touches upon ‘a most intimate part of an individual’s private life’, there must exist ‘particularly serious reasons’ before such interference may be justified.²⁴⁸ An interference with private life is only admissible if it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society. ‘Phallometric testing’ may not comply with these requirements insofar as it does not seem to respond to a pressing social need, and the means employed might be deemed disproportionate to the aims pursued. As the discussion below will show, there are other means of testing the credibility of the applicant, namely through interviews, which are less intrusive. The Czech Republic is currently the only known EU Member State to use such an examination to ascertain the claimant’s credibility. In other Member States, authorities do not have a specific test to ascertain one’s sexual orientation, and credibility is assessed based on all the information, allegations and evidence adduced by the applicant. For instance, the UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity, published by the UNHCR on 21 November 2008, considers that ‘self-identification as LGBT should be taken as an indication of the individual’s sexual orientation’ (para. 35). The very existence of a presumption against the credibility of claims concerning the homosexuality of the person seeking international protection itself is a source of concern. In the same document, the UNHCR emphasises that any doubt should benefit the asylum-seeker, and that his or her testimony should not have its credibility questioned merely by virtue of the fact that the person concerned does not correspond to stereotypical images of LGBT persons (para. 37). The UNHCR adds 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. Enquiries as to the applicant’s realisation and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant’s credibility’ (para. 37).

For example the Swedish media²⁴⁹ have reported that according to two externally conducted studies, administrators and decision-makers at the Migration Board have prejudiced ideas of LGBT people based on norms and stereotypes. The Minister responsible has been reported as conceding that many Swedish authorities still view the LGBT perspective as a new and unknown issue. Since the inception of a project called ‘Beyond the border’, 300 employees of the Migration Board have been trained in norm criticism. The Minister emphasised that correct information is crucial to guarantee the quality

assurance of the asylum process. In this context, the UNHCR guidance note also highlights that the fact that the applicant mentions his or her sexual orientation only after the initial interview should not be treated as an inconsistency raising suspicion about the real motives for seeking international protection. In fact, ‘the applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case. Even where the initial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim’ (para. 38).

Finally, the practice of ‘phallometry’ cannot be defended on the basis that it is only performed with the explicit consent of the person concerned. Where the claim to asylum or to subsidiary protection will be rejected unless such consent is given, the notion of free consent becomes meaningless. It is also questionable whether the consent will be sufficiently informed, since there can be doubts that the applicant has sufficient knowledge and understanding of all elements and implications of the testing or that the consent form contains information that the asylum procedures may be ended if the applicant refuses consent. The Czech NGO Organization for Aid to Refugees [*Organizace pro pomoc uprchlíkům*] questioned whether the asylum seeker is informed about the procedure itself in a way that is understandable for him.

5.4. Subsidiary protection

In addition to its stipulations on the recognition of refugee status, the Qualification Directive provides that States shall grant subsidiary protection status to persons who do not qualify as refugees, where such persons fear serious harm upon being sent back to their State of origin. Serious harm includes, *inter alia*, the infliction of the death penalty or execution, as well as ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’ (Article 15(a)(b)).²⁵⁰

In Cyprus, the Equality Body received a complaint on 5 June 2008 filed by an Iranian national whose claim to asylum had been rejected despite the fact that he alleged a fear of prosecution in his country of origin because of his sexual orientation. In finding in his favour,²⁵¹ the

248 ECtHR, *Smith and Grady v. the United Kingdom*, Nos. 33985/96 and 33986/96, 22 July 1999, para. 89; ECtHR, *Dudgeon v. the United Kingdom*, No. 7525/76, 22 October 1981, para. 52.

249 Dagens Nyheter, 27 July 2010; Sveriges Radio, 26 July 2010 (in Swedish).

250 Article 15(c) also refers to ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.

251 Cyprus/The Office of the Commissioner for Administration (Ombudsman)/Case Ref. No. A.K.R. 103/2008 (18 July 2008).

Equality Body cited information supplied by the ILGA, Amnesty International and other NGOs according to which homosexuality in Iran is punishable either with hanging or with stoning and which revealed that since the 1980s executions of homosexuals take place secretly and using other charges as a pretext. Reference was also made to the human rights instruments ratified by Cyprus and to the case law of the ECtHR, which establishes the right of LGBT people to equal treatment and prohibits the deportation of persons to countries where they are likely to be subjected to torture. Special attention was drawn to article 10(1)(d) of the Qualification Directive. The Equality Body found that the Asylum Service's rejection of the application was not adequately justified and that the complainant's allegations deserved further examination. The 2008 report had already noted that harassment on grounds of sexual orientation may constitute either persecution, allowing individual concerned as a refugee if he/she seeks asylum, or (in accordance with the case-law of the ECtHR) a form of inhuman or degrading treatment, which would prevent deportation and would entitle the individual to subsidiary protection, in accordance with the provisions of the Qualification Directive.

In this regard, it is a source of concern that EU Member States rely on lists of 'safe' countries of origin that are drawn without reference to the specific risks of persecution by State organs 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 is made up of 17 States (Armenia, Benin, Bosnia-Herzegovina, Cape Verde, Croatia, Ghana, India, Macedonia, Madagascar, Mali, Mauritius, Mongolia, Senegal, Serbia, Tanzania, Turkey and Ukraine).²⁵² Persons originating from these countries are not entitled to temporary benefits or a residence permit, they have their claims fast-tracked and the lodging of appeals does not have suspensive effect, i.e. they can be deported before the National Court for the Right of Asylum (CNDA, formerly the CRR) hears their appeal. Yet some of these States have explicit homophobic legislation: this is the case in Benin, Ghana, India, Mauritius, Senegal and Tanzania.

252 Albany and Niger have been withdrawn from this list following a judgement of the Council of State of 13 February 2008 (France/Council of State/No. 295443 (13 February 2008)). The administrative court declared the political and social context in these States insufficient to meet the requirements of stability and safe environment laid down by law.

Conclusions

This report reveals certain important trends in relation to the rights of LGBT persons across the EU. Several examples in Member States signal a positive evolution in protection from sexual orientation and gender identity discrimination. However, some worrying developments in legislation and practices have also been noted. On many issues there remains a lack of clarity and uniformity to the detriment of LGBT rights. Some of these problems could be addressed by the Commission, Parliament and the Member States in the Council of the EU during the ongoing process of negotiating legislative reforms. Some others could be addressed by more proactive and more coordinated action by Member States and/or regional and local authorities.

In the context of gender reassignment treatment, some Member States are discussing the possibility of moving away from treating gender identity as a psychiatric disorder and of embracing the notion that this is primarily a question of individual self-determination. There has also been some relaxation of the conditions for alteration of name and the recorded sex on official documents (such as the precondition of divorce or surgery). Overall, however, the conditions and procedures attached to gender reassignment treatment and its legal recognition remain vague, medicalised and cumbersome across the EU.

The number of Member States extending protection against sexual orientation discrimination beyond the sphere of employment into the areas covered by the Racial Equality Directive has continued to rise. However, a number of Member States have not yet done so. More encouraging is that most Member States have extended the mandate of their equality bodies to cover sexual orientation discrimination. While this approach contributes to the realisation of an equal right to equal protection for all grounds of discrimination, the problem of the 'hierarchy of grounds' remains. The Member States in the Council of the EU now have the opportunity to adopt the Commission's proposal for a 'Horizontal' Directive, which would prohibit discrimination on all the grounds listed in the TFEU across the same range of contexts as the Racial Equality Directive.

The recognition of gender identity as a ground of discrimination remains uneven across the Member States. EU Law requires at the least that individuals discriminated against on the basis that they have undergone or intend to undergo gender reassignment be protected under the concept of 'sex' discrimination. However, two principal difficulties remain. First, some Member States protect this group under the ground of 'sex', while others use different grounds including sexual orientation or a specific ground of 'gender reassignment' or 'sexual identity'. In

some Member States this ground is protected explicitly in legislation, in others it emerges from the practice of courts and equality bodies. In others still, there remains ambiguity as to whether this group is protected at all under domestic law. The mandate of equality bodies vis-à-vis transgender issues often remains implicit and this might result in gaps in protection. Second, it is still unclear whether EU law prohibits discrimination against individuals based on a wider concept of gender identity, namely as non-identification or non-conformity with the sex assigned at birth that is expressed through means other than surgical and/or hormonal procedures, such as style of dress, use of cosmetic products, or behaviour. Very few Member States recognise this explicitly in their legislation or practice. This situation could start to be redressed by the express inclusion of the ground of 'gender identity' in any future amendment of the Gender Equality Directive on Goods and Services.

There also remains a lack of clarity surrounding the scope of the exception in the Employment Equality Directive afforded to religious and ethos-based organisations which permits them to differentiate between individuals on the basis of their religion or belief where this constitutes an occupational requirement in the context of the workplace. In some Member States this has been interpreted broadly allowing the exception to extend to discrimination on grounds of sexual orientation, and to posts or situations that may be unconnected to representing, transmitting or upholding that body's beliefs. The Commission has engaged with several Member States over this issue in the context of infringement procedures.

With regards to employment-related partner benefits, some important developments have taken place in the case law of the CJEU and ECtHR. Under EU law there is no obligation on Member States to create an institution of registered partnership for same-sex couples, or open marriage beyond opposite-sex couples. However, evolutions in EU law and the ECHR make it increasingly difficult to treat same-sex couples less favourably than opposite-sex couples. Evolution in domestic practice in this regard was noted in a small number of Member States.

With regard to freedom of assembly and expression for LGBT persons improvements can be noted across a number of Member States where pride marches have been held without incident. However, even here, tensions remain between authorities and the courts and equality bodies of some Member States. In particular, authorities seem to have routine resort to 'public order' exceptions in order to ban LGBT marches without proper application of the principle of proportionality, as required by the

ECHR. In addition, in some places violent counter-demonstrations have continued, and authorities have been slow to intervene or ban such protests.

Several Member States have introduced legislation and practices aimed at promoting education and dialogue with a view to challenging negative attitudes towards LGBT persons. Only one Member State has introduced legislation that bans the 'promotion' of homosexuality and same sex relations to minors or in public.

In so far as incidents of abuse and victimisation are regulated by Member States' criminal law, there has been modest progression. Almost half the Member States criminalise incitement to hatred or discrimination on grounds of sexual orientation, but only one Member State has joined this group since the 2008 report. Moreover, both 'incitement' and 'hatred' are often interpreted narrowly by national courts. A slightly lower number of Member States explicitly provide for homophobic motivation as an aggravating factor for criminal offences. Transphobia is included as an aggravating factor in only one jurisdiction.

The number of Member States providing for formalisation of same-sex relationships either through marriage or registered partnerships grew since the 2008 report, so that a majority of them now do so. However, three Member States have explicitly limited marriage as an institution only open to opposite-sex couples through revision or consolidation of existing legislation. A minority of Member States do not provide for registered partnerships between same-sex couples in their national law. This has significant implications for the free movement rights of same-sex couples, since the Free Movement Directive only obliges Member States to allow entry to registered partners as 'family members' where partnerships are treated as equivalent to marriage in the national law of the State of destination.

In the context of family reunification (which concerns third country nationals) almost half of the Member States appear not to grant entry and residence rights to the sponsor's same-sex spouse. Two Member States have introduced legislation since the 2008 report which

explicitly refuses to recognise the validity of same-sex marriages. Several Member States extend the right to family reunification to same-sex spouses, registered partners or de facto partners from outside the EU. Others extend the right to family reunification for same-sex registered or de facto partners of individuals granted refugee or subsidiary protection status. The number of Member States doing so has increased only modestly since the 2008 report.

A positive trend can be observed in relation to the international protection afforded to LGBT persons, with the vast majority of Member States including sexual orientation as a recognised ground of persecution. However, transgender persons still do not receive the same degree of recognition. In addition, several Member States adopt a problematic approach to the issue of establishing a claim of persecution on the ground of sexual orientation. While some of these will accept that risk of persecution exists upon proof that homosexuality is socially stigmatised in the State of origin, several others require that homosexuality is criminalised or that actual sanctions have been imposed in the State of origin. Some Member States also refuse to accept that a risk of persecution exists, because they consider that an applicant can conceal their sexual orientation in their State of origin. There are also reports that in one Member State the credibility of claims by gay men is verified by authorities through testing physical reactions to erotic stimuli. This practice is problematic in light of the right to privacy and the right to protection from degrading treatment under the ECHR.

In conclusion, while encouraging developments towards better protection of LGBT rights have been noted in a number of Member States, in others little has changed since the previous FRA 2008 report, and in others some setbacks were also identified. The lack of a uniform approach and of a coherent framework for action with clear milestones for the fulfilment of LGBT rights shows that future action needs to be better coordinated at EU level. This should ideally be based on a coherent approach able to mobilise the legislative, financial and policy coordination tools in the context of a shared multi-annual framework.

European Union Agency for Fundamental Rights

Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 Update
Comparative legal analysis

2010 — 64 pp — 21 x 29.7 cm

ISBN 978-92-9192-631-2

doi:10.2811/83741

A great deal of information on the European Union Agency for Fundamental Rights is available on the Internet. It can be accessed through the FRA website at fra.europa.eu.

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Developments over the past years testify to the increasing awareness of the rights of lesbian, gay, bisexual and transgender (LGBT) persons in the European Union. This report updates the FRA comparative legal analysis of discrimination on the basis of sexual orientation and gender identity in the EU of June 2008. It provides an overview of trends and developments at the international and EU level on legislation and legal practice in the field. While some encouraging developments towards better protection of LGBT rights have been noted in a number of Member States, in others little has changed since 2008, and in others some setbacks were also identified.

A comprehensive approach to issues of discrimination and victimisation visible across the areas examined would add to the fulfilment of fundamental rights for LGBT people throughout Europe.

FRA - European Union Agency for Fundamental Rights
Schwarzenbergplatz 11
1040 - Wien
Austria
Tel.: +43 (0)1 580 30 - 0
Fax: +43 (0)1 580 30 - 691
Email: information@fra.europa.eu
fra.europa.eu

