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Sexual orientation discrimination law outside the labour market

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Sexual orientation discrimination law outside the labour market

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Contents

EXECUTIVE SUMMARY	7
RÉSUMÉ	10
ZUSAMMENFASSUNG	14
1 INTRODUCTION	18
1.1 Background and context	18
1.2 The European Union and sexual orientation	19
1.3 The report: aims, scope and methodology	20
2 REGIONAL NON-DISCRIMINATION PROTECTIONS FOR SEXUAL ORIENTATION IN EUROPE	21
2.1 Council of Europe human rights system	21
2.1.1 Non-judicial institutions of the Council of Europe	21
2.1.2 Case law of the European Court of Human Rights	23
2.2 European Union rights system	26
2.2.1 Primary and secondary legislation	26
2.2.2 Case law of the Court of Justice of the European Union	27
2.3 Conclusion	29
3 DEFINITION OF SEXUAL ORIENTATION	30
3.1 Statutory definition of sexual orientation	30
3.2 Judicial explanations of the meaning and nature of sexual orientation	31
3.3 National human rights bodies, ombudspersons and non-discrimination strategies	32
3.4 Alternative terminology	33
3.5 Yogyakarta Principles	33
3.6 Conclusion	33
4 SOCIAL PROTECTION	35
4.1 Healthcare	35
4.1.1 Existence of prohibitions on sexual orientation discrimination in healthcare	35
4.1.2 Alternative sources of prohibitions on sexual orientation discrimination in healthcare	39
4.2 Case law	41
4.2.1 Access to assisted reproduction services	41
4.2.2 Prohibitions on donating blood	42
4.2.3 Case law in Poland	43
4.3 Social security	44
4.3.1 Existence of prohibitions on sexual orientation discrimination in social security	44
4.3.2 Potential prohibitions on sexual orientation discrimination in social security	46
4.4 Case law	47
4.5 Conclusion	48
5 SOCIAL ADVANTAGES	50
5.1 Existence of prohibitions on sexual orientation discrimination in social advantages	50
5.1.1 Explicit and implicit prohibitions against discrimination	50
5.1.2 Regional prohibitions against discrimination	51
5.1.3 Uncertainty regarding the scope of prohibitions against discrimination	52
5.1.4 Potential alternative protections	53
5.2 Case law	54
5.3 Conclusion	55
6 EDUCATION	57
6.1 Protection against sexual orientation discrimination in education	57
6.1.1 Express prohibitions against discrimination	57
6.1.2 Prohibitions against discrimination emerging from numerous legal sources	58

6.1.3	Regional prohibitions against discrimination	59
6.1.4	Prohibitions against discrimination: educational levels	60
6.1.5	Prohibition of discrimination by association	61
6.1.6	Alternative sources of prohibitions on sexual orientation discrimination in education	62
6.2	Case law	63
6.3	Conclusion	65
7	ACCESS TO AND THE SUPPLY OF GOODS AND SERVICES	66
7.1	Prohibitions on sexual orientation discrimination	66
7.1.1	Explicit protections in access to and the supply of goods and services	66
7.1.2	Criminal law protections	67
7.1.3	Enumerating specific goods and services for protection	67
7.1.4	Multi-source and general protections in access to and the supply of goods and services	69
7.2	Case law	70
7.2.1	Case law in countries with protections for access to and the supply of goods and services	70
7.2.2	Cases in countries without protections for access to and the supply of goods and services	74
7.3	Conclusion	75
8	EXCEPTIONS	76
8.1	Absence or existence of statutory exceptions to sexual orientation protections	76
8.1.1	Absence of exceptions to prohibitions on discrimination	76
8.1.2	Proportionality analysis	76
8.1.3	Education	77
8.1.4	Positive action	78
8.1.5	Specific national regimes for exceptions	78
8.2	Case law	80
8.3	Conclusion	82
9	CONCLUSIONS AND RECOMMENDATIONS	83
9.1	Current levels of protection in the Member States: enhancing legal safeguards	83
9.2	Lack of case law	84
9.3	Understanding and assessing objections to enhanced sexual orientation protections	86
9.3.1	Exceptions	87
9.3.2	Legal relationship recognition	87

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Executive summary

Over the past three decades, there has been an important shift in the rights and status of lesbian, gay and bisexual (LGB) individuals in the European Union (EU). From a position where, as late as the early 1990s, criminal laws still prohibited same-sex sexual intercourse in a number of European jurisdictions, LGB people now enjoy increased social, political and legal visibility throughout the 27 Member States and the United Kingdom.

At present, nearly all EU countries formally acknowledge same-sex partnerships and it is possible to contract a same-sex marriage in 14 jurisdictions. Lesbian, gay and bisexual people are increasingly present in political, cultural and sporting life, and their presence reflects tangible changes in broader public attitudes. In 2019, the European Commission's Eurobarometer on the 'Social Acceptance of LGBTI People in the EU' revealed that, in almost 80 % of Member States, more than half of the population now agree that 'gay, lesbian and bisexual people should have the same rights as heterosexual people'. Similarly, in almost 65 % of EU jurisdictions, more than half of the population also agrees that 'there is nothing wrong in a sexual relationship between two persons of the same sex'. Evolving social attitudes in the European Union are mirrored in pan-European legal reforms, which have enhanced protections against sexual orientation discrimination and developed positive rights in a number of key fields.

Yet despite this welcome progress, many challenges remain. Although public opinion is shifting, there remains considerable hostility to LGB people. According to the 2019 Eurobarometer, a significant proportion of EU citizens still oppose public displays of same-sex affection, LGB-inclusive education and gay or lesbian children within their own families. According to the recent findings of the second survey of the European Union Agency for Fundamental Rights on LGBTI people in the EU, in the previous 12 months, 39 % of lesbian women, 32 % of gay men, 36 % of bisexual women and 28 % of bisexual men across the Union felt discriminated against in areas other than employment due to being LGBTI.

The European Union has been a key regional actor in protecting and promoting the rights of LGB populations across the 27 Member States. Article 19(1) of the Treaty on the Functioning of the European Union specifically empowers the Council of the European Union (Council) to 'take appropriate action to combat discrimination based' on sexual orientation. This commitment to equality is reaffirmed through Article 21(1) of the Charter of Fundamental Rights of the European Union. In the field of secondary legislation, however, EU law remains comparatively limited in scope. While Directive 2000/78/EC establishes important protections within employment and occupation, the Council has not yet – unlike in the fields of race or ethnic origin and sex – adopted guarantees for LGB individuals beyond the labour market. While, in 2008, the European Commission suggested a more expansive non-discrimination framework, this proposal remains pending.

Against this background, the report explores national prohibitions on sexual orientation discrimination in four key areas – social protection, social advantages, education, and access to and the supply of goods and services. The report asks whether and how the 27 EU Member States and the United Kingdom provide relevant legal protection in these fields – taking into account statutory safeguards, executive regulations and administrative practice. There is a strong emphasis on the case law of national courts, equality bodies and ombudspersons, as the report investigates whether judicial interventions (even in the absence of statutory protection) can provide sufficient safeguards for sexual orientation in the four areas under review.

Following an introduction to the aims and structure of the report (Section 1), Section 2 describes existing non-discrimination protections for sexual orientation in Europe. It focuses on two regional frameworks:

(I) the Council of Europe human rights system, including soft law standards promoted by non-judicial institutions and the case law of the European Court of Human Rights; and (II) the European Union rights system, including relevant safeguards set out in primary legislation, EU directives and the growing jurisprudence of the Court of Justice of the European Union. Section 2 is not an exhaustive summary of all rights instruments and judicial opinions which advocate sexual orientation equality in Europe. Rather, before embarking upon an overview of domestic protections throughout the 27 Member States and the United Kingdom, Section 2 explains the regional context in which those national laws (or the absence thereof) must be understood.

Section 3 explores the extent to which national laws across the European Union define ‘sexual orientation’. Throughout the 27 Member States and the United Kingdom, few jurisdictions have established a statutory definition for that term. Rather, there is evidence that, in many countries, domestic legislatures and judiciaries consider that sexual orientation has a common meaning and assume that it does not require precise elaboration. Only five jurisdictions – Bulgaria, Ireland, Malta, Sweden and the UK – offer a specific explanation in their laws. In a small number of EU Member States, courts have assisted in interpreting the meaning and the nature of sexual orientation, and human rights bodies, ombudspersons and national anti-discrimination strategies have also provided guidance. In at least three countries, domestic law currently uses terminology other than ‘sexual orientation’ and this can impact both the scope and purpose of the relevant protections. Section 3 concludes with the suggestion of a uniform definition for ‘sexual orientation’ in future EU equality legislation.

Section 4 looks at non-discrimination guarantees in social protection, particularly healthcare and social security. At present, 17 EU jurisdictions and the UK prohibit unequal treatment due to sexual orientation in these fields. Such protections are achieved through a mixture of explicit statutory and executive rules, as well as through judicial interpretations of general equality guarantees. In a number of countries, although national law does not expressly outlaw sexual orientation discrimination in social protection, it may be possible to identify implicit or partial safeguards in other legal norms or policies, including administrative law, domestic constitutions and the mandates of ombudspersons or equality bodies. This may also be the case for social advantages (Section 5), education (Section 6) and access to and the supply of goods and services (Section 7). Similarly, in common with other areas addressed by this report, there is a notable absence of case law – although courts and equality bodies have explored indirect discrimination, assisted reproduction and restrictions on blood donations from men who have sex with men (MSM). Section 4 concludes that, moving forward, there is a need for minimum EU standards on sexual orientation guarantees in social protection.

Section 5 moves on to address prohibitions against unequal treatment in social advantages. As for social protection, national laws in 17 EU jurisdictions and the United Kingdom outlaw sexual orientation discrimination in this field. In some Member States, safeguards in access to social advantages are explicit. However, in other countries, identifying legal protections for sexual orientation is a matter of interpretation or imputation and there remains uncertainty regarding the scope of prohibitions in at least two EU jurisdictions. There has been little published case law in this sphere – with the limited available jurisprudence focusing on social advantages for same-sex couples. Indeed, Section 5 reveals that growing formal recognition of same-sex couples across the Union is increasing access to benefits previously reserved to different-sex spouses (a theme specifically considered in Section 9.3.2). Like the discussion of social protection, Section 5 paints a complex picture of equality and supports arguments in favour of minimum EU standards.

Section 6 considers education. At present, 18 EU Member States and the UK offer protection in this field. In many jurisdictions, the law once again establishes explicit guarantees – express safeguards for both accessing and enjoying education. Such prohibitions typically cover the full educational spectrum (pre-primary to third-level) and are often reinforced through complementary legal instruments. Yet despite these guarantees, Section 6 also identifies key concerns. In nine Member States, the position regarding sexual orientation in education remains incomplete: either national law does not outlaw such unequal

treatment or there remains ambiguity. Similarly, in many EU countries, there is a requirement for clearer protections against discrimination by association. In common with social protection and social advantages, the case law on education is notably sparse. Moving forward, domestic and EU policy makers should adopt meaningful action so that, where they experience sexual orientation discrimination in education, individuals are sufficiently empowered to enforce their rights.

Section 7 investigates prohibitions in access to and the supply of goods and services. It identifies important concerns – non-existent or only partial protections, ambiguity regarding legal guarantees in some jurisdictions, and the absence of case law. As for social protection, social advantages and education, safeguarding in this field would benefit from minimum EU standards. Yet Section 7 also reveals positive indicators. At present, 20 EU Member States and the United Kingdom prohibit unequal treatment due to sexual orientation in access to and the supply of goods and services. There is also, despite shortcomings, a growing body of jurisprudence – where domestic courts are acknowledging and censuring sexuality-motivated discrimination in areas such as leasing and purchasing property, sports and recreation and the hospitality industry. While this case law has emerged from a minority (11) of the Member States, there is evidence that courts and equality bodies are positively engaging with equality guarantees. This is so, even in jurisdictions where there are not yet explicit safeguards against sexual orientation discrimination.

Section 8 explores exceptions to prohibitions on sexual orientation discrimination. It reveals that – despite concerns that national laws should accommodate people who hold moral, philosophical or religious objections to specific sexual orientations – policy makers and judiciaries in few EU Member States have instituted exemptions from equality guarantees. In certain countries, there are general qualification provisions, which apply to all or most protected characteristics and which permit differentiation subject to proportionality analysis. Similarly, limited exceptions are also identifiable in housing, education and positive actions, as well as in the case law on goods and services in two jurisdictions. Yet overall, across the Union, there is little evidence of legislative or judicial urgency for broad exceptions to sexual orientation protections. As EU and domestic policy makers move forward, considering the appropriateness and workability of minimum EU standards, Section 8 recommends referring to existing national practice and reflecting upon the actual need for exemptions in future legislation.

Section 9 offers concluding observations and recommendations. Drawing upon the preceding analyses, it identifies three areas for further consideration: enhancing existing legal protections; the absence of case law; and objections to the prohibition of sexual orientation discrimination outside the labour market. To the extent that EU and national policy makers acknowledge that, within the four areas covered by this report, everyone, irrespective of sexual orientation, should have equal enjoyment of rights, Section 9 reiterates the compelling argument that EU-level intervention, similar to broad actions already taken for race or ethnic origin, is the most effective, appropriate and practical means to achieve that goal.

Similarly, in the context of the relative absence of case law highlighted by this report, Section 9 suggests key questions and actions to assist policy makers in moving beyond nominal prohibitions, and identifying substantive reforms, which give practical effect to sexual orientation safeguards. Finally, in response to potential objections to enhanced protections for sexual orientation outside the labour market, Section 9 notes that legal relationship recognition, while beneficial for the equality of same-sex couples, remains a prerogative of the Member States and, anticipating future EU legislation, once again advises careful reflection on the necessity of broad exceptions.

Résumé

Les droits et le statut des personnes lesbiennes, gays et bisexuelles (LGB) ont considérablement évolué au sein de l'Union européenne (UE) depuis une trentaine d'années. Alors qu'au début des années 1990 le droit pénal de plusieurs pays européens interdisait encore les relations homosexuelles, les personnes LGB bénéficient désormais d'une visibilité sociale, politique et juridique accrue dans les 27 États membres et au Royaume-Uni.

La quasi-totalité des pays de l'Union reconnaissent formellement aujourd'hui le partenariat entre personnes de même sexe et quatorze d'entre eux autorisent le mariage homosexuel. Les personnes lesbiennes, gays et bisexuelles sont davantage présentes dans la vie politique, culturelle et sportive, et cet état de fait reflète les changements concrètement intervenus dans l'attitude du public en général. En 2019, l'Eurobaromètre de la Commission européenne consacré à l'acceptation sociale des personnes LGBTI au sein de l'UE révélait que, dans près de 80 % des États membres, plus de la moitié de la population convient désormais que les personnes gays, lesbiennes et bisexuelles devraient avoir les mêmes droits que les personnes hétérosexuelles. De même, dans près de 65 % des pays de l'Union, plus de la moitié de la population convient également ne voir aucun problème à une relation sexuelle entre deux personnes de même sexe. L'évolution des attitudes sociales au sein de l'UE se traduit par des réformes juridiques paneuropéennes visant à renforcer les protections à l'encontre de la discrimination fondée sur l'orientation sexuelle et à instaurer des droits positifs dans un certain nombre de domaines clés.

S'il faut se réjouir de ces avancées, force est de constater que de nombreux défis doivent encore être relevés. En dépit de l'évolution de l'opinion publique, une hostilité importante subsiste à l'égard des personnes LGB. Selon l'Eurobaromètre de 2019, une proportion non négligeable de citoyens européens se montrent encore réticents vis-à-vis des témoignages publics d'affection entre personnes de même sexe, d'une éducation inclusive LGB et d'enfants gays ou lesbiens au sein de leur propre famille. Selon les résultats de la seconde enquête récemment réalisée par l'Agence des droits fondamentaux de l'Union européenne concernant les personnes LGBTI au sein de l'UE, 39 % des femmes lesbiennes, 32 % des hommes gays, 36 % des femmes bisexuelles et 28 % des hommes bisexuels s'y sont sentis discriminés au cours des 12 mois précédents, dans d'autres domaines que l'emploi, du fait d'être une personne LGBTI.

L'Union européenne a joué un rôle régional déterminant dans la protection et la promotion des droits des populations LGB dans les 27 États membres. L'article 19, paragraphe premier, du traité sur le fonctionnement de l'Union européenne habilite spécifiquement le Conseil de l'Union européenne («le Conseil») à «prendre les mesures nécessaires en vue de combattre toute discrimination fondée sur [...] l'orientation sexuelle». Cet engagement est réaffirmé à l'article 21, paragraphe premier, de la charte des droits fondamentaux de l'Union européenne. En termes de législation dérivée, toutefois, le droit de l'UE conserve une portée relativement limitée. Car si la directive 2000/78/CE instaure d'importantes protections dans le domaine de l'emploi et du travail, le Conseil n'a toujours pas – à l'inverse des dispositions qu'il a prises concernant la race ou l'origine ethnique et le sexe – adopté de garanties pour les personnes LGB en dehors du marché du travail. La Commission européenne a bien suggéré en 2008 un cadre élargi en matière de lutte contre la discrimination, mais sa proposition est toujours en suspens.

C'est dans ce contexte que le présent rapport examine les interdictions nationales de discrimination fondée sur l'orientation sexuelle dans quatre domaines clés: la protection sociale, les avantages sociaux, l'éducation, et l'accès et la fourniture de biens et de services. Il pose la question de savoir si – et de quelle manière – les 27 États membres de l'UE et le Royaume-Uni assurent une protection juridique pertinente dans ces domaines, en ce compris les garanties législatives, les dispositions réglementaires

et les pratiques administratives. Le rapport met un accent particulier sur la jurisprudence des juridictions nationales, des organismes pour l'égalité et des médiateurs dans le but d'établir si les interventions judiciaires (même en l'absence de protection prévue par la loi) peuvent s'avérer des mécanismes de protection suffisants en matière d'orientation sexuelle dans les quatre domaines examinés.

Après un premier chapitre destiné à introduire les objectifs et la structure du rapport, le chapitre 2 décrit les protections actuellement en place en Europe pour lutter contre la discrimination fondée sur l'orientation sexuelle. Il se concentre sur deux cadre régionaux: (I) le système des droits de l'homme du Conseil de l'Europe, y compris les normes non contraignantes promues par des instances non judiciaires et la jurisprudence de la Cour européenne des droits de l'homme; et (II) le système des droits de l'Union européenne, y compris les garanties pertinentes énoncées dans la législation primaire, les directives de l'UE et la jurisprudence de plus en plus abondante de la Cour de justice de l'Union européenne. Ce deuxième chapitre n'est pas un récapitulatif complet de tous les instruments relatifs aux droits et de toutes les opinions judiciaires prônant l'égalité en matière d'orientation sexuelle en Europe: il se veut davantage, préalablement à l'analyse des protections nationales en vigueur dans les 27 États membres et au Royaume-Uni, une explication du contexte régional dans lequel s'inscrivent ces législations internes (ou leur absence).

Le chapitre 3 examine la mesure dans laquelle les législations nationales au sein de l'Union européenne définissent «l'orientation sexuelle». Il montre que rares sont les juridictions des 27 États membres et du Royaume-Uni qui ont établi une définition officielle de ce terme et que, dans de nombreux pays, les législateurs et les magistrats considèrent que l'orientation sexuelle a un sens général qui ne requiert pas, selon eux, d'élaboration plus précise. Cinq États seulement – la Bulgarie, l'Irlande, Malte, le Royaume-Uni et la Suède – en proposent une explication spécifique dans leur législation. Dans quelques États membres de l'UE, les juridictions ont contribué à l'interprétation du sens et de la nature de l'orientation sexuelle, et des organismes de promotion des droits de l'homme, des médiateurs et des stratégies nationales de lutte contre les discriminations ont été sources de références. Dans trois pays au moins, l'ordre juridique interne utilise actuellement une autre terminologie que «l'orientation sexuelle», ce qui peut avoir une incidence à la fois sur l'objet et sur le champ d'application des protections concernées. Le chapitre 3 conclut en suggérant une définition uniforme de l'orientation sexuelle dans les futures dispositions législatives de l'UE.

Le chapitre 4 se penche sur les garanties de non-discrimination en matière de protection sociale avec un accent particulier sur les soins de santé et la sécurité sociale. Dix-sept pays de l'UE et le Royaume-Uni interdisent actuellement une inégalité de traitement dans ces domaines pour cause d'orientation sexuelle. Cette protection est assurée au moyen d'une combinaison de dispositions réglementaires et exécutives, et d'interprétations judiciaires des garanties générales en matière d'égalité. Il est possible, dans un certain nombre de pays dont le droit national ne proscriit pas expressément la discrimination fondée sur l'orientation sexuelle dans le domaine de la protection sociale, d'identifier des protections implicites ou partielles dans d'autres normes juridiques ou politiques, en ce compris le droit administratif, les constitutions nationales et les mandats des médiateurs ou des organismes de promotion de l'égalité. Tel peut également être le cas pour ce qui concerne les avantages sociaux (chapitre 5), l'éducation (chapitre 6) et l'accès aux biens et aux services et la fourniture de biens et services (chapitre 7). De même, comme dans d'autres domaines couverts par le présent rapport, on observe une absence notoire de jurisprudence – bien que les juridictions et organismes chargés de promouvoir l'égalité se soient penchés sur la discrimination indirecte, la procréation assistée et les restrictions relatives aux dons de sang par des hommes ayant des relations homosexuelles (HRH). Le chapitre 4 conclut qu'une avancée requiert des normes européennes minimales quant aux garanties relatives à l'orientation sexuelle en matière de protection sociale.

Le chapitre 5 enchaîne en s'intéressant aux interdictions d'inégalité de traitement pour ce qui concerne les avantages sociaux. Comme dans le cas de la protection sociale, la législation nationale de 17 États membres de l'UE et du Royaume-Uni proscriit la discrimination fondée sur l'orientation sexuelle dans

ce domaine. Dans certains d'entre eux, les garanties en termes d'accès aux avantages sociaux sont explicites; dans d'autres, toutefois, l'identification de cette protection juridique relève de l'interprétation ou de l'imputation – et l'incertitude persiste dans deux États au moins de l'UE quant à la portée des interdictions. La jurisprudence publiée à cet égard est très peu abondante – et les quelques précédents disponibles portent essentiellement sur les avantages sociaux pour les couples homosexuels. Le chapitre 5 montre effectivement que la reconnaissance formelle grandissante des couples de même sexe au sein de l'Union se traduit par un accès de plus en plus large à des prestations antérieurement réservées à des conjoints de sexe différent (thème spécifiquement examiné au point 9.3.2). Dans le droit fil de l'analyse relative à la protection sociale, le cinquième chapitre dépeint un tableau complexe de l'égalité et appuie l'argumentation en faveur de normes minimales au niveau de l'UE.

Le chapitre 6 est consacré à l'éducation – domaine dans lequel une protection est actuellement assurée dans 18 États membres de l'UE et au Royaume-Uni. Dans ce cas également, nombreux sont les pays dont la législation établit des garanties explicites, autrement dit des protections expresses tant en ce qui concerne l'accès que l'exercice du droit à l'éducation. Ces interdictions de discrimination couvrent généralement tous les niveaux éducatifs (de l'enseignement pré-primaire à l'enseignement supérieur) et sont fréquemment étayées par des instruments juridiques complémentaires. Le chapitre 6 met cependant en évidence, en dépit de ces garanties, un certain nombre de préoccupations majeures. Dans neuf États membres, la prise de position à l'égard de l'orientation sexuelle dans l'éducation reste fragmentaire: soit le droit national n'interdit pas ce type d'inégalité de traitement, soit une ambiguïté subsiste. De même, dans beaucoup d'États membres de l'UE, des protections plus claires s'imposent à l'encontre de la discrimination par association. Tout comme dans les domaines de la protection sociale et des avantages sociaux, la jurisprudence relative à l'éducation est particulièrement peu abondante. Il conviendrait, pour que des progrès soient accomplis, que les législateurs nationaux et européens prennent des mesures de fond habilitant suffisamment les victimes de discrimination fondée sur l'orientation sexuelle dans le domaine de l'éducation à faire valoir leurs droits.

Le chapitre 7 étudie les interdictions en matière d'accès et de fourniture de biens et de services et recense les préoccupations principales à cet égard, en l'occurrence l'inexistence ou le caractère partiel des protections, l'ambiguïté quant aux garanties juridiques dans plusieurs États, et l'absence de jurisprudence. Comme dans le cas de la protection sociale, des avantages sociaux et de l'éducation, la protection dans ce domaine aurait tout à gagner de l'établissement de normes minimales au niveau de l'UE. Le chapitre 7 n'en met pas moins en évidence certains indicateurs positifs. À l'heure actuelle, 20 États membres de l'UE et le Royaume-Uni interdisent l'inégalité de traitement basée sur l'orientation sexuelle en ce qui concerne l'accès aux biens et aux services et leur fourniture. On observe également, en dépit de certaines carences, une jurisprudence de plus en plus abondante dans laquelle les juridictions nationales reconnaissent et condamnent la discrimination motivée par la sexualité dans des domaines tels que la location et l'achat de biens immobiliers, les sports et les loisirs, et le secteur hôtelier. Bien que cette jurisprudence émane d'une minorité (11) États membres, elle tend à démontrer que les instances judiciaires et les organismes de promotion de l'égalité abordent positivement les garanties d'égalité. Tel est même le cas dans des juridictions n'ayant pas encore adopté de protections explicites contre la discrimination fondée sur l'orientation sexuelle.

Le chapitre 8 s'intéresse aux exceptions en matière d'interdiction de discrimination fondée sur l'orientation sexuelle. Il révèle que, malgré certaines préoccupations selon lesquelles les lois nationales devraient tenir compte des personnes ayant des objections morales, philosophiques ou religieuses vis-à-vis d'orientations sexuelles particulières, rares sont les pouvoirs politiques et judiciaires des États membres de l'UE qui ont instauré des exemptions de l'application des garanties d'égalité. Un certain nombre de pays se sont dotés de critères généraux qui s'appliquent à toutes les caractéristiques protégées, ou presque, et qui permettent une différenciation sous réserve d'une analyse de proportionnalité. De façon analogue, des exceptions limitées sont également recensées pour ce qui concerne le logement, l'éducation et les actions positives, de même que dans la jurisprudence relative aux biens et aux services dans deux pays. Dans l'ensemble de l'Union, toutefois, on note peu d'empressement législatif ou judiciaire en faveur de larges

déroptions aux protections relatives à l'orientation sexuelle. À l'heure où les décideurs nationaux et de l'UE vont de l'avant et étudient la pertinence et la faisabilité de normes européennes minimales, le chapitre 8 recommande qu'ils se réfèrent aux pratiques nationales existantes et réfléchissent à la réelle nécessité d'exemptions dans la future législation.

Le chapitre 9 propose en conclusion une série d'observations et de recommandations. S'appuyant sur les analyses des chapitres précédents, il définit trois aspects appelant un examen plus approfondi: le renforcement des protections juridiques; l'absence de jurisprudence; et les objections à l'interdiction de discrimination fondée sur l'orientation sexuelle en dehors du marché du travail. Dans la mesure où les décideurs nationaux et de l'UE reconnaissent que, dans les quatre domaines couverts par le présent rapport, toute personne doit pouvoir, indépendamment de son orientation sexuelle, exercer ses droits de manière égale, le chapitre 9 réaffirme l'argument convaincant selon lequel une intervention à l'échelon de l'Union européenne, similaire aux actions de grande ampleur déjà menées par rapport aux motifs de la race et de l'origine ethnique, constitue le moyen le plus efficace, le plus pertinent et le plus pragmatique de parvenir à cet objectif.

De même, étant donné la relative absence de jurisprudence soulignée par le présent rapport, le chapitre 9 propose une série de questions et actions clés en vue d'aider les décideurs à aller au-delà d'interdictions symboliques et à définir des réformes de fond capables de concrétiser les garanties en rapport avec l'orientation sexuelle. Enfin, en réponse aux objections éventuelles vis-à-vis d'un renforcement des protections en matière d'orientation sexuelle en dehors du marché du travail, le chapitre 9 constate que la reconnaissance du lien de droit, tout en étant bénéfique en termes d'égalité des couples de même sexe, demeure une prérogative des États membres et conseille une fois encore, dans la perspective d'une future législation de l'UE, une mûre réflexion quant à la nécessité de larges dérogations.

Zusammenfassung

In den letzten drei Jahrzehnten haben sich die Rechte und der Status von Lesben, Schwulen und Bisexuellen (LSB) in der Europäischen Union (EU) stark verändert. Ausgehend von einer Situation, in der Homosexualität noch Anfang der 1990er Jahre in einigen europäischen Ländern strafbar war, werden LSB in den 27 Mitgliedstaaten und im Vereinigten Königreich heute auf sozialer, politischer und rechtlicher Ebene stärker wahrgenommen.

In fast allen EU-Ländern werden gleichgeschlechtliche Partnerschaften inzwischen formell anerkannt, in 14 Ländern sind auch gleichgeschlechtliche Ehen möglich. Lesbische, schwule und bisexuelle Menschen sind zunehmend im politischen, kulturellen und sportlichen Leben präsent, und diese Präsenz ist Ausdruck spürbarer Veränderungen in den Einstellungen der breiten Öffentlichkeit. 2019 ergab die Eurobarometer-Umfrage der Europäischen Kommission zur sozialen Akzeptanz von LGBTI in der EU, dass in fast 80 % der Mitgliedstaaten inzwischen mehr als die Hälfte der Bevölkerung der Meinung ist, dass „Schwule, Lesben und Bisexuelle die gleichen Rechte wie Heterosexuelle haben sollten“. Ebenso stimmt in fast 65 % der EU-Staaten mehr als die Hälfte der Bevölkerung der Aussage zu, dass „an einer sexuellen Beziehung zwischen zwei Personen desselben Geschlechts nichts Schlechtes ist“. Die sich verändernden gesellschaftlichen Einstellungen in der EU spiegeln sich in europaweiten Rechtsreformen wider, die den Schutz vor Diskriminierung aufgrund der sexuellen Orientierung verbessert und positive Rechte in einer Reihe von Schlüsselbereichen entwickelt haben.

Trotz dieser begrüßenswerten Fortschritte existieren immer noch viele Herausforderungen. Die öffentliche Meinung ändert sich zwar, trotzdem gibt es nach wie vor erhebliche Feindseligkeiten gegenüber LSB-Personen. Laut der Eurobarometer-Umfrage 2019 lehnt ein beträchtlicher Teil der EU-Bürgerinnen und Bürger das Zeigen gleichgeschlechtlicher Zuneigung in der Öffentlichkeit, eine LSB einbeziehende Bildung sowie schwule oder lesbische Kinder in der eigenen Familie weiterhin ab. Den jüngsten Erkenntnissen der zweiten Umfrage der Agentur der Europäischen Union für Grundrechte zur Situation von LGBTI in der EU zufolge fühlten sich in den vorangegangenen zwölf Monaten 39 % der lesbischen Frauen, 32 % der schwulen Männer, 36 % der bisexuellen Frauen und 28 % der bisexuellen Männer in Bereichen außerhalb der Beschäftigung diskriminiert, weil sie LGBTI waren.

Was den Schutz und die Förderung der Rechte von LSB-Personen in den 27 Mitgliedstaaten betrifft, so war die Europäische Union ein regionaler Schlüsselakteur. Artikel 19 Absatz 1 des Vertrags über die Arbeitsweise der Europäischen Union ermächtigt den Rat der Europäischen Union (Rat) ausdrücklich, „geeignete Vorkehrungen [zu] treffen, um Diskriminierungen aus Gründen ... der sexuellen Orientierung zu bekämpfen“. Diese Verpflichtung zur Gleichbehandlung wird in Artikel 21 Absatz 1 der Charta der Grundrechte der Europäischen Union bekräftigt. Im Bereich der sekundärrechtlichen Vorschriften ist das EU-Recht jedoch noch immer vergleichsweise beschränkt. Während die Richtlinie 2000/78/EG im Bereich Beschäftigung und Beruf wichtige Schutzmaßnahmen festschreibt, hat der Rat – anders als in Bezug auf „Rasse“ oder ethnische Herkunft und Geschlecht – über den Arbeitsmarkt hinaus noch keine Rechte für LSB-Personen beschlossen. 2008 legte die Europäische Kommission einen Vorschlag für einen weitreichenderen Nichtdiskriminierungsrahmen vor, der jedoch noch immer anhängig ist.

Vor diesem Hintergrund untersucht der Bericht nationale Verbote von Diskriminierung aufgrund der sexuellen Orientierung in vier Schlüsselbereichen: Sozialschutz, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen. Der Bericht geht der Frage nach, ob und wie die 27 EU-Mitgliedstaaten und das Vereinigte Königreich in diesen Bereichen für einen entsprechenden rechtlichen Schutz sorgen – unter Berücksichtigung von gesetzlichen Schutzbestimmungen, exekutiven Vorschriften und Verwaltungsverfahren. Ein wichtiger Schwerpunkt ist die Rechtsprechung von nationalen

Gerichten, Gleichbehandlungsstellen und Ombudspersonen, da der Bericht untersucht, ob gerichtliche Interventionen (auch bei fehlendem gesetzlichem Schutz) in den vier Schlüsselbereichen ausreichenden Schutz für sexuelle Orientierung bieten können.

Nach einer Einführung in die Ziele und die Struktur des Berichts (Abschnitt 1) beschreibt Abschnitt 2, welche Vorschriften zum Schutz vor Diskriminierung aufgrund der sexuellen Orientierung in Europa derzeit existieren. Er konzentriert sich dabei auf zwei regionale Rahmenwerke: (I) das Menschenrechtssystem des Europarates einschließlich der von außergerichtlichen Institutionen geförderten Soft-Law-Standards und der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und (II) das Rechtssystem der Europäischen Union einschließlich der im Primärrecht, in den EU-Richtlinien und in der zunehmenden Rechtsprechung des Gerichtshofs der Europäischen Union festgeschriebenen einschlägigen Schutzbestimmungen. Abschnitt 2 liefert keine erschöpfende Zusammenfassung aller Rechtsinstrumente und richterlichen Entscheidungen, die Gleichbehandlung ohne Unterschied der sexuellen Orientierung in Europa unterstützen. Vielmehr erläutert er den regionalen Kontext, in dem die nationalen Gesetze (bzw. das Fehlen derselben) zu verstehen sind, und gibt danach einen Überblick über den innerstaatlichen Schutz, den die 27 Mitgliedstaaten und das Vereinigte Königreich gewähren.

Abschnitt 3 untersucht, inwieweit die innerstaatlichen Gesetze innerhalb der Europäischen Union „sexuelle Orientierung“ definieren. Betrachtet man die 27 Mitgliedstaaten und das Vereinigte Königreich, so haben nur wenige dieser Länder eine gesetzliche Definition dieses Begriffs entwickelt. Vielmehr gibt es Anhaltspunkte dafür, dass in vielen Ländern die nationalen Gesetzgeber und Gerichte der Ansicht sind, dass „sexuelle Orientierung“ ein gängiger Begriff ist, der keiner weiteren Präzisierung bedarf. Lediglich in fünf Ländern – Bulgarien, Irland, Malta, Schweden und Vereinigtes Königreich – enthalten die Gesetze entsprechende Erläuterungen. In einigen wenigen EU-Mitgliedstaaten haben die Gerichte dazu beigetragen, Wesen und Bedeutung von sexueller Orientierung auszulegen, und auch Menschenrechtsorganisationen, Ombudspersonen und nationale Antidiskriminierungsstrategien haben Orientierungshilfen geliefert. In mindestens drei Ländern verwendet das innerstaatliche Recht derzeit einen anderen Begriff als „sexuelle Orientierung“, was Auswirkungen sowohl auf den Umfang als auch auf den Zweck des entsprechenden Schutzes haben kann. Abschnitt 3 schließt mit dem Vorschlag einer einheitlichen Definition des Begriffs „sexuelle Orientierung“ in künftigen EU-Gleichbehandlungsvorschriften.

Abschnitt 4 befasst sich mit Nichtdiskriminierungsgarantien im Sozialschutz, insbesondere in der Gesundheitsversorgung und der sozialen Sicherheit. Gegenwärtig verbieten 17 EU-Staaten und das Vereinigte Königreich Ungleichbehandlungen aufgrund der sexuellen Orientierung in diesen Bereichen. Dieser Schutz basiert auf einer Mischung aus ausdrücklichen gesetzlichen und exekutiven Bestimmungen sowie auf gerichtlichen Auslegungen allgemeiner Gleichbehandlungsgarantien. In einigen Ländern verbietet das innerstaatliche Recht Diskriminierungen aufgrund der sexuellen Orientierung im Sozialschutz zwar nicht ausdrücklich, ist es gegebenenfalls jedoch möglich, in anderen Rechtsnormen oder Richtlinien (z.B. im Verwaltungsrecht, in nationalen Verfassungen oder in den Mandaten von Ombudspersonen und Gleichbehandlungsstellen) einen impliziten oder partiellen Schutz zu finden. Dies kann auch für soziale Vergünstigungen (Abschnitt 5), Bildung (Abschnitt 6) sowie den Zugang zu und die Versorgung mit Gütern und Dienstleistungen (Abschnitt 7) gelten. Ebenso wie in anderen Bereichen, die Gegenstand dieses Berichts sind, ist auch hier ein signifikanter Mangel an Rechtsprechung festzustellen – wiewohl Gerichte und Gleichbehandlungsstellen mittelbare Diskriminierung, assistierte Reproduktion und Beschränkungen für Blutspenden von Männern, die Sex mit Männern haben (MSM), untersucht haben. Abschnitt 4 kommt zu dem Ergebnis, dass im Zuge des weiteren Vorgehens EU-Mindeststandards für Garantien im Hinblick auf sexuelle Orientierung im Sozialschutz erforderlich sind.

In Abschnitt 5 geht es um das Verbot der Ungleichbehandlung bei sozialen Vergünstigungen. Was den Sozialschutz betrifft, so verbietet das nationale Recht in 17 EU-Ländern und im Vereinigten Königreich Diskriminierungen aufgrund der sexuellen Orientierung in diesem Bereich. In einigen Mitgliedstaaten ist der Zugang zu sozialen Vergünstigungen ausdrücklich garantiert. In anderen Ländern ist es hingegen eine Frage der Auslegung oder Zuschreibung, rechtlichen Schutz für sexuelle Orientierung ausfindig zu

machen, und in mindestens zwei EU-Ländern besteht Unsicherheit hinsichtlich der Reichweite des Verbots. Die veröffentlichte Rechtsprechung in diesem Bereich ist sehr beschränkt – wobei sich die wenigen verfügbaren Entscheidungen auf soziale Vergünstigungen für gleichgeschlechtliche Paare konzentrieren. Tatsächlich zeigt Abschnitt 5, dass die zunehmende formale Anerkennung gleichgeschlechtlicher Paare innerhalb der Union den Zugang zu Leistungen, die bislang verschiedengeschlechtlichen Ehepartnern vorbehalten waren, erleichtert (ein Thema, das in Abschnitt 9.3.2 speziell untersucht wird). Wie schon die Auseinandersetzung mit Sozialschutz liefert auch Abschnitt 5 ein vielschichtiges Bild der Gleichstellung und unterstützt Argumente zugunsten von EU-Mindeststandards.

Abschnitt 6 befasst sich mit Bildung. Gegenwärtig gewähren 18 EU-Mitgliedstaaten und das Vereinigte Königreich in diesem Bereich Schutz. In vielen Ländern enthält das nationale Recht erneut ausdrückliche Garantien – expliziten Schutz sowohl beim Zugang zu als auch bei der Inanspruchnahme von Bildung. Diese Verbote beziehen sich in der Regel auf das gesamte Bildungsspektrum (vom Vorschul- bis zum Hochschulbereich) und werden häufig durch ergänzende Rechtsinstrumente untermauert. Abgesehen von diesen gesetzlichen Garantien benennt Abschnitt 6 jedoch auch einige zentrale Probleme. In neun Mitgliedstaaten ist die Situation, was sexuelle Orientierung im Bildungsbereich betrifft, nach wie vor lückenhaft: Entweder verbietet das nationale Recht entsprechende Ungleichbehandlungen nicht oder es enthält Unklarheiten. In vielen EU-Ländern ist außerdem ein eindeutigerer Schutz vor Diskriminierung aufgrund von Assoziierung erforderlich. Wie schon in den Bereichen Sozialschutz und soziale Vergünstigungen ist die Rechtsprechung auch im Bildungsbereich ausgesprochen spärlich. Im Zuge des weiteren Vorgehens sollten die politischen Entscheidungsträger, sowohl auf nationaler Ebene als auch auf EU-Ebene, wirksame Maßnahmen ergreifen, damit Betroffene, die im Bildungsbereich aufgrund ihrer sexuellen Orientierung diskriminiert werden, ausreichende Möglichkeiten haben, ihre Rechte durchzusetzen.

Abschnitt 7 untersucht Verbote beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen. Er zeigt wichtige Probleme auf – nicht existierender oder nur partieller Schutz, Unklarheiten in Bezug auf die rechtlichen Garantien in manchen Ländern und das Fehlen von Rechtsprechung. Wie in den Bereichen Sozialschutz, soziale Vergünstigungen und Bildung würde auch der Schutz in diesem Bereich von EU-Mindeststandards profitieren. Abschnitt 7 weist aber auch auf positive Aspekte hin. Derzeit verbieten 20 EU-Mitgliedstaaten und das Vereinigte Königreich Ungleichbehandlungen aufgrund der sexuellen Orientierung beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen. Es gibt – trotz einiger Mängel – auch eine zunehmende Rechtsprechung dahingehend, dass nationale Gerichte sexualitätsbasierte Diskriminierung in Bereichen wie der Anmietung bzw. dem Erwerb von Eigentum, Sport und Freizeit sowie dem Gastgewerbe bestätigen und verurteilen. Diese Rechtsprechung wurde zwar nur in einer Minderheit (11) von Mitgliedstaaten angetroffen, es gibt aber Anhaltspunkte dafür, dass Gerichte und Gleichbehandlungsstellen sich konstruktiv mit Gleichbehandlungsgarantien auseinandersetzen – und dies sogar in Ländern, in denen noch kein ausdrücklicher Schutz vor Diskriminierung aufgrund der sexuellen Orientierung existiert.

Abschnitt 8 widmet sich den Ausnahmen vom Verbot der Diskriminierung aufgrund der sexuellen Orientierung. Es zeigt sich, dass – allen Einwänden zum Trotz, dass die nationalen Gesetze Menschen berücksichtigen sollten, die moralische, philosophische oder religiöse Bedenken gegen bestimmte sexuelle Orientierungen haben – politische Entscheidungsträger und Gerichte in wenigen EU-Mitgliedstaaten Ausnahmen von den Gleichbehandlungsgarantien zugelassen haben. In einigen Ländern gibt es allgemeine Ausnahmevorschriften, die für alle oder die meisten geschützten Merkmale gelten und eine Differenzierung, abhängig von einer Verhältnismäßigkeitsprüfung, ermöglichen. Beschränkte Ausnahmen sind auch in den Bereichen Wohnen, Bildung und bei positiven Maßnahmen festzustellen sowie in der Rechtsprechung zu Gütern und Dienstleistungen in zwei Ländern. Insgesamt gibt es in der Union jedoch kaum Anzeichen für eine Dringlichkeit umfassender Ausnahmen vom Schutz der sexuellen Orientierung auf der Ebene der Gesetzgebung oder der Justiz. Während die politischen Entscheidungsträger auf der Ebene der EU und der Mitgliedstaaten das Thema vorantreiben, indem sie die Zweckmäßigkeit und Umsetzbarkeit von EU-Mindeststandards prüfen, sollten sie sich, so die Empfehlung in Abschnitt 8, von den bestehenden

nationalen Praktiken leiten lassen und über die tatsächliche Notwendigkeit von Ausnahmen in künftigen Gesetzgebungen nachdenken.

Abschnitt 9 enthält abschließende Anmerkungen und Empfehlungen. Auf der Grundlage der vorangegangenen Analysen werden drei Bereiche zur weiteren Erörterung identifiziert: Verbesserung des bestehenden Rechtsschutzes; mangelnde Rechtsprechung; Einwände gegen das Verbot von Diskriminierung aufgrund der sexuellen Orientierung außerhalb des Arbeitsmarktes. Insoweit die politischen Entscheidungsträger auf der Ebene der Union und der Mitgliedstaaten anerkennen, dass alle Menschen, unabhängig von ihrer sexuellen Orientierung, in den vier untersuchten Bereichen gleiche Rechte genießen sollten, gibt es, so die Bekräftigung in Abschnitt 9, ein zwingendes Argument dafür, dass ein Eingreifen auf EU-Ebene – ähnlich den bereits bei „Rasse“ oder ethnischer Herkunft ergriffenen umfassenden Maßnahmen – das wirksamste, angemessenste und praktikabelste Mittel ist, um dieses Ziel zu erreichen.

In Zusammenhang mit dem weitgehenden Fehlen von Rechtsprechung, auf das der Bericht hinweist, schlägt Abschnitt 9 einige Schlüsselfragen und Maßnahmen vor, die politische Entscheidungsträger dabei unterstützen sollen, formale Verbote zu überwinden und substanzielle Reformen zu entwickeln, die dem Schutz der sexuellen Orientierung zu praktischer Wirksamkeit verhelfen. Auf mögliche Einwände gegen einen stärkeren Schutz der sexuellen Orientierung außerhalb des Arbeitsmarktes weist Abschnitt 9 schließlich darauf hin, dass die rechtliche Anerkennung gleichgeschlechtlicher Beziehungen für die Gleichstellung homosexueller Paare zwar von Vorteil ist, nach wie vor jedoch im Ermessen der Mitgliedstaaten liegt, und empfiehlt mit Blick auf die künftige EU-Gesetzgebung erneut, die Notwendigkeit großzügiger Ausnahmeregelungen sorgfältig zu prüfen.

1 Introduction

1.1 Background and context

Over the past three decades, there has been an important shift in the rights and status of lesbian, gay and bisexual (LGB) individuals in the European Union (EU). From a position where, as late as the early 1990s, criminal laws still prohibited same-sex sexual intercourse in a number of European jurisdictions, LGB people now enjoy increased social, political and legal visibility throughout the 27 Member States and the United Kingdom.

At present, nearly all EU countries formally acknowledge same-sex partnerships and it is possible to contract a same-sex marriage in 14 jurisdictions. Lesbian, gay and bisexual people are increasingly present in political, cultural and sporting life, and their presence reflects tangible changes in broader public attitudes. In 2019, the European Commission's Eurobarometer on the 'Social acceptance of LGBTI People in the EU' revealed that, in almost 80 % of Member States, more than half of the population now agree that 'gay, lesbian and bisexual people should have the same rights as heterosexual people'.¹ Similarly, in almost 65 % of EU jurisdictions, more than half of the population also agrees that 'there is nothing wrong in a sexual relationship between two persons of the same sex'.²

Evolving social attitudes in the European Union are mirrored in pan-European legal reforms, which have enhanced protections against sexual orientation discrimination and developed positive rights in a number of key fields. As noted in Section 2, since the landmark case of *Salgueiro da Silva Mouta v Portugal*,³ the European Court of Human Rights (ECtHR) has acknowledged that Article 14 of the European Convention on Human Rights (ECHR) covers (through the notion of 'other status') unequal treatment on the basis of sexual orientation. In recent years, the ECtHR has invoked Article 14 ECHR, in conjunction with other Convention rights, to expand protections for LGB people in, inter alia, adoption,⁴ civil partnership,⁵ immigration,⁶ tenancy succession⁷ and the public affirmation of identity.⁸

These European regional developments have emerged alongside greater progress within the United Nations human rights system, where the Special Procedures,⁹ human rights treaty bodies¹⁰ and the Office of the UN High Commissioner for Human Rights¹¹ have all condemned violence and discrimination on the basis of sexual orientation. Indeed, in 2016, the UN Human Rights Council specifically appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.¹²

Yet despite these welcome movements, many challenges remain for lesbian, gay and bisexual populations throughout the European Union. Although public opinion is shifting, there remains considerable hostility to LGB people. According to the 2019 Eurobarometer, a significant proportion of EU citizens still oppose public displays of same-sex affection,¹³ LGB-inclusive education¹⁴ and gay or lesbian children within their own families.¹⁵ According to the recent findings of the second survey of the European Union Agency for Fundamental Rights on LGBTI people in the EU,¹⁶ in the previous 12 months, 39 % of lesbian women, 32 % of gay men, 36 % of bisexual women and 28 % of bisexual men across the Union felt discriminated against in areas other than employment due to being LGBTI.¹⁷ In the same period, 41 % of lesbian women, 38 % of gay men, 33 % of bisexual women and 30 % of bisexual men experienced harassment due to

3 *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 47.

12 UN Human Rights Council (2016), Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity, UN Doc. A/HRC/RES/32/2, [3].

13 European Commission (2019) *Eurobarometer on the social acceptance of LGBTI people in the EU*, p. 5.

14 European Commission (2019) *Eurobarometer on the social acceptance of LGBTI people in the EU*, p. 15.

15 European Commission (2019) *Eurobarometer on the social acceptance of LGBTI people in the EU*, p. 13.

16 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union.

17 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union, p. 34.

being LGBTI.¹⁸ Moreover, changing attitudes towards, and legal protections for, sexual orientation have been experienced unevenly across the 27 Member States – as attested to by the 2019 Eurobarometer,¹⁹ ILGA-Europe Rainbow Map and Index 2020²⁰ and the latest findings of the European Equality Law Review.²¹

1.2 The European Union and sexual orientation

The European Union has been a key regional actor in protecting and promoting the rights of LGB populations across the 27 Member States. Article 19(1) of the Treaty on the Functioning of the European Union specifically empowers the Council of the European Union (Council) to ‘take appropriate action to combat discrimination based’ on sexual orientation. This commitment to equality is reaffirmed through Article 21(1) of the Charter of Fundamental Rights of the European Union, which expressly names ‘sexual orientation’ among the grounds for which discrimination shall be prohibited.

In recent years, EU lawmakers have included LGB populations within laws regulating, *inter alia*, victims’ rights²² and asylum.²³ The Court of Justice of the European Union has defended the equality and dignity of lesbian, gay and bisexual litigants in areas such as partnership benefit,²⁴ blood donation rules,²⁵ hiring practices²⁶ and the free movement of married couples.²⁷ The European Commission has become a vital soft law actor, supporting academic and civil society activities²⁸ and drafting a high-profile List of Actions to Advance LGBTI Equality in 2015.²⁹ Building upon that List of Actions, the European Commission will launch, in the fourth quarter of 2020, a new ‘LGBTI+ Equality Strategy’ – aiming ‘to address... persisting discrimination and inequality’ due to sexual orientation, gender identity, gender expression and sex characteristics.³⁰

In the field of secondary legislation, however, EU law remains comparatively limited in its current scope. While Directive 2000/78/EC³¹ establishes important protections within employment and occupation, the Council has not yet – unlike in the fields of race or ethnic origin and sex – adopted guarantees for LGB individuals beyond the labour market. While in 2008 the European Commission suggested a more expansive framework for implementing the principle of equal treatment (2008/0140),³² this proposal remains pending. In consequence, there is currently no EU-wide legislation requiring minimum sexual

18 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union, p. 44.

19 See generally, European Commission (2019) *Eurobarometer on the social acceptance of LGBTI people in the EU*.

20 ILGA-Europe Rainbow Map and Index 2020, available at: <https://www.ilga-europe.org/rainboweurope/2020>. The ILGA-Europe Rainbow Map and Index 2020 was co-funded by the Rights Equality and Citizenship (REC) programme 2014-2020 of the European Union.

21 For the latest editions, see: ‘Law Reviews’, European Equality Law Network website, available at: <https://www.equalitylaw.eu/publications/law-reviews>.

22 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

23 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

24 Judgment of 1 April 2008, *Maruko*, C267/06, EU:C:2008:179.

25 Judgment of 29 April 2015, *Léger*, C528/13, EU:C:2015:288.

26 Judgment of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C81/12, EU:C:2013:275.

27 Judgment of 5 June 2018, *Coman*, C673/16, EU:C:2018:385.

28 See e.g. SOGICA Project (Sexual Orientation and Gender Identity Claims of Asylum), University of Sussex, Supported by the European Research Council, <http://www.sogica.org/en/>.

29 See: European Commission, ‘List of Actions to Advance LGBTI Equality’, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/list-actions-advance-lgbti-equality_en.

30 European Commission, ‘Roadmap’ for the Lesbian, Gay, Bisexual, Transgender and Intersex+ Equality Strategy, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12410-LGBTI-equality>. The quoted text is from the ‘Roadmap’ document and can be found in the ‘Context’ box in Part A.

31 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

32 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, Brussels, 2 July 2008, COM(2008) 426 final, 2008/0140 (CNS).

orientation protections in matters of social protection, social advantages, education, and in access to and the supply of goods and services.

1.3 The report: aims, scope and methodology

Against this background, the report explores prohibitions on sexual orientation discrimination beyond the labour market. Focusing on four key areas – social protection, social advantages, education, and access to and the supply of goods and services – the report asks whether and how the 27 EU Member States and the United Kingdom provide relevant legal protections in these fields – taking into account statutory safeguards, executive regulations and administrative practice. There is also a strong emphasis on the case law of national courts, equality bodies and ombudspersons, as the report investigates whether judicial interventions (even in the absence of statutory protection) can provide sufficient safeguards for sexual orientation in the four areas surveyed in this report.

The report is divided into nine sections. Sections 2 and 3 consider introductory matters, including existing regional protections against sexual orientation discrimination in Europe (Section 2), as well as the question of whether Member States define sexual orientation in their laws (Section 3). Sections 4–7 explore the existence of relevant prohibitions in the 27 Member States and the UK, addressing social protection (Section 4), social advantages (Section 5), education (Section 6) and access to and the supply of goods and services (Section 7). Each of these four substantive sections offers a detailed description of the applicable laws and jurisprudence, with short concluding analyses rounding off each chapter. In Section 8, the report highlights limited exceptions to sexual orientation non-discrimination protections and the report ends with Conclusions and Recommendations in Section 9.

The data for this report was collected through the European network of legal experts in gender equality and non-discrimination. In 2019, a detailed thematic questionnaire was circulated to 28 national experts on non-discrimination covering all EU Member States and the United Kingdom. The report was subsequently prepared through comparison and analysis of the 28 national responses. The deadline for submitting national reports was 28 February 2020. As such, in some cases, the report may not capture the most recent developments in Member State law. The report is written on the basis of the four core themes, rather than by individually focusing on each jurisdiction surveyed. At different junctures, the report highlights specific laws, case law and practices from each of the 27 Member States and the UK, depending on their immediate relevance for particular themes or emerging legal trends. The report makes frequent use of overview tables, with the aim of offering a clearer visual picture for the reader of current protections against sexual orientation discrimination across the European Union.

2 Regional non-discrimination protections for sexual orientation in Europe

Section 2 explores existing non-discrimination protections for sexual orientation in Europe. It focuses on two regional frameworks: (I) the Council of Europe (CoE) human rights system, including soft law standards promoted by the non-judicial institutions of the CoE and the case law of the European Court of Human Rights; and (II) the European Union rights system, including relevant safeguards set out in primary legislation, EU directives and the growing jurisprudence of the Court of Justice of the European Union. Section 2 is not an exhaustive summary of all rights instruments and judicial opinions which advocate sexual orientation equality in Europe. Rather, before embarking upon an overview of domestic protections throughout the 27 Member States and the United Kingdom, Section 2 explains the regional context in which those national laws (or the absence thereof) must be understood.

2.1 Council of Europe human rights system

In recent years, the Council of Europe has been a prominent advocate for non-discrimination protections on the grounds of sexual orientation. While the European Court of Human Rights (ECtHR) has undoubtedly played the most high-profile role in condemning unequal treatment, other institutions within the CoE – including the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities and the Commissioner for Human Rights – have also adopted key recommendations and resolutions in this field, creating a substantial body of soft-law jurisprudence in support of sexual orientation equality.

2.1.1 Non-judicial institutions of the Council of Europe

Committee of Ministers

In 2010, the Committee of Ministers (CoM) – the decision-making body of the CoE³³ – issued a landmark recommendation ‘on measures to combat discrimination on grounds of sexual orientation or gender identity’.³⁴ Recommendation CM/Rec(2010)5 called upon the Member States of the Council of Europe to examine, review and analyse their national laws ‘in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation...’.³⁵ The Committee of Ministers urged Member States to ensure that ‘legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation...’³⁶ and that ‘victims of discrimination are aware of and have access to effective legal remedies before a national authority’.³⁷ Since 2010, Recommendation CM/Rec(2010)5 has encouraged positive action in EU Member States, as countries have adopted policies and action plans to implement reforms.³⁸

For the specific context of this report, looking beyond the labour market, it is important to note that, in Recommendation CM/Rec(2010)5, the Committee of Ministers made key proposals in the fields of education, healthcare and housing. For example, ‘taking into due account the over-riding interests of the child’, CoM advocated ‘appropriate legislative and other measures, addressed to educational staff and pupils, to ensure that the right to education can be effectively enjoyed without discrimination on grounds

33 ‘Committee of Ministers’, Council of Europe website: <https://www.coe.int/en/web/tbilisi/committeeministers>.

34 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, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies.

35 Recommendation CM/Rec(2010)5 of the Committee of Ministers, Recommendation [1].

36 Recommendation CM/Rec(2010)5 of the Committee of Ministers, Recommendation [2].

37 Recommendation CM/Rec(2010)5 of the Committee of Ministers, Recommendation [3].

38 See e.g. in Italy, the National Strategy for LGBT 2013-2015 (*Strategia nazionale per la prevenzione ed il contrasto della discriminazione basata sull’orientamento sessuale e l’identità di genere*).

of sexual orientation...'³⁹ Similarly, in healthcare, Recommendation CM/Rec(2010)5 advocated taking into account the specific needs of lesbian, gay and bisexual individuals when developing national plans, including 'suicide prevention measures, health surveys, medical curricula, training courses and materials, and when monitoring and evaluating the quality of health-care services'.⁴⁰ Finally, in housing, Member States should create 'protection against discriminatory evictions' and guarantee 'equal rights to acquire and retain ownership of land and other property' irrespective of sexual orientation.⁴¹

Parliamentary Assembly of the Council of Europe

The intervention of the Committee of Ministers has been accompanied by, and reinforced through, resolutions and recommendations of the Parliamentary Assembly of the Council of Europe (PACE). Bringing together representatives from the 47 national parliaments,⁴² PACE has, in recent years, adopted a number of positions in favour of lesbian, gay and bisexual equality. It has also been active in promoting the rights of trans and intersex populations.⁴³ In Resolution 1728(2010), PACE observed that LGB people 'face deeply rooted prejudices, hostility and widespread discrimination all over Europe',⁴⁴ with homophobia and transphobia having 'particularly serious consequences for young LGBT people'.⁴⁵ The Assembly called upon Member States to 'adopt and implement anti-discrimination legislation which includes sexual orientation... among the prohibited grounds'.⁴⁶

In light of the apparent absence of case law and implementation identified in this report (see Sections 4-7 and 9.2), it is interesting that, more than ten years ago, PACE was already highlighting the need for effective reporting to 'judicial and non-judicial bodies' and for national human rights structures and equality bodies that 'effectively address' sexual orientation discrimination.⁴⁷ Subsequently, in 2013, the Assembly reiterated these recommendations – urging Member States to introduce 'civil legislation protecting against discrimination on grounds of sexual orientation... in all areas of life, including employment, education, health, access to goods and services, housing, access to social security and social advantages'.⁴⁸ As this report illustrates, while many EU jurisdictions have now heeded that call, a number of significant lacunae remain. PACE also recommended that the Committee of Ministers mainstream sexual orientation non-discrimination into 'its activities in the areas of youth, equality, human dignity and intercultural dialogue, including its religious dimension'⁴⁹ and 'explicitly include sexual orientation... as prohibited grounds of discrimination in all its future relevant conventions'.⁵⁰

Congress of Local and Regional Authorities and Commissioner for Human Rights of the Council of Europe

39 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, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies), Appendix, VI [31].

40 Recommendation CM/Rec(2010)5 of the Committee of Ministers, VII [33].

41 Recommendation CM/Rec(2010)5 of the Committee of Ministers, VII [37].

42 'Parliamentary Assembly of the Council of Europe', Council of Europe website: <https://pace.coe.int/en/>.

43 Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe on Discrimination against transgender people in Europe, *Text adopted by the Assembly* on 22 April 2015 (15th Sitting); Resolution 2191 (2017) of the Parliamentary Assembly of the Council of Europe on Promoting the human rights of and eliminating discrimination against intersex people, *Text adopted by the Assembly* on 12 October 2017 (35th Sitting).

44 Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe on Discrimination on the basis of sexual orientation and gender identity, *Text adopted by the Assembly* on 29 April 2010 (17th Sitting), [3].

45 Resolution 1728(2010) of the Parliamentary Assembly, [8].

46 Resolution 1728(2010) of the Parliamentary Assembly, [16.5].

47 Resolution 1728(2010) of the Parliamentary Assembly, [16.7].

48 Resolution 1948 (2013) of the Parliamentary Assembly of the Council of Europe on Tackling discrimination on the grounds of sexual orientation and gender identity, *Text adopted by the Assembly* on 27 June 2013 (26th Sitting), [9.1.3].

49 Recommendation 2021(2013) of the Parliamentary Assembly of the Council of Europe on Tackling discrimination on the grounds of sexual orientation and gender identity, *Text adopted by the Assembly* on 27 June 2013 (26th Sitting), [5.3].

50 Recommendation 2021(2013) of the Parliamentary Assembly, [5.6].

In addition to CoM and PACE, two other institutions within the CoE – the Congress of Local and Regional Authorities (CLRA)⁵¹ and the Commissioner for Human Rights of the Council of Europe (Commissioner) – have shown clear support for sexual orientation equality.

In a 2015 resolution on '[g]uaranteeing lesbian, gay, bisexual and transgender (LGBT) people's rights', the CLRA invited local and regional authorities to 'adopt a clear, holistic action plan for their towns and regions which commits to diversity, promotes respect and rejects discrimination, being guided by the policies and practices contained in the appendix to CM/Rec(2010)5...'⁵² According to the Congress, there should be multi-level and multi-stakeholder cooperation to 'ensure legislation fully respects LGBT people's human rights and that legislative provisions at all levels are complementary and comprehensive'.⁵³ Furthermore, the CLRA has clearly rejected the notion that the values or rules 'of a "dominant culture" [could] be invoked to justify... any other form of discrimination, including on grounds of sexual orientation...'.⁵⁴ In recommendations adopted at the same time, the Council urged the Committee of Ministers to 'implement the different Council of Europe texts promoting respect for LGBT people's rights'.⁵⁵ This built upon previous recommendations that CoM should request Member States of the Council of Europe to 'take a public stand against discrimination on the grounds of belonging to a sexual minority'.⁵⁶

The Commissioner for Human Rights of the Council of Europe has also been unequivocal in promoting equality protections for sexual orientation. In a 2011 report, the Commissioner explicitly called upon Member States of the Council of Europe to '[e]nact comprehensive national legislation on non-discrimination and include sexual orientation... among the prohibited grounds'.⁵⁷ Member States should 'screen national legislation to detect and correct possible inconsistencies with non-discrimination legislation in force to prevent discrimination on grounds of sexual orientation...'.⁵⁸ Furthermore, in specific sectors, the Commissioner has recommended training healthcare professionals on 'the importance of respecting the dignity of LGBT persons',⁵⁹ combating 'bullying and harassment of LGBT students and staff'⁶⁰ and promoting 'initiatives which encourage the full inclusion and respect of LGBT staff in the work environment'.⁶¹

2.1.2 Case law of the European Court of Human Rights

The European Court of Human Rights, perhaps more so than any other international or regional tribunal, has played a vital role in safeguarding the rights of lesbian, gay and bisexual individuals. While, since the

51 According to the Council of Europe's website, the CLRA is 'an institution of the Council of Europe, responsible for strengthening local and regional democracy in its 47 member states and assessing the application of the European Charter of Local Self-Government'. The Congress 'works to foster consultation and political dialogue between national governments and local and regional authorities, through cooperation with the Council of Europe's Committee of Ministers'. The CLRA comprises 'two chambers: the Chamber of Local Authorities and the Chamber of Regions. It has 324 representatives and 324 substitutes, all appointed for four years, representing over 150 000 local and regional authorities in the Council of Europe's 47 member states'. See 'A European Assembly of local and regional elected representatives': <https://www.coe.int/en/web/congress/overview>.

52 Resolution 380(2015) of the Congress of Local and Regional Authorities on Guaranteeing lesbian, gay, bisexual and transgender (LGBT) people's rights: a responsibility for Europe's towns and regions, [11.a.i.].

53 Resolution 380(2015) of the Congress of Local and Regional Authorities, [11.b.i.].

54 Resolution 380(2015) of the Congress of Local and Regional Authorities, [2].

55 Recommendation 370 (2015) of Congress of Local and Regional Authorities on Guaranteeing lesbian, gay, bisexual and transgender (LGBT) people's rights: a responsibility for Europe's towns and regions, [5.b.].

56 Recommendation 211(2007) of the Congress on Local and Regional Authorities on Freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons, [7.a.].

57 Commissioner for Human Rights of the Council of Europe (2014), *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd ed, Council of European Publishing, p. 11.

58 Commissioner for Human Rights of the Council of Europe (2014), *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd ed, Council of European Publishing.

59 Commissioner for Human Rights of the Council of Europe (2014), *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd ed, Council of European Publishing, p. 14.

60 Commissioner for Human Rights of the Council of Europe (2014), *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd ed, Council of European Publishing.

61 Commissioner for Human Rights of the Council of Europe (2014), *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd ed, Council of European Publishing.

early 1980s, the ECtHR has consistently acknowledged the right of LGB people to enjoy private life – a key element in the Court's condemnation of anti-sodomy statutes⁶² – it has also, over the past two decades, recognised and affirmed protections against unequal treatment due to sexual orientation.

In the seminal case of *Salgueiro da Silva Mouta v Portugal*, which concerned restricted parental visitation rights, the Strasbourg judges expressly confirmed that 'a distinction based on considerations regarding the applicant's sexual orientation... is not acceptable under [Article 14 of] the Convention'.⁶³ Although sexual orientation is not explicitly enumerated in the list of protected characteristics set out in Article 14 of the European Convention on Human Rights (ECHR), it falls within the concept of 'other status' recognised by that provision.⁶⁴ In numerous subsequent decisions, the ECtHR has identified and censured impermissible discrimination due to sexual orientation in the enjoyment of Convention rights. Like sex, such unequal treatment can only be justified, as the Court regularly emphasises, by reference to 'particularly convincing and weighty reasons'.⁶⁵

In *Karner v Austria*⁶⁶ and *Kozak v Poland*,⁶⁷ the ECtHR held that there was a violation of Article 14 ECHR (read in conjunction with Article 8) where individuals were prevented, under national law, from succeeding to tenancies held by their same-sex partners. A violation of Article 14 ECHR (read with Article 8) also arose in *PB and JS v Austria* because same-sex partners of insured individuals were excluded from coverage under sickness and accident insurance.⁶⁸ In *Pajić v Croatia*, there was an infringement of Article 14 ECHR (read with Article 8) where Croatia withheld residence permits for family reunification from same-sex partners, although they were available to both married and unmarried different-sex couples.⁶⁹ This decision was subsequently reinforced in *Taddeucci and McCall v Italy* where Italian law reserved residence permits for family grounds to married spouses.⁷⁰ As such, same-sex couples, irrespective of their level of commitment, were absolutely excluded because Italy did not recognise same-sex marriages. However, in *Aldeguer Tomás v Spain*, the ECtHR did not find a violation of the Convention where an individual was refused a surviving spouse's allowance following the death of his same-sex life partner.⁷¹ At the relevant time, Spanish law restricted such allowances to married couples and excluded same-sex partners from marital unions.

In *Vallianatos v Greece*, Greek law, without sufficient justification and in circumstances where same-sex couples did not have a right to marry, reserved a new civil union institution to different-sex couples.⁷² According to the ECtHR, this was incompatible with Article 14 ECHR (in conjunction with Article 8). In *Ratzenböck and Seydl v Austria*, however, where different-sex couples were omitted from the registered partnership law, a violation of Article 14 ECHR (read with Article 8) did not arise.⁷³ Marriage was available to different-sex couples who, consequently, were not similarly situated with same-sex partners, who did require alternative relationship structures. In *JM v United Kingdom*, the ECtHR held that Article 14 ECHR (in conjunction with Article 1 of Protocol 1 to the ECHR) had been infringed when a woman experienced discrimination in the calculation of child maintenance payments because she was now in a same-sex (rather than different-sex) relationship.⁷⁴

62 See e.g. *Dudgeon v United Kingdom* [1983] 5 EHRR 572; *Norris v Ireland* [1991] 13 EHRR 186.

63 *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 47, [36].

64 Article 14 of the European Convention on Human Rights provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' [emphasis added].

65 *Vallianatos v Greece* [2014] 59 EHRR 12, [77].

66 *Karner v Austria* [2004] 38 EHRR 24.

67 *Kozak v Poland* [2010] ECHR 280.

68 European Court of Human Rights, *PB and JS v Austria*, App. No. 18984/02, 22 July 2010.

69 *Pajić v Croatia* European Court of Human Rights, App. No. 68453/13, 23 February 2016.

70 *Taddeucci and McCall v Italy* [2016] ECHR 604.

71 *Aldeguer Tomás v Spain* [2016] 65 EHRR 24.

72 *Vallianatos v Greece* [2014] 59 EHRR 12.

73 *Ratzenböck and Seydl v Austria* [2017] ECHR 947.

74 European Court of Human Rights, *JM v United Kingdom*, App. No. 37060/06, 28 September 2010.

In *Bayev and Others v Russia*, the ECtHR found a violation of Article 14 ECHR (read with Article 10 ECHR) where individuals were fined for protesting against so-called gay ‘propaganda’ laws in Russia and for publicly affirming the normality of gay, lesbian and bisexual sexual orientations.⁷⁵ The Strasbourg Court has also condemned, as violating Article 14 ECHR (read with Article 11) repeated refusals to permit gay and lesbian equality marches in Moscow,⁷⁶ the prohibition of a demonstration advocating for laws to protect sexual minorities from discrimination in Moldova,⁷⁷ and the unequal treatment of a request to hold an assembly in Warsaw highlighting discrimination against minority populations.⁷⁸ In the recent case, *Beizaras and Levickas v Lithuania*, the ECtHR identified an unjustifiable interference of Article 14 ECHR (read with Article 8) where Lithuanian authorities refused to launch a pre-trial investigation into homophobic online hate directed towards the applicants.⁷⁹

In a number of cases, the ECtHR has concluded that discrimination motivated by sexual orientation also implicates the right to be free from inhuman or degrading treatment set out in Article 3 ECHR. For example, in *X v Turkey*, the ECtHR found a violation of Article 3 ECHR (read with Article 14).⁸⁰ Following reports to prison officials that he had been subjected to bullying and intimidation, a gay male individual was placed in solitary confinement for a period totalling eight months. According to the Strasbourg judges, the sexual orientation of the prisoner, rather than the need to adopt protective measures, was the ‘predominant reason for totally excluding him from prison life’.⁸¹ *Identoba and Others v Georgia* also involved an interference with Article 3 ECHR (read with Article 14).⁸² The Georgian authorities had failed both to ensure the safety of participants on a march to mark the International Day against Homophobia, and to properly investigate how homophobia and transphobia had aggravated attacks on the march. In *MC and CA v Romania*, the ECtHR condemned, as violating Article 3 ECHR (procedural limb) (read with Article 14 ECHR), the ineffective investigation of an attack after an annual gay march in Bucharest – including the failure to consider ‘the role played by possible homophobic motives’.⁸³

It is important to acknowledge, however, that, in a number of significant judgments, the ECtHR has rejected claims of discrimination on the basis of sexual orientation. In a consistent line of case law since *Schalk and Kopf v Austria*,⁸⁴ the Strasbourg court has ruled that limiting marriage to different-sex couples does not currently violate either Article 12 ECHR or Article 8 ECHR (read together with Article 14).⁸⁵ While Member States cannot unjustifiably exclude same-sex couples from civil unions and may, in certain circumstances, have an obligation to introduce same-sex registered partnerships, even where such alternative relationship structures are not yet available to different-sex couples,⁸⁶ they retain the right to determine access to marital unions. Similarly, in *Gas and Dubois v France*, it was lawful for the French state to reserve simple second parent adoptions to married spouses, even if that meant that all same-sex couples, by virtue of the prohibition on same-sex marriage, would be excluded.⁸⁷ However, as *X and Others v Austria* illustrates, it would not be permissible to limit second parent adoption for unmarried same-sex couples where no similar restriction applies to unmarried different-sex couples.⁸⁸

75 *Bayev and Others v Russia* [2018] 66 EHRR 10.

76 *Alekseyev v Russia* [2010] ECHR 1562.

77 *GenderDoc-M v Moldova* [2012] ECHR 1000.

78 European Court of Human Rights, *Bączkowski and Others v Poland*, App. No. 1543/06, 3 May 2007.

79 *Beizaras and Levickas* [2020] ECHR 19.

80 European Court of Human Rights, *X v Turkey* App. No. 24626/09, 9 October 2012.

81 European Court of Human Rights, *X v Turkey* App. No. 24626/09, 9 October 2012, [57].

82 *Identoba and Others v Georgia* [2015] ECHR 474.

83 European Court of Human Rights, *MC and CA v Romania* App. No. 12060/12, 12 April 2016, [124].

84 *Schalk and Kopf v Austria* [2011] 53 EHRR 20.

85 See e.g. *Hamalainen v Finland* [2014] 37 BHRC 55; *Orlandi and Others v Italy* [2017] ECHR 115; *Chapin and Charpentier v France* [2016] ECHR 504.

86 See *Oliari and others v Italy* [2017] 65 EHRR 26.

87 *Gas and Dubois v France* [2010] ECHR 444.

88 *X and Others v Austria* [2013] 57 EHRR 14.

2.2 European Union rights system

2.2.1 Primary and secondary legislation

The European Union has also been a key regional actor in challenging discrimination on the basis of sexual orientation. Article 10 of the Treaty on the Functioning of the European Union (TFEU) expressly provides that, '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on... sexual orientation.' To this end, under Article 19(1) TFEU, the Council of the European Union (Council) can 'take appropriate action to combat discrimination' due to sexual orientation. These safeguards are also reinforced through Article 21(1) of the Charter of Fundamental Rights of the European Union which, since 2009, has 'the same legal value as the Treaties'.⁸⁹ Under Article 21(1), and within the limited field of application set out in Article 51, the Charter prohibits '[a]ny discrimination based on any ground such as... sexual orientation.'

In 2000, the Council, acting in accordance with Article 19(1) TFEU (then Article 13 of the Treaty establishing the European Community), adopted Directive 2000/78/EC,⁹⁰ laying down a 'general framework for combating discrimination' in employment and occupation. Directive 2000/78/EC extends explicit protection to four characteristics – religion or belief, disability, age and sexual orientation.⁹¹ Recital 11 to the preamble of the directive acknowledges that unequal treatment on the basis of sexual orientation undermines the 'attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons'. Directive 2000/78/EC prohibits sexual orientation discrimination for, inter alia, the conditions of accessing employment, the terms and conditions of employment, membership or involvement in workers' organisations, and access to vocational training and guidance.⁹²

Unlike for the protected grounds of race or ethnic origin and sex, the Council has not expanded equality guarantees for sexual orientation beyond the labour market. This means that, at present, outside the national protections described in this report (Sections 4-7), there are no non-discrimination requirements for sexual orientation in social protection, social advantages, education and access to and the supply of goods and services. In 2008, the European Commission proposed a more expansive framework for implementing the principle of equal treatment (2008/0140),⁹³ but the Council has not yet taken up this initiative.

EU secondary legislation does expressly acknowledge sexual orientation in the sphere of victims' rights and asylum. For example, Recital 9 in the preamble to Directive 2012/29/EU (Victims' Rights Directive)⁹⁴ affirms that 'victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind', including due to sexual orientation. Recital 56 further recommends that '[i]ndividual assessments should take into account the personal characteristics of the victim', such as sexual orientation. In the sphere of EU asylum law, Directive 2011/95/EU (Recast Qualification Directive)⁹⁵ recognises that, '[f]or the purposes of defining a particular social group', sexual orientation 'should be

89 Article 6(1) of the Treaty on European Union.

90 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

91 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 1.

92 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 3(1).

93 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, Brussels, 2 July 2008, COM(2008) 426 final, 2008/0140 (CNS).

94 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

95 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

given due consideration in so far as [it is] related to the applicant's well-founded fear of persecution'.⁹⁶ Indeed, under Article 10(1)(d) of Directive 2011/95/EU, depending upon the national context, 'a particular social group might include a group based on a common characteristic of sexual orientation'.

2.2.2 Case law of the Court of Justice of the European Union

Many of the strongest affirmations of sexual orientation equality in EU law have emerged from the case law of the Court of Justice of the European Union (CJEU). Given the limited competence of the EU, a sizable portion of the CJEU's jurisprudence on sexual orientation has focused on the labour market. Yet in recent years, the Luxembourg judges have been increasingly willing to address unequal treatment in a broader range of areas, including blood donation rules, asylum policies and free movement for same-sex couples.

*Case law on employment and occupation*⁹⁷

In a series of cases since 2004, the CJEU has held that individuals who enter registered same-sex partnerships in EU Member States which limit marriage to different-sex couples must have the same access as different-sex spouses to certain employment and occupation benefits, such as survivor pensions granted under occupational pension schemes, so long as national law treats registered partners as being in a comparable situation to different-sex spouses for the purposes of the relevant benefits.⁹⁸

The CJEU has adopted an expansive approach to the question of comparability, confirming that same-sex partners and different-sex spouses need not be in an 'identical' situation and that the absence of comparability for some employment-related benefits is not determinative in relation to others.⁹⁹ In *Hay v Credit agricole mutuel de Charente-Maritime et des Deux-Sevres*, prior to the introduction of same-sex marriage in France, the CJEU held that, despite significant differences between the two institutions, same-sex couples in a civil solidarity pact were comparably situated to different-sex individuals in a marriage for the purposes of marriage-related advantages set out in a collective agreement.

In *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, concerning homophobic statements about the recruitment of football players, the CJEU concluded that, under Articles 2(2) and 10(1) of Directive 2000/78/EC, it is possible to identify sufficient 'facts from which it may be presumed that there has been... discrimination' by a football club if discriminatory statements are made by a person who, although not able to bind or represent the club in recruitment, presents themselves as having a leading role within the football club and is perceived by the media and the public as such.¹⁰⁰ In the subsequent judgment, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*, where an individual stated on the radio that he would neither hire gay or lesbian persons in his company nor use their services, the CJEU similarly ruled that such statements were covered by the prohibition on sexual orientation discrimination in Article 3(1)(a) of Directive 2000/78/EC.¹⁰¹ This was so even if no recruitment

96 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Recital 30 to the preamble.

97 See also: *Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills* where the CJEU stated that, under Articles 2 and 6(2) of Directive 2000/78/EC, national rules for occupational benefit schemes were 'not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where' those rules did 'not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation', Judgment of 24 November 2016, *Parris*, C-443/15, EU:C:2016:897, Paragraph 82.

98 Judgment of 1 April 2008, *Maruko*, C267/06, EU:C:2008:179; Judgment of 10 May 2011, *Römer*, C147/08, EU:C:2011:286.

99 Judgment of 12 December 2013, *Hay*, C267/12, EU:C:2013:823, Paragraphs 33 and 38.

100 Judgment of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C81/12, EU:C:2013:275, Paragraph 53.

101 Judgment of 23 April 2020, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*, C507/18, EU:C:2020:289, Paragraph 58.

procedure had been opened, nor was planned, so long as ‘the link between the statements and the conditions for access to employment or occupation [was] not hypothetical’.¹⁰²

Cases on blood donation, asylum and free movement for same-sex spouses

The case of *Léger* addressed the sensitive topic of blood donation restrictions for men who have sex with men (MSM) (see Section 4.2.2). The CJEU found that, under the applicable secondary EU legislation, it is permissible for Member States to permanently defer donations from MSM where, ‘on the basis of current medical, scientific and epidemiological knowledge and data’,¹⁰³ there is sufficient evidence that male same-sex sexual intercourse puts ‘persons at a high risk of acquiring severe infectious diseases’.¹⁰⁴ However, permanent restrictions on providing blood ‘may discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1) of the Charter’.¹⁰⁵ As such, the CJEU requires national courts, ‘with due regard to the principle of proportionality’,¹⁰⁶ to determine whether there are alternative, effective methods, beyond absolute restrictions, for ensuring a ‘high level of health protection of the recipients’.¹⁰⁷

In the sphere of asylum, the CJEU has observed that, although under EU law¹⁰⁸ the existence of national rules criminalising same-sex sexual acts does not, by itself, constitute persecution,¹⁰⁹ imposing terms of imprisonment for such conduct is ‘an act of persecution’.¹¹⁰ According to the CJEU, it is not reasonable for Member States, in assessing applications for asylum on the ground of sexual orientation, to expect that those individuals, ‘in order to avoid persecution’,¹¹¹ will hide or cover their sexual orientation in their jurisdiction of origin.¹¹² Furthermore, national authorities cannot determine the credibility of applicants for asylum by reliance on ‘stereotyped’ assumptions regarding sexual orientation,¹¹³ invasive questions about ‘sexual practices’,¹¹⁴ sexually explicit supporting evidence,¹¹⁵ the results of ‘projective personality tests’¹¹⁶ or the sole fact that an ‘applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution’.¹¹⁷

Finally, in the recent *Coman* judgment, the CJEU held that, where a citizen of a Member State, having genuinely taken up residence in another EU country in accordance with Article 7(1) of Directive 2004/38/

102 Judgment of 23 April 2020, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*, C507/18, EU:C:2020:289, Paragraph 58.

103 Judgment of 29 April 2015, *Léger*, C528/13, EU:C:2015:288, Paragraph 69.

104 Judgment of the 29 April 2015, *Léger*, C528/13, EU:C:2015:288, Paragraph 69.

105 Judgment of 29 April 2015, *Léger*, C528/13, EU:C:2015:288, Paragraph 50.

106 Judgment of 29 April 2015, *Léger*, C528/13, EU:C:2015:288, Paragraph 69.

107 Judgment of 29 April 2015, *Léger*, C528/13, EU:C:2015:288, Paragraph 69.

108 The relevant legislation at the time was Article 9(1), read with Article 9(2)(c), of 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. As noted, this has now been recast through Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

109 Judgment of 7 November 2013, *Minister voor Immigratie en Asiel v X, Y and Z*, C199/12 to C201/12, EU:C:2013:720, Paragraph 61.

110 Judgment of 7 November 2013, *Minister voor Immigratie en Asiel v X, Y and Z*, C199/12 to C201/12, EU:C:2013:720, Paragraph 61.

111 Judgment of 7 November 2013, *Minister voor Immigratie en Asiel v X, Y and Z*, C199/12 to C201/12, EU:C:2013:720, Paragraph 71.

112 Judgment of 7 November 2013, *Minister voor Immigratie en Asiel v X, Y and Z*, C199/12 to C201/12, EU:C:2013:720, Paragraph 76.

113 Judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C148/13 to C150/13, EU:C:2014:2406, Paragraph 72. See Article 4(3)(c) of Directive 2004/83/EC and Article 13(3)(a) of Directive 2005/85/EC.

114 Judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C148/13 to C150/13, EU:C:2014:2406. See Article 4 of Directive 2004/83/EC read in the light of Article 7 of the Charter of Fundamental Rights of the European Union.

115 Judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C148/13 to C150/13, EU:C:2014:2406. See Article 4 of Directive 2004/83/EC read in the light of Article 1 of the Charter of Fundamental Rights of the European Union.

116 Judgment of 25 January 2018, *F v Bevandorlasi es Allampolgarsagi Hivatal*, C473/16, EU:C:2018:36, Paragraph 71.

117 Judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C148/13 to C150/13, EU:C:2014:2406, Paragraph 72. See Article 4(3) of Directive 2004/83/EC and Article 13(3)(a) of Directive 2005/85/EC.

EC,¹¹⁸ marries a third-country national of the same sex in that other EU jurisdiction, Article 21(1) TFEU prohibits the Member State of origin from withholding a right of residence from the third-country national merely because domestic law does not recognise same-sex marriages.¹¹⁹ Directive 2004/38/EC was a landmark piece of EU secondary legislation as it explicitly included, within the concept of ‘family member’, those partners ‘with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage’.¹²⁰

2.3 Conclusion

Section 2 has offered a brief overview of regional protections against sexual orientation discrimination in Europe. It reveals that, over the past two decades, supranational courts and policy makers have become increasingly aware of the unequal treatment which individuals in all parts of the European continent continue to experience due to their sexual orientation.

Within the Council of Europe, the case law of the European Court of Human Rights is perhaps the most high-profile example of a regional body identifying and condemning discriminatory policies motivated by sexual orientation. From family reunifications to survivor tenancies and from discriminatory detention rules to online harassment, the existing jurisprudence of the ECtHR covers a broad spectrum of topics impacting life in Europe, including family law, criminal justice, immigration, free expression and the right to publicly assemble. It is reinforced through important interventions from other key CoE institutions, including the Committee of Ministers, which have called upon regional bodies and Member States to adopt concrete and effective measures to tackle homophobia. Although significant challenges, both legal and social, remain across the 47 Member States, and while political sensitivities may curtail immediate action on sensitive issues, such as same-sex marriage, the Council of Europe remains a crucial voice for sexual orientation equality, continually pushing for more robust and effective guarantees against unequal treatment.

Within the European Union rights system, given the limited competence, there have been naturally fewer, but still significant, steps towards promoting sexual orientation non-discrimination. Since the Treaty of Amsterdam, especially in the field of employment and occupation, the Council of the European Union has established notable legal safeguards against sexuality motivated bias. In addition, for a growing number of spheres, the Union legislature is creating measures to ensure and promote sexual orientation equality – encouraging EU and domestic authorities to explicitly consider sexuality when undertaking key actions and decisions. Such greater awareness and visibility for sexual orientation in secondary EU legislation and soft law is mirrored in the recent case law of the Court of Justice of the European Union, an institution which, since 2004, has published a series of landmark judgments affirming core protections for gay, lesbian and bisexual populations in the 27 Member States. Yet, as Section 2 also illustrates, despite increased Union-level policies, the actual fields in which EU prohibitions on sexual orientation discrimination apply are still comparatively few in number. Moving forward, as the European Commission launches a new ‘LGBTI+ Equality Strategy’,¹²¹ further legislative protections and safeguards must be among the key priorities.

118 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

119 Judgment of 5 June 2018, *Coman*, C673/16, EU:C:2018:385, Paragraph 51.

120 See Article 2(2)(b) of Directive 2004/38/EC.

121 See the ‘Roadmap’ document for context regarding the new Lesbian, Gay, Bisexual, Transgender and Intersex+ Equality Strategy, European Commission website, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12410-LGBTI-equality>. The ‘Roadmap’ document does include ‘improving legal protection’ among the ‘possible types of actions’; see Part B: ‘What does the Initiative Aim to Achieve and How’.

3 Definition of sexual orientation

3.1 Statutory definition of sexual orientation

Throughout the 27 Member States and the United Kingdom, few jurisdictions have established a statutory definition of 'sexual orientation'. There is evidence that, across the European Union, national legislatures and judiciaries consider that sexual orientation has a common meaning and that it does not require specific elaboration.¹²²

At present, only five countries – **Bulgaria, Ireland, Malta, Sweden** and the **UK** – offer a specific explanation for that term in their laws. In **Bulgaria**, Section 1(10) of the Protection Against Discrimination Act (PADA), Additional Provision, defines sexual orientation as 'heterosexual, homosexual or bisexual orientation'. Section 1(10) PADA refers to personal orientation, rather than identifying particular categories of individuals who benefit from protection. A similar understanding of 'sexual orientation' operates under Irish and Swedish law. In **Ireland**, Section 2(1) of the Equal Status Acts 2000-2018 defines the term to include 'heterosexual, homosexual or bisexual orientation' and in **Sweden** – according to Chapter 1, Section 5 of the Discrimination Act (2008:567) – sexual orientation means 'homosexual, bisexual or heterosexual orientation'.

In the **United Kingdom**, due to internal constitutional structures, different legal instruments regulate the meaning of sexual orientation in Great Britain¹²³ and in Northern Ireland. However, the applicable definition in both instances has many commonalities. For **England and Wales**, and for **Scotland**, Section 12(1) of the Equality Act 2010 provides that sexual orientation 'means *a person's sexual orientation* towards – (a) persons of the same sex, (b) persons of the opposite sex, or (c) *persons of either sex*' [emphasis added]. In **Northern Ireland**, Regulation 2 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 similarly defines sexual orientation as '*a sexual orientation* towards – (a) persons of the same sex; (b) persons of the opposite sex; (c) *persons of the same sex and of the opposite sex*' [emphasis added]. Such definitions illustrate how the law in the United Kingdom, in common with most of the 27 EU Member States, remains firmly grounded in a binary understanding of legal sex.¹²⁴

In **Finland** and **Germany**, neither the General Act on Equal Treatment (AGG) nor the Non-Discrimination Act provide a statutory definition of sexual orientation. However, the explanatory report to the German AGG states that 'sexual identity' (see below) includes homosexual, bisexual, trans and intersex individuals. In Finland, although the Government's proposal for the Non-Discrimination Act does not define sexual orientation in the section where all other grounds of discrimination are explained, the proposal does define that term – as including homosexual, heterosexual and bisexual orientation – in an analysis of the situation of trans and intersex populations.

122 This appears to be the position in, *inter alia*, Romania, Portugal, Croatia and Austria.

123 Great Britain comprises of two separate legal jurisdictions: England and Wales, and Scotland.

124 See Dunne, P. and Van den Brink, M. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, pp. 66-67. Publications Office of the European Union. https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=638586. However, see also: Dunne, P. and Mulder, J. (2018). 'Beyond the binary: Towards a "third" sex category in Germany?' *German Law Journal*, Vol 19, issue 3, pp. 627- 648; Dunne, P. and Clark, S. (2019) *Comparative legal review of gender recognition laws across the Commonwealth*, p. 40, Equality and Justice Alliance. https://www.sistersforchange.org.uk/wp-content/uploads/2019/11/720_SistersForChange_EJA_ComparativeLegalReview-GenderRecognitionLaws_CW_Nov2019.pdf; Gossli, S. L. and Volzmann, B. (2019), 'Legal gender beyond the binary', *International Journal of Law, Policy and the Family*, Vol. 33, issue 3, pp. 403-429.

Table 1 Member States with a statutory definition of sexual orientation

Country	Yes	No
Austria		X
Belgium		X
Bulgaria	X	
Croatia		X
Cyprus		X
Czechia		X
Denmark		X
Estonia		X
Finland		X ¹²⁵
France		X
Germany		X ¹²⁶
Greece		X
Hungary		X
Ireland	X	
Italy		X
Latvia		X
Lithuania		X
Luxembourg		X
Malta	X	
Netherlands		X
Poland		X
Portugal		X
Romania		X
Slovakia		X
Slovenia		X
Spain		X
Sweden	X	
United Kingdom	X	

3.2 Judicial explanations of the meaning and nature of sexual orientation

In a small number of EU jurisdictions, despite the absence of a statutory definition, domestic courts have offered guidance both on the meaning and the nature of sexual orientation. In relation to the former, the Three-Member Court of Misdemeanours of Aigio (**Greece**), during a recent appeal concerning homophobic hate speech, interpreted sexual orientation to include heterosexual, homosexual and bisexual people.¹²⁷ In **France**, the Court of Cassation, Criminal Chamber, has ruled that 'homosexuality' is a sexual orientation¹²⁸ and, in **Denmark**, a court has similarly observed that sexual orientation encompasses homosexual people (i.e. lesbian and gay individuals).¹²⁹ On the other hand, in the **Netherlands**, the Court of Appeal

¹²⁵ In Finland, although the Government's proposal for the Non-Discrimination Act does not define sexual orientation in the section where all other grounds of discrimination are explained, the Proposal does define the term – as including homosexual, heterosexual and bisexual orientation – in an analysis of the situation of trans and intersex populations.

¹²⁶ In Germany, the explanatory report to the General Act on Equal Treatment states that 'sexual identity' includes homosexual, bisexual, trans and intersex individuals.

¹²⁷ Greece, Three-Member Court of Misdemeanours of Aigio, Decisions Nos. 47 & 49/2019, 28 January 2019.

¹²⁸ France, Court of cassation, Criminal Chamber, No. 16-85637, 28 November 2017.

¹²⁹ Denmark, Decision No. UfR 2008.1353 V.

of Leeuwarden has had to clarify that ‘hetero- or homosexual orientation’, the applicable terminology in that jurisdiction (see below), does not cover trans individuals.¹³⁰

As regards the nature of sexual orientation,¹³¹ the Constitutional Court in **Czechia** has observed, in a case relating to same-sex parents, that sexual orientation is both innate and unchangeable.¹³² As such, it cannot be a pretext for discrimination.¹³³ In **Italy**, the Administrative Regional Tribunal of Catania, during an appeal brought by an individual deemed to have ‘sexual identity disorders’, stated clearly that sexual orientation is neither a disorder nor an illness.¹³⁴ In **Lithuania**, the Supreme Court¹³⁵ has drawn heavily upon the jurisprudence of the European Court of Human Rights – confirming that sexual orientation discrimination is as serious as racial or ethnic inequalities, differences based on sexual orientation require particularly convincing and weighty reasons and that differences based solely on sexual orientation are unacceptable.

3.3 National human rights bodies, ombudspersons and non-discrimination strategies

In addition to judicial intervention, the meaning of sexual orientation has also been elaborated upon by national human rights bodies, ombudspersons and through anti-discrimination strategies – although such definitions have limited scope and significance within the national legal context. In **Czechia**, the Office of the Ombudsperson defines sexual orientation as the ‘permanent focus of emotional and sexual attraction to men, women, or both sexes’.¹³⁶ The **French** Equality Body describes the term as referring to ‘sexual attraction and/or affection towards persons of the opposite sex (heterosexuality), of the same sex (homosexuality) or either one or the other sex (bisexuality)’.¹³⁷ In addition, in the **Netherlands**, the Netherlands Institute for Human Rights (NIHR) includes bisexual people within the concept of ‘hetero- or homosexual orientation’ (although it explicitly excludes paedophilia from the scope of protection).¹³⁸

In **Italy**, a definition of sexual orientation is set out in the strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity, which was developed to implement Recommendation CM/Rec (2010)5.¹³⁹ The glossary of terms included within the strategy describes sexual orientation as ‘the direction of affective and sexual attraction towards other people: it can be heterosexual, homosexual or bisexual’. Similarly, in **Belgium**, the 2013 Inter-Federal Plan to Fight against Homophobic and Transphobic Violence defined sexual orientation ‘on the basis of the gender of the individuals for whom an individual has both physical and emotional attraction and affection’.¹⁴⁰

130 Netherlands, Court of Appeal of Leeuwarden, ECLI:NL:GHLEE:1995:AC2855, 13 January 1995.

131 In some instances, Member States’ courts have rejected the notion that allegedly discriminatory actions are motivated by considerations of sexual orientation. For example, in 2018, the Supreme Administrative Court of Bulgaria held that a denial of the services of a notary public based on domestic legislation not recognising same-sex marriage ‘was not linked in any way to the complainant’s sexual orientation’. See Supreme Administrative Court of Bulgaria, Decision No. 12113, Case No. 5381/2017, 10 October 2018.

132 Czechia, Constitutional Court, Pl. ÚS 7/15, 14 June 2016.

133 Czechia, Constitutional Court, Pl. ÚS 7/15, 14 June 2016.

134 Italy, Regional Administrative Tribunal of Catania, No. 2353, 28 October 2005.

135 Lithuania, Supreme Court, *N.M. v Lietuvos edukologijos universitetas*, civil Case No. e3K-3-497-611/2016, 6 December 2016.

136 Office of the Ombudsperson (2019). *Byť LGBT+ v Česku* (To be LGBT+ in the Czech Republic). https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum-LGBT.pdf.

137 Défenseur des droits. (2017). *Guide Agir contre les discriminations liées à l'orientation sexuelle et à l'identité de genre dans l'emploi* (Guide for action against discrimination based on sexual orientation and gender identity in employment). <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/guide-num-lgbt-06.05.19.pdf>.

138 See: Netherlands Institute for Human Rights, Opinion 2019-116.

139 See: *National LGBT Strategy 2013-2015* (Strategia nazionale per la prevenzione ed il contrasto della discriminazione basata sull'orientamento sessuale e l'identità di genere), available at: http://www.unar.it/wp-content/uploads/2017/12/LGBT-strategia-unar-17_24.pdf.

140 Institute for Equality between Women and Men (2013) *Inter-federal plan to fight against homophobic and transphobic violence*, available at: https://igvm-iefh.belgium.be/fr/avis_et_recommandations/plan_daction_interfederal_de_lutte_contre_les_discriminations_homophobes_et.

3.4 Alternative terminology

As noted above, in at least three Member States, national law uses terminology other than ‘sexual orientation’ to confer the relevant protections. In **Cyprus**, the applicable ground is ‘genetic orientation’. In the **Netherlands**, equality law and the criminal law refer to ‘hetero- or homosexual orientation’.¹⁴¹ In **Germany**, the AGG and other laws speak of ‘sexual identity’.¹⁴²

The use of such alternative categories can impact both the meaning and the scope of domestic protections. In **Cyprus**, the concept of ‘genetic orientation’ arguably encompasses inequalities arising from both sexual orientation *and* gender identity. Indeed, the Cypriot Equality Body, while acknowledging the need for intersex-specific frameworks, has occasionally addressed intersex under the wider mandate to address genetic orientation. Similarly, in **Germany**, the explanatory report to the AGG includes homosexual, bisexual, trans and intersex populations within the concept of ‘sexual identity’. However, academic commentary on German law regards trans identities as a matter of gender, rather than sexual identity.¹⁴³ The Federal Constitutional Court of Germany considers both characteristics as (distinct) aspects of autonomous personality.¹⁴⁴

3.5 Yogyakarta Principles

In recent years, there is evidence – across legislation, courts and equality bodies – that Member States are being influenced by the Yogyakarta Principles (Principles) in their approach to sexual orientation protections.¹⁴⁵ In **Malta**, Article 2 of the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016 (2016 Act) adopts the precise definition of sexual orientation as set out in the Introduction to the Principles: ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than one gender’. The 2016 Act is not specifically directed towards discrimination but seeks to ‘affirm that all persons have a sexual orientation, a gender identity and a gender expression, and that no particular combination of these three characteristics constitutes a disorder, disease, illness, deficiency, disability and, or shortcoming’.¹⁴⁶ Similarly, in **Luxembourg** and **Slovenia**, the Centre for Equal Treatment and the Constitutional Court of the Republic of Slovenia¹⁴⁷ have both invoked the definition set out in the Principles, with the former also observing that ‘the concept of sexual orientation takes in heterosexuality, homosexuality, bisexuality, pansexuality and asexuality’.¹⁴⁸

3.6 Conclusion

Moving forward, there may be merit for the European Union to consider a uniform definition of ‘sexual orientation’ in future EU equality legislation. Although experiences of sexuality are deeply personal, and difficult to capture in rigid or static explanations, there is also the risk that the absence of a standard definition across the 27 Member States is resulting in weaker or incomplete protections. In particular, where sexual orientation is understood through the lens of what is supposed to be ‘common knowledge’,

141 See Article 1(b) of the General Equal Treatment Act (*Algemene wet gelijke behandeling*) and Article 429 quater (1) of the Criminal Code (*Wetboek van Strafrecht*).

142 See e.g. Article 10(2) of the Constitution of Berlin (*Verfassung von Berlin, VerfBE*), 23 November 1995.

143 See e.g. Mahlmann, M. (2007), in: Rudolf, B. and Mahlmann, M. (eds.), *Gleichbehandlungsrecht: Handbuch* (Equality law: handbook), Baden-Baden, Nomos Verlag, §3 para. 63 with further references to corresponding jurisprudence from the Court of Justice of the European Union (CJEU).

144 See e.g. Federal Constitutional Court of Germany, 1 BvL 3/03 (6 December 2005), [48]; Federal Constitutional Court of Germany, 1 BvR 2019/16 (8 November 2017), [38ff].

145 A 2007 soft-law document, authored by 29 distinguished human rights experts, which apply international human rights to sexual orientation and gender identity; see ‘About the Yogyakarta Principles’, Yogyakarta Principles website, no publication date available, <http://www.yogyakartapinciples.org/principles-en/about-the-yogyakarta-principles/>.

146 Malta, Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016 (see Title).

147 Slovenia, Constitutional Court, Decision No. U-I-212/10-16, 29 March 2013.

148 Luxembourg, Centre for Equality Treatment, ‘What is sexual orientation’, <http://cet.lu/en/faq/>.

national safeguards against discrimination may provide only narrow guarantees, excluding those with less socially intelligible experiences of sexuality. Evidence from EU asylum law illustrates the potential hazards in relying upon assumptions and stereotypes about homosexuality to guarantee rights on the basis of sexual orientation.¹⁴⁹ A uniform definition, based on the expansive model set out in the Principles, would encourage a broad and inclusive understanding of sexual orientation, maximising the scope and reach of EU equality law protections.

¹⁴⁹ Judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C148/13 to C150/13, EU:C:2014:2406, Paragraphs 59-63.

4 Social protection

Section 4 explores the extent to which national laws in the 27 EU Member States and the United Kingdom offer protections against sexual orientation discrimination in the sphere of social protection. In particular, Section 4 addresses domestic laws relating to healthcare (4.1) and social security (4.2)

4.1 Healthcare

4.1.1 Existence of prohibitions on sexual orientation discrimination in healthcare

At present, national laws in 17 EU Member States and the United Kingdom prohibit discrimination on the basis of sexual orientation in healthcare. Such protections are achieved through a mixture of explicit statutory and executive rules, as well as through judicial interpretations of general equality guarantees.

Explicit protections

In **Slovakia**, the Anti-Discrimination Act (ADA) establishes the relevant prohibition on sexual orientation discrimination in this field.¹⁵⁰ Section 11(2)–(6) of the Slovak Healthcare Act also contains a general equal treatment clause¹⁵¹ and, according to national health insurance rules, policyholders can exercise their rights in accordance with the principle of equality in healthcare as regulated under the ADA.¹⁵² In **Slovenia**, Article 2, Paragraph 1 (Indent 5), of the Protection Against Discrimination Act (PADA) extends the scope of that legislation to healthcare, while Article 1, Paragraph 1, brings sexual orientation within the protected grounds.¹⁵³ In **Croatia**,¹⁵⁴ the Anti-Discrimination Act prohibits unequal treatment due to sexual orientation in all spheres of life, but also refers to ten areas requiring specific attention, including healthcare.¹⁵⁵

In **Sweden**, Chapter 2, Section 13 of the Discrimination Act affirms that '[d]iscrimination is prohibited' in relation to 'health and medical care and other medical services'. Similar guarantees exist in, amongst

150 Slovakia, Section 2, Paragraph (1), read in conjunction with Sections 3(1) and 5(1)(2)(a)(b), of the Anti-Discrimination Act.

151 Slovakia, Act No. 576/2004 on Healthcare, Services Related to the Provision of Healthcare and on amending and supplementing certain acts, as amended (Zákon č. Act No. 576/2004 Z. z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov).

152 Slovakia, Section 29 of Act No. 580/2004 on Health Insurance and on amendment and supplementation of Act No 95/2002 on Insurance and on amending and supplementing certain laws, as amended (Zákon č. 580/2004 Z. z. o zdravotnom poistení a o zmene a doplnení zákona č. 95/2002 Z. z. o poisťovníctve a o zmene a doplnení niektorých zákonov v znení neskorších predpisov).

153 Slovenian law must be read in the light of Article 14 of the national Constitution, which has been interpreted to cover sexual orientation and which sets out a general protection against discrimination. See: Constitutional Court of the Republic of Slovenia, U-I-425/06, 2 July 2009.

154 The Same-Sex Life Partnership Act also prohibits discrimination against sexual orientation, ensuring that in areas such as social protection (including healthcare and social security) registered same-sex life partners are treated equally to different-sex spouses (Articles 61, 64 and 68 of the Same-sex Life Partnership Act, 15 July 2014). For social protection, the guarantee against unequal treatment in the Same-Sex Life Partnership Act arises from the general prohibition on discrimination which is not limited to specific areas (Article 6(3) of the Same-sex Life Partnership Act, 15 July 2014). The Same-Sex Life Partnership Act explicitly mentions discrimination in the area of healthcare in relation to the possibility of protection of health interests of a life partner. As such, unfavourable treatment in the exercise of such interests (e.g. preventing a life partner from making decisions for a life partner who lacks capacity), due to there being two people of the same sex in the life partnership, is unlawful sexual orientation discrimination (Article 67 of the Same-sex Life Partnership Act, 15 July 2014). According to the Same-Sex Life Partnership Act, the position of life partners within the social welfare system can be amended by separate legislation on social welfare, with regard to the prohibition of less favourable treatment against life partnerships than that provided to marital relationships in relation to obligations, rights and services connected to the social welfare system (Article 65 of the Same-sex Life Partnership Act, 15 July 2014).

155 Croatia, Article 8(4) of the Anti-discrimination Act, 9 July 2008, Official Gazette 85/2008, 112/2012.

other Member States,¹⁵⁶ **Czechia**,¹⁵⁷ **France**,¹⁵⁸ **Germany**,¹⁵⁹ **Luxembourg**¹⁶⁰ and **Romania**.¹⁶¹ Article L 1110-3 of the French Code of Public Health recognises a general right to equality in accessing healthcare, although it does not enumerate specific protected grounds. In **Belgium**, according to federal law,¹⁶² competence in the area of healthcare largely belongs to the Communities, which have duly enacted the necessary legislation to outlaw sexual orientation discrimination.¹⁶³ By contrast, in **Austria**, regional protections for the public provision of healthcare and social security have emerged¹⁶⁴ in a context where the federal legislature is competent to enact non-discrimination guarantees but has so far declined to extend safeguards for sexual orientation.¹⁶⁵ This has particular relevance in the sphere of contracts between private actors, which remain exclusively governed by federal law.

General and catch-all equality guarantees

In some Member States, the relevant prohibitions are part of broader, highly-inclusive equality guarantees, or they have been achieved through general equality protections within the field of healthcare. In **Bulgaria**, for example, the Protection Against Discrimination Act prohibits all forms of discrimination for all protected grounds in all spheres.¹⁶⁶ The **Finnish** Non-discrimination Act protects against sexual orientation discrimination in all public and private activities (excluding private life, family life and the practice of religion) – with healthcare clearly coming within the scope of that legislation.¹⁶⁷ In **Portugal**, Basis 2(1)(a) of the Basic Law on Healthcare affirms that patients are entitled to the protection of their health in accordance with the principles of equality, non-discrimination, confidentiality and privacy.¹⁶⁸ Basis 4(2)(d) further acknowledges that equality and non-discrimination are foundations of health policy in Portugal.¹⁶⁹

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- 156 In Hungary, for example, see Articles 7, 8, 9, 10 and 25 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003.
- 157 Czechia, Section 2(3), together with Section 1(1)(h), of Act No. 198/2009 Coll. of 23 April 2009.
- 158 France, Articles 1 and 2(3) of Law No. 2008-496 of 27 May 2008.
- 159 Germany, Section 2.1.5 and Section 19 of the General Act on Equal Treatment (private contracts), as well as Article 3.1. of the Basic Law (GG).
- 160 Luxembourg, Article 2(1)(e) the Law of 28 November 2006.
- 161 Romania, Article 3 letter c) and Article 10 letter b) of Government Ordinance 137/2000 of 31 August 2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*).
- 162 Belgium, Article 5, para. 1, I, 1°, and II, 2°, of the Special Federal Act of 8 August 1980.
- 163 See: Belgium, Article 20, 4°, Article 16, para. 3 and Article 16, para. 1 of the Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008 (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*); Article 4, 3°, Article 3, 1°, Article 5, al. 2, 1° and Article 5, al. 2, 2° of the Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*); Article 4, 5°, Article 3, 1°, Article 5, al. 1, 1° and Article 5, al. 1, 2° of the Decree of 19 March 2012 to combat certain forms of discrimination (*Dekret zur Bekämpfung bestimmter Formen von Diskriminierung*); Article 4, para. 1, 5°, Article 5, 2° and Article 9, para. 2 of the Decree of 9 July 2010 on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Décret relatif à la lutte contre certaines formes de discrimination et à la mise en oeuvre du principe de l'égalité de traitement*).
- 164 See: Austria, Viennese Anti-Discrimination Act, Wr LGBl No. 35/2004 (Section 1); Burgenlandian Anti-Discrimination Act, Bgl LGBl No. 84/2005 (Section 23); Carinthian Anti-Discrimination Act, Kntn LGBl No. 63/2004 (Section 12); Lower Austrian Anti-Discrimination Act, NÖ LGBl No. 24/2017 (Section 3); Upper Austrian Anti-Discrimination Act, OÖ LGBl No. 50/2005 (Section 2); Salzburgian Equal Treatment Act, Slzb LGBl No. 31/2006 (Section 28); Styrian Equal Treatment Act, Stmk LGBl No. 66/2004 (Section 32); Tyrolian Anti-Discrimination Act, T LGBl No. 25/2005 (Section 3); Vorarlbergian Anti-Discrimination Act, Vrbg LGBl No. 17/2005 Section §1). These provincial statutes also apply to social advantages (Section 4), education (Section 5) and access to and the supply of goods and services (Section 6).
- 165 In Austria, the federal Equal Treatment Act prohibits discrimination in social protection, including in healthcare and social security, on the ground of ethnic affiliation Section 31(3)). In recent years, there have been calls to level up Austrian federal non-discrimination protections to include sexual orientation. So far, the federal parliament has declined to enact safeguards in this sphere.
- 166 Bulgaria, Article 4 (1) and Article 6 (1) of the Protection Against Discrimination Act.
- 167 Finland, Section 2 (scope of application) and Section 8 (scope of discrimination) of the Non-Discrimination Act (*Yhdenvertaisuuslaki*), 1325/2014.
- 168 Portugal, Law 95/2019, Basis Law on Healthcare (*aprova a Lei de Bases da Saúde*), Diário da República Série I, No. 169.
- 169 See also: National Strategy for Equality and Non-Discrimination – Portugal + Equal (2018 – 2030) which provides for the development of guidelines and technical standards in the field of LGBTI health.

Services and public functions

In **Ireland**, the **Netherlands** and the **United Kingdom**, protections have emerged from expanded definitions of the concept of ‘services’ and ‘public functions’. Section 5 (material scope) and Section 3(2) (d) (personal scope) of the **Irish** Equal Status Acts 2000–2018 (ESA) prohibit direct discrimination due to sexual orientation in the field of healthcare. Under Section 5(1) ESA, which is addressed in more detail in Section 7 of this report, ‘[a] person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service’. The former Equality Tribunal (now the Workplace Relations Commission) has interpreted ‘services’ under the ESA to include healthcare.¹⁷⁰ Similarly, in the **Netherlands**, Article 7(1) of the General Equal Treatment Act protects against discrimination on the basis of sexual orientation with regard to access to and the supply of goods and services, including healthcare.¹⁷¹ In **England** and **Wales**, and in **Scotland**, prohibitions in this field are achieved through the ‘services and public functions’ protection enshrined in Section 29 of the Equality Act 2010, while Regulations 5 and 12 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 also prohibit discrimination on the ground of sexual orientation in the performance of public functions, including healthcare (**Northern Ireland**).

Finally, in **Spain**, the prohibition of sexual orientation discrimination in healthcare, and in other areas covered by this report, is set out in a broad range of legislative, constitutional and judicial sources.¹⁷² Under Article 3 of the General Health Law,¹⁷³ ‘[p]ublic healthcare will be extended to the entire Spanish population. Access and health benefits will be carried out under conditions of *effective equality*’ [emphasis added]. Article 3 must be read in conjunction with Article 14 of the national Constitution,¹⁷⁴ which has been interpreted as protecting against sexual orientation discrimination.¹⁷⁵ The Spanish Constitutional Court often invokes Article 14 where ordinary laws do not clearly prohibit discrimination¹⁷⁶ or where legal norms may result in potential discrimination.¹⁷⁷ Taken together, Article 3 and Article 14 outlaw unequal treatment in healthcare due to sexual orientation.

These statutory and constitutional provisions are reinforced by Articles 27 and 28 of Law 62/2003 of 30 December 2003,¹⁷⁸ which create a general protection in all fields against discrimination ‘both in the

170 Complaints have been referred against various healthcare providers such as hospitals, doctors and dentists (none are on the sexual orientation ground, however). See e.g. *Equality Tribunal, A Patient v The Mater Misericordiae University Hospital*, DEC-S2009-057, 25 August 2009; *Equality Tribunal, Mr A v A Dental Practice*, DEC-S2014-006, 18 June 2014; *A Potential Patient v A Medical Centre*, ADJ-00019028, 19 June 2019. As Section 2(1) ESA does not set out an exhaustive definition of the meaning of ‘service’, it was possible for the Equality Tribunal to interpret the term as including healthcare.

171 See also: Netherlands, Article 429 quater (1) of the Criminal Code which makes it a criminal offence to discriminate on the basis of sexual orientation in the exercise of one’s office, job or enterprise. The term ‘office’ was added in 1991 to include discrimination by public servants (Staatsblad 1991, 623). The provision must therefore be understood to cover discrimination by healthcare professionals and healthcare organisations, as well as public servants working in the field of healthcare.

172 See e.g. Spain, Article 6 of Law 14/2006 on Assisted Human Reproduction Techniques (*Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida*), BOE, 27 May 2006, which expressly prohibits discrimination based on sexual orientation.

173 Spain, *Ley 14/1986, de 25 de abril, General de Sanidad*, BOE, 29 April 1986.

174 Spain, Constitution (*Constitución Española*), 1978, BOE, 29 December 1978. The doctrine of the Constitutional Court of Spain on the principle of equality and the prohibition of discrimination was summarised in Decision 200/2001, 4 October 2001.

175 Spain, Judgment No. 41/2006, 13 February 2006.

176 Spain, Constitutional Court, Judgment No. 69/1991.

177 Spain, Constitutional Court, Judgment No. 3/2018.

178 Spain, Law 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*), BOE, 31 December 2003.

public sector and in the private sector'.¹⁷⁹ Furthermore, Articles 2,¹⁸⁰ 511¹⁸¹ and 512¹⁸² of the Spanish Criminal Code establish a number of sanctions for individuals who deny persons benefits on the basis of their sexual orientation.

At the regional level, Article 16 of **Catalonian** Law 11/2014 affirms that '[t]he health system of Catalonia must incorporate the gender perspective and must take into account the specific needs of LGBTI people, in order to guarantee them the right to receive healthcare and enjoy health services in objective conditions of equality'.¹⁸³

Table 2 Prohibition on discrimination due to sexual orientation in healthcare

Country	Yes	No
Austria		X
Belgium	X	
Bulgaria	X	
Croatia	X	
Cyprus		X ¹⁸⁴
Czechia	X	
Denmark		X
Estonia		X ¹⁸⁵
Finland	X	
France	X	
Germany	X	
Greece		X
Hungary	X	
Ireland	X	
Italy		X
Latvia		X
Lithuania		X ¹⁸⁶
Luxembourg	X	

179 This law, which transposed (not without certain problems) Directive 2000/43/EC and Directive 2000/78/EC, does not specify the relevant fields of application (it only does so for other articles in the transposition of Directive 2000/43/EC in relation to the protected grounds of race or ethnic origin). As such, it must be understood as a general prohibition of discrimination in all fields.

180 Article 22 of the Spanish Criminal Code identifies 'racism, anti-Semitism or any other kind of discrimination relating to the victim's (...) sexual orientation' as an aggravating factor in relation to the commission of an offence.

181 Article 511 of Criminal Code provides for jail sentences, fines and a disqualification from holding public office where an 'individual in charge of a service open to the general public' withholds a benefit from a person on the basis of sexual orientation. See: Spain, *Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, BOE, 31 March 2015.

182 Article 512 of the Spanish Criminal Code states: 'Those who, in the exercise of their professional or business activities, deny a person a benefit to which they are entitled by virtue of (...) their sexual orientation (...), incur the penalty of special disqualification for the exercise of profession, trade, industry or commerce and special disqualification for educational profession or trade, in the field of teaching, sports and leisure for a period of one to four years' (National Expert's Translation).

183 Law 11/2014 establishes a series of measures to counteract discrimination on the basis of sexual orientation, gender identity or gender expression in healthcare, such as awareness and prevention regarding HIV/AIDS and other sexually transmitted infections, research and development of specific health policies, healthcare relating to trans identities, or access to assisted reproduction.

184 It may be possible to identify relevant protections in healthcare in Article 28 of the Constitution. In addition, unequal treatment on the basis of sexual orientation comes within the mandate of the Equality Body.

185 In Estonia, Article 12(1) of the national Constitution sets out an explicit ban on discrimination on any ground.

186 In Lithuania, the Law on Equal Treatment does not expressly prohibit sexual orientation discrimination in the fields of social protection, including healthcare and social security. However, the Equal Opportunities Ombudsperson has indicated that healthcare does fall within the scope of that legislation – through the prohibition in the area of access to, and supply of, goods and services.

Country	Yes	No
Malta		X ¹⁸⁷
Netherlands	X	
Poland		X
Portugal	X	
Romania	X	
Slovakia	X	
Slovenia	X	
Spain	X	
Sweden	X	
United Kingdom	X	

4.1.2 Alternative sources of prohibitions on sexual orientation discrimination in healthcare

Administrative law

In a number of EU Member States, although national law does not explicitly prohibit sexual orientation discrimination in healthcare, it may be possible to identify implicit or partial protections in other legal norms or policies. In **Denmark**, for example, public authorities, including those who provide public healthcare and social security services, are governed by a general principle of equality, which is applicable under administrative law and has the force of legislation.

Constitutional law

In at least three jurisdictions, specific or general constitutional guarantees may offer relevant safeguards in this field. In **Malta**, Article 45 of the national Constitution outlaws discrimination attributable ‘wholly or mainly’¹⁸⁸ to the characteristics of ‘race, place of origin, political opinions, colour, creed, sex, *sexual orientation* or gender identity’ [emphasis added].¹⁸⁹ Article 45 prohibits such descriptions being used as a pretext for subjecting individuals to ‘disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description’.¹⁹⁰ There is a compelling argument that discriminating against individuals in healthcare, due to their sexual orientation, is incompatible with Article 45 and constitutes a violation of the Maltese Constitution. Such protections are further supported by Protocol 12 of the European Convention on Human Rights¹⁹¹ and the European Convention Act.¹⁹²

In **Cyprus**, Article 28 of the Constitution also sets out a far-reaching equality provision, which prohibits discrimination ‘on any ground whatsoever’ without limiting its scope of application. However, judicial interpretation of Article 28 has been problematic. In **Estonia**, Article 12(1) of the national Constitution

187 Article 45 of the national Constitution outlaws discrimination attributable ‘wholly or mainly’ to the characteristics of ‘race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity’.

188 Malta, Article 45(3) of the Constitution.

189 Malta, Article 45(3) of the Constitution.

190 Malta, Article 45(3) of the Constitution.

191 Signed by Malta on 8 December 2015; ratified by Malta on 8 December 2015; entered into force in Malta on 1 April 2016. See: ‘Chart of Signatures and Ratifications of Treaty 177’, Council of Europe website, 11 July 2020, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures>.

192 See also Malta, Article 15(2) of the Gender Identity, Gender Expression and Sex Characteristics Act 2015, which provides that ‘[t]he pathologisation of any form of sexual orientation, gender identity and / or gender expression as may be classified under the International Classification of Diseases or any other similar internationally recognised classification, shall be null and void in Malta. The nullity of such classification shall not impact negatively the provision of any healthcare service related to sex and, or gender’.

sets out an explicit ban on discrimination on any ground.¹⁹³ According to legal doctrine in that country, this provision is directly applicable in all spheres regulated by the law. In at least one case, the Estonian Supreme Court has ruled that a provision of the Social Tax Act, relating to payment for dependent spouses and automatic access to the public health insurance system, infringed Article 12(1) because it did not extend to same-sex registered partners.¹⁹⁴ This case would also have relevance for the field of social advantages (Section 5).

Alternative legal provisions

It may also be possible to locate protections against sexual orientation discrimination in other domestic statutory provisions which are relevant to healthcare. In **Latvia**, the Law on Social Security,¹⁹⁵ which covers the public¹⁹⁶ provision of social services, including healthcare and social security, prohibits differential treatment based on 'race, colour, gender, age, disability, health condition, religious, political or other conviction, national or social origin, property or family status, or other circumstances'.¹⁹⁷ Although sexual orientation is not explicitly listed among the protected grounds, it potentially comes within the scope of 'other circumstances'.¹⁹⁸ Similarly, the **Polish** Medical Treatment Act provides that, when determining access to medical services, and to waiting lists in particular, such lists should be drawn up according to the principle of just, equal, anti-discriminatory and fair access to medical treatment¹⁹⁹ – although the statute does not identify specific grounds to be protected.

Mandates and practices of national equality bodies and ombudspersons

The mandates and practices of national equality bodies and ombudspersons may be a final source of protection. In **Lithuania**, the Law on Equal Treatment does not expressly prohibit sexual orientation discrimination in the fields of social protection, including healthcare and social security. However, the Equal Opportunities Ombudsperson has previously indicated that healthcare does fall within the scope of that legislation – through the prohibition on access to, and supply of, goods and services.²⁰⁰ Indeed, the Ombudsperson has even analysed complaints of unequal treatment in healthcare due to other protected grounds listed in the Law on Equal Treatment. While there is a need for case law on the matter, the practice of the Ombudsperson suggests that Lithuanian law could be interpreted to protect against sexual orientation discrimination in healthcare.²⁰¹ Similarly, in **Cyprus**, although national legislation does not establish the relevant prohibition, unequal treatment on the basis of sexual orientation does come within the mandate of the Equality Body.²⁰² This has relevance for the fields of social protection, social advantages and access to and the supply of goods and services.

193 Estonia, Constitution (*Eesti Vabariigi põhiseadus*), Riigi Teataja 1992, 26, 349. Riigi Teataja (hereinafter RT) – Official State Gazette.

194 Estonia, Constitutional Review Chamber of the Supreme Court of Estonia, No. 5-19-42, 18 December 2019.

195 Latvia, Law on Social Security, 7 September 1995.

196 Services provided by the private sector (private medical care, for example) are covered by the Consumer Rights Protection Law (Article 3.1) on grounds of race or ethnic origin and disability. See: Latvia, Consumer Rights Protection Law, 18 March 1999.

197 Article 2 of the Law on Social Security refers to the 'prohibition of differential treatment' as one of the principles of the provision of social services (including healthcare). Article 2.1 (1) specifies that, in the provision of social services, differential treatment based on a person's race, colour, gender, age, disability, health condition, religious, political or other conviction, national or social origin, property or family status, or other circumstances is prohibited.

198 There is no current case law on this point.

199 Poland, Article 20(1) of the Act on Medical Treatment Financed from Public Resources (*Ustawa z 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*), Dz.U.2017.1938 t.j..

200 See: Equal Opportunities Ombudsperson (2010), *Annual Report for 2010*.

201 On the other hand, in 2019, the Equal Opportunities Ombudsperson received a complaint regarding sexual orientation discrimination in 'social affairs' – as indicated in the Annual Report for 2019. The report stated that the Ombudsperson could not investigate the complaint as it fell outside the protected grounds in the Law on Equal Treatment (See: Equal Opportunities Ombudsperson. (2020), *Annual Report for 2019*). This suggests that, unlike for healthcare, the Ombudsperson would not be willing to interpret social security as falling within the zone of access to, and supply of, goods and services.

202 Cyprus, Article 6(2)(d) of the Law on combating racial and other forms of discrimination (Commissioner) N. 42(I)/2004.

4.2 Case law

In common with social advantages (Section 5) and education (Section 6), across the EU Member States and United Kingdom there is a notable absence of case law on unequal treatment due to sexual orientation in healthcare. In a broad range of jurisdictions, including **Austria, Belgium, Bulgaria, Croatia, Ireland, Romania, Slovakia** and the **UK**, there are no publicly-recorded instances where courts, ombudspersons or national equality bodies have had the opportunity to apply sexual orientation protections in the field of healthcare.²⁰³

In **Sweden**, a district court – in a judgment which was subsequently affirmed by the appeals court – has held that there was discrimination where a female same-sex couple were advised by their local health clinic to seek specialist care because of the supposedly complicated nature of providing healthcare to lesbian partners.²⁰⁴ Similarly, in **France**, in a complaint lodged by a woman whose female partner was required to leave the room by a gynaecologist before the consultation could take place, the former French Equality Body (HALDE) advised that, where a medical professional establishes conditions for the practice and provision of healthcare services, they must be applied equally to all patients.²⁰⁵ Article 225-1 of the French Penal Code requires that the reason for imposing such conditions should not be related to sexual orientation.²⁰⁶

4.2.1 Access to assisted reproduction services

Access to assisted reproduction services, particularly for female same-sex couples, has given rise to litigation in a number of countries – with adjudicating authorities adopting different conclusions depending upon the nature of the claim and the precise terms of the statute invoked.

In **Spain**, in contravention of Article 6 of Law 14/2006, the Ministry of Health had, in 2014, published an order which reserved publicly-assisted reproduction for people who had been ‘subject to a fertility investigation’²⁰⁷ – thus excluding two women. In a case brought by a married couple, whose treatment at a private clinic receiving public funds was suspended following the Ministerial Decree, Social Court No. 18 found that the clinic had engaged in impermissible discrimination on the basis of sexual orientation.²⁰⁸ The couple were entitled to receive assisted reproductive services under Law 14/2006.²⁰⁹ Similarly, in **Finland**, the Helsinki Administrative Court, in a judgment that is currently under appeal, upheld an earlier decision of the National Non-Discrimination and Equality Tribunal,²¹⁰ which prohibited public healthcare hospitals from discriminating against same-sex female couples by denying access to fertility treatments.²¹¹

There have also been cases where national courts and equality bodies have concluded that withholding assisted reproduction services does not constitute unlawful discrimination. In **France**,²¹² the Council of State recently refused to refer legislation, which denied access to such services to female same-sex couples, to the Constitutional Council for review.²¹³ According to the Council of State, the French

203 There was also no recorded case law in Greece, Denmark, Latvia and Cyprus. However, given that the law in these countries does not explicitly prohibit sexual orientation discrimination in healthcare, it is perhaps less surprising that there would not be case law on the issue.

204 The District Court awarded the couple SEK 15 000. The Appeals Court agreed with the District Court’s conclusions but raised the compensation to SEK 30 000. The Supreme Court rejected the Equality Ombudsman’s further appeal that the compensation was still too low. See: Supreme Court of Sweden, Case No. T5507-12, 26 June 2014 (*HÖGSTA DOMSTOLENS DOM meddelad i Stockholm den 26 juni 2014, Mål nr T5507-12 decision*).

205 France, Haute autorité de lutte contre les discriminations, 2009-207, 18 March 2009.

206 France, Haute autorité de lutte contre les discriminations, 2009-207, 18 March 2009.

207 Spain, Ministerial Decree SSI/2065/2014 of 31 October 2014.

208 Spain, Social Court No. 18, Auto 672/2015, 15 September 2015.

209 Spain, Social Court No. 18, Auto 672/2015, 15 September 2015.

210 Finland, National Non-Discrimination and Equality Tribunal of Finland, decision 80/2015, 9 December 2016.

211 Finland, Helsinki Administrative Court, 6 March 2019.

212 In France, Article L 2141-2 of the Code of Public Health and Article 33 of the Law on Bioethics No. 2011-814 of 7 July 2011 reserve access to assisted reproduction to different-sex couples.

213 France, Conseil d’Etat (Supreme administrative court), No. 421899, 28 September 2018.

Constitution permits different treatment between those who are differently-situated. Having chosen to specifically address the position of different-sex couples who, although of child-bearing age, are experiencing infertility, it was not unconstitutional for the legislature to omit female same-sex couples who were not in a comparable situation.²¹⁴

In the **Netherlands**, a clinic refused to provide services to a female same-sex couple who wished to use donor sperm for the conception of their child. The Netherlands Institute Human Rights (NIHR) found that, although there was indirect discrimination on the basis of sexual orientation, the clinic was justified in refusing the services because it did not have appropriate facilities to store the sperm and check for health concerns as required by Dutch law.²¹⁵ In subsequent opinions, the NIHR similarly found that there had not been unlawful discrimination where two clinics withheld services from a male-same sex couple who wished to have a child through surrogacy.²¹⁶ Under the surrogacy arrangement, one woman would donate her gametes while another woman would gestate the child. The Netherlands Institute for Human Rights observed that, in the case of the first clinic, it only provided the requested services in situations where, irrespective of sexual orientation, a couple could show evidence of medical necessity.²¹⁷ In relation to the second clinic, it only offered services where the couple seeking treatment produced the gametes to be used.²¹⁸ As the NIHR was satisfied that the clinics would have withheld services from similarly situated different-sex couples, it concluded that there was no discrimination under Article 7(1) of the General Equal Treatment Act.²¹⁹

4.2.2 Prohibitions on donating blood

Restrictions on men who have sex with men (MSM) donating blood have also been a source of controversy in a number of member states.²²⁰ In 2017, the **Czech** Ombudsperson concluded that deferring MSM blood donations for 12 months after the most recent sexual intercourse were not discriminatory, but rather were motivated by the current epidemiological understanding and a desire to maintain the integrity of the blood supply.²²¹ However, the Ombudsperson observed that the applicable rules should be guided by scientific knowledge and updated if appropriate.²²² It stressed the need to differentiate between sexual orientation and sexual practice.²²³ In particular, merely having a homosexual sexual orientation should not be equated with risky sexual behaviour justifying a deferral.²²⁴ A similar approach has recently been adopted in two opinions by the NIHR in the **Netherlands**²²⁵ – relying upon evidence of comparatively higher transmission rates among the MSM population,²²⁶ even where the applicant was in a monogamous relationship.²²⁷ For the NIHR, a key factor was evidence that blood authorities had not yet identified sufficiently reliable and safe procedures for collecting blood donations in a less differentiating and stigmatising manner.²²⁸

214 France, Conseil d'Etat (Supreme administrative court), No. 421899, 28 September 2018.

215 Netherlands Institute for Human Rights, Opinion 2009-31. However, in the same case, the NIHR did find that the clinic had discriminated against the couple to the extent that it had provided services to a different-sex couple who also used donor sperm.

216 Netherlands Institute for Human Rights, Opinions 2015-6 and 2015-7.

217 Netherlands Institute for Human Rights, Opinion 2015-6.

218 Netherlands Institute for Human Rights, Opinion 2015-7.

219 There is an argument that, in Opinion 2015-7, the requirement that the couple seeking treatment produce both gametes indirectly discriminates against same-sex couples who, in most cases, will not be capable of producing sperm and ova for conception. Thus, such a requirement would have a disproportionate impact upon same-sex couples.

220 In Finland, for example, the national expert identifies controversy surrounding the restriction, which national policies place on blood donations from men who have sex with men who are in stable same-sex relationships, as compared with different-sex couples who are not subject to similar restrictions.

221 Czechia, Opinion of the Ombudsperson, 3997/2016/VOP, 21 December 2017.

222 Czechia, Opinion of the Ombudsperson, 3997/2016/VOP, 21 December 2017.

223 Czechia, Opinion of the Ombudsperson, 3997/2016/VOP, 21 December 2017.

224 Czechia, Opinion of the Ombudsperson, 3997/2016/VOP, 21 December 2017.

225 Netherlands Institute for Human Rights, Opinions 2017-33 and 2019-60.

226 Netherlands Institute for Human Rights, Opinions 2017-33 and 2019-60.

227 Netherlands Institute for Human Rights, Opinion 2019-60.

228 The research was conducted by Sanquin, a foundation that collects and distributes blood for donations.

On the other hand, in **Belgium** in 2019, the Constitutional Court partially annulled the Law of 11 August 2017 on various health-related provisions, which, under Article 8, prohibited men from donating blood during the period of 12 months after their last sexual intercourse with other men.²²⁹ The court found that the 12-month deferral was incompatible with Article 10 (equality before the law) and Article 11 (non-discrimination) of the Constitution of Belgium. Such difference in treatment was not reasonably justified and the Constitutional Court repealed Article 8.²³⁰

In **Lithuania**, the Ombudsperson has investigated complaints regarding the MSM blood ban as part of the general duty to implement equal opportunities for state institutions in Article 5 of the Law on Equal Treatment. In a 2011 report to the Minister of Health, the Ombudsperson recommended changes to the Order regulating the requirements and questions for blood donors to 'avoid formulating prejudiced attitudes, that persons of homosexual orientation are carriers of infectious diseases and to discourage the equating of "risky sexual behaviour" with a homosexual sexual orientation'.²³¹ In **Hungary**, a friendly settlement was reached where a female same-sex couple was labelled as 'sick' and refused permission to donate blood by the supervising physician. Following a complaint to the Hungarian Equal Treatment Authority, the National Blood Supply Service apologised to the couple and undertook to update the content of donor information leaflets, clarifying the applicable rules.²³²

4.2.3 Case law in Poland

In recent years, there have been a number of cases in **Poland** relating to sexual orientation discrimination in healthcare. This is so, even though Polish law does not currently prohibit unequal treatment due to sexual orientation in this sphere.

On one occasion, XY, an individual who informed her General Practitioner that she was in a relationship with a woman, was subject to judgement and religious condemnation from the doctor, who suggested that she could seek medical treatment for her sexual orientation. The Patient Rights Ombudsman concluded that the General Practitioner had violated XY's right to dignity and privacy. In another case, YZ, who was a candidate to foster children, sought a certificate from her family doctor. In response, the doctor critiqued YZ's life choices, indicated her opposition to same-sex couples raising children and sought to discredit the patient at the Local Family Centre. Once again, the Patient Rights Ombudsman determined that these actions constituted a breach of dignity and privacy.²³³

By contrast, in 2016, the Supreme Administrative Court in Warsaw confirmed²³⁴ an earlier judgment²³⁵ refusing to overturn a decision of the President of the National Health Fund, who had rejected a request, made by X, who was an insured person, to extend health insurance coverage to her female civil partner.²³⁶ The Provincial Administrative Court in Warsaw had observed that the national Law on Healthcare recognised only different-sex spouses, but not same-sex civil partners, as family members for the purposes of health insurance.²³⁷ The court emphasised the constitutional primacy of different-sex marriage,²³⁸ while also observing that, unlike in *Maruko*,²³⁹ there is no formal relationship status in Poland which places same-sex

229 Belgium, Constitutional Court, No. 122/2019, 26 September 2019.

230 Belgium, Constitutional Court, No. 122/2019, 26 September 2019, Article 8 of the Law of 11 August 2017 was repealed with regard to donations of fresh frozen plasma. On the other hand, the Constitutional Court found that the deferral period is justified with regard to plasma and the donation of other blood components.

231 Lithuania, Equal Opportunities Ombudsperson (2011), *Annual report for 2011*.

232 Háttér Society, 'Sajtóközlemény – EBH-ügy: Sokkoló az egészségügyi szakma melegekkel kapcsolatos tájékoztatlansága', 20 September 2013, <http://hatter.hu/hirek/sajtokozlemeny-ebh-ugy-sokkolo-az-egeszsegugyi-szakma-melegekkel-kapcsolatos-tajekozatlansaga>.

233 The national expert for Poland accessed information regarding both cases through the Ombudsman's Office.

234 Poland, Supreme Administrative Court in Warsaw, II GSK 866/15, 25 October 2016.

235 Poland, Provincial Administrative Court in Warszawa, VI SA/Wa 1733/14, 25 November 2014.

236 The couple had entered into a civil partnership in Scotland.

237 Poland, Article 5 pt. B) of the Law on Healthcare.

238 Article 18 of the Polish Constitution, which states that 'marriage as a union of woman and man, family, maternity and parenthood are under the protection and care of the Republic of Poland'.

239 Judgment of 1 April 2008, *Maruko*, C267/06, EU:C:2008:179, Paragraph 73.

partners in a comparable situation to spouses for the purposes of health insurance benefits.²⁴⁰ As such, the Provincial Administrative Court in Warsaw held that the President of the National Health Fund had not engaged in unlawful sexual orientation discrimination. The Supreme Administrative Court in Warsaw largely adopted the lower court reasoning in refusing the appeal.²⁴¹

4.3 Social security

4.3.1 Existence of prohibitions on sexual orientation discrimination in social security

Common sources of protection between social security and healthcare

As in the field of healthcare, national laws in 17 EU Member States and the United Kingdom protect against sexual orientation discrimination in social security. In a number of jurisdictions, the same statutory provisions and/or judicial interpretations establish the relevant prohibition for both healthcare and social security. This is the case in, among other countries, **Bulgaria**,²⁴² **Croatia**,²⁴³ **Finland**,²⁴⁴ **France**,²⁴⁵ **Ireland**,²⁴⁶ **Luxembourg**²⁴⁷ and **Slovenia**.²⁴⁸

In **Slovakia**, Section 2, Paragraph 1, read in conjunction with Sections 3(1) and 5(1)(2)(a)(b) of the Anti-Discrimination Act (ADA), sets out the prohibition against unequal treatment due to sexual orientation in social security – as it does for healthcare. However, Slovak law also provides additional safeguards in the sphere of social security through the Act on Old-Age Pension Saving²⁴⁹ and the Act on Supplementary Pension Saving.²⁵⁰ Similarly, in **Spain**, the case law on Article 14 of the Constitution, Law 62/2003 of 30 December 2003 and the Criminal Code, which provides the context for safeguards in healthcare, is also relevant in the field of social security. However, Article 2 of the General Social Security Act of 2015, which must be read in the light of Article 14, additionally confirms that the Spanish social security system is based on four principles: universality, unity, solidarity and equality.²⁵¹

In **Czechia**, **Hungary**, the **Netherlands**, **Romania** and **Sweden** prohibitions on sexual orientation discrimination for both healthcare and social security emerge from the same general statute or ordinance, but are established through separate articles or sub-sections in the relevant legal instrument.

240 Poland, Provincial Administrative Court in Warsaw, VI SA/Wa 1733/14, 25 November 2014.

241 Poland, Supreme Administrative Court in Warsaw, II GSK 866/15, 25 October 2016.

242 Bulgaria, Article 4 (1) and Article 6 (1) of the Protection Against Discrimination Act.

243 Croatia, Article 8 (3) of the Anti-discrimination Act, 9 July 2008.

244 Finland, Section 2 [scope of application] and Section 8 [scope of discrimination] of the Non-Discrimination Act (*Yhdenvertaisuuslaki*), 1325/2014.

245 France, Articles 1 and 2 3° of Law No. 2008-496 of 27 May 2008.

246 Ireland, Section 5(1) and Section 3(2)(d) of the Irish Equal Status Acts 2000-2018 (ESA). However, it is important to note that there is specific case law that has interpreted 'social security' as falling within the concept of 'services' in Section 2(1) ESA. See: *McQuaid v Department of Social Protection*, DEC-S2014-015, 2 October 2014.

247 Luxembourg, Article 2(1)(e) of the Law of 28 November 2006.

248 Article 1, Paragraph 1 of the Protection against Discrimination Act defines the personal grounds, including sexual orientation, while Article 2 (Indent 5), Paragraph 1, defines the fields, including healthcare and social protection. As noted, Slovenian law must be read in the light of Article 14 of the national Constitution, which has been interpreted to cover sexual orientation and which sets out a general protection against discrimination. See: Slovenia, Constitutional Court of the Republic of Slovenia, U-I-425/06, 2 July 2009.

249 The Act on Old-Age Pension Saving contains a prohibition of discrimination clause formulated as a referral to the Anti-discrimination Act; See: Slovakia, Section 9 of Act No. 43/2004 on Old-Age Pension Saving and amending and supplementing certain laws, as amended (*Zákon č. 43/2004 Z. z. o starobnom dôchodkovom sporení a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*).

250 According to the Act on Supplementary Pension Saving, discrimination in the performance of supplementary pension saving is prohibited in compliance with the Anti-discrimination Act, unless the Act on Supplementary Pension Saving states otherwise. See Slovenia, Section 7(1) of the Act on Supplementary Pension Saving, 650/2004.

251 Spain, Royal Decree-Law 8/2015, of October 30, approving the revised text of the General Law of Social Security, BOE, October 31, 2015 (*RLD 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social*, BOE, 31 October 2015).

In **Czechia**, for example, Section 2(3), read together with Section 1(1)(f) of the Anti-Discrimination Act, protects against unequal treatment due to sexual orientation in social security,²⁵² while comparable guarantees against such discrimination are enshrined in Articles 3 *letter b*), 6 *letter c*) and 8 of the **Romanian** Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination.²⁵³

In **Sweden**, it is Chapter 2, Section 13(2-3) of the Discrimination Act which outlaws unequal treatment based on sexual orientation in 'social services activities, and assistance in the form of special transport services and national special transport services and housing adaptation allowances'.²⁵⁴ Similarly, in **Hungary**, Articles 7, 8, 9 and 10 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA) establish the general safeguards against direct and indirect discrimination, including on the basis of sexual orientation, as well as against harassment and instructions to discriminate. These general provisions have equal relevance in the field of healthcare. However, Article 24 ETA provides a more focused (but non-exhaustive) list of the areas within social security where discrimination and harassment is not permissible: (i) any form of financial or in-kind assistance is requested/provided that is financed from social security schemes, and (ii) in the case of social or child protection allowances or services.²⁵⁵

In **Belgium**, in contrast to healthcare, social security is largely regulated by federal rather than Communities law.²⁵⁶ Article 4, 4°, Article 5, para. 1, 2°, Article 5, para. 3 and Article 14 of the Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination prohibit direct and indirect discrimination due to sexual orientation in the sphere of social security. Similar protections are established under Article 3.1 of the **German** Basic Law and Section 19(1) of the German Social Code IV. In the **Netherlands**, Article 429quater (1) of the Criminal Code prohibits unequal treatment, including on the basis of sexual orientation, in the exercise of one's office, job or enterprise. As is relevant for other areas addressed in this report, the term 'office' was added in 1991 to include discrimination by public servants²⁵⁷ and the provision is now understood to cover sexual orientation discrimination by public servants implementing social security laws. Similarly, in **Portugal**, Article 7 of Law 4/2007, the Basic Law on the Social Security System,²⁵⁸ prohibits all forms of discrimination for all grounds and is considered as an open-ended rule, which protects against sexual orientation discrimination.

Table 3 Prohibition on discrimination due to sexual orientation in social security

Country	Yes	No
Austria		X
Belgium	X	
Bulgaria	X	
Croatia	X	
Cyprus		X ²⁵⁹
Czechia	X	
Denmark		X

252 For healthcare, as noted above, see Czechia, Section 2(3), together with Section 1(1)(h), of the Anti-Discrimination Act, Act No. 198/2009 Coll. of 23 April 2009.

253 For healthcare, see Romania, Article 3 letter c) and Article 10 letter b) of Government Ordinance 137/2000 of 31 August 2000 regarding the prevention and punishment of all forms of discrimination.

254 For healthcare, see Sweden, Chapter 3, Section 13(1), of the Discrimination Act.

255 For healthcare, see Hungary, Articles 7, 8, 9, 10 and 25 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

256 Belgium, Article 6, para. 1, VI, al. 4, 12° of the Special Federal Act of 8 August 1980 for institutional reforms.

257 Netherlands, Staatsblad 1991, 623.

258 Portugal, Law 4/2007, Basic Law on the Social Security System (*Aprova as bases gerais do sistema de segurança social*), 16 January 2007, Diário da República, Série I-A, No. 11, 16 January 2007.

259 It may be possible to identify relevant protections within Article 28 of the Constitution.

Country	Yes	No
Estonia		X ²⁶⁰
Finland	X	
France	X	
Germany	X	
Greece		X
Hungary	X	
Ireland	X	
Italy		X
Latvia		X
Lithuania		X
Luxembourg	X	
Malta		X ²⁶¹
Netherlands	X	
Poland		X
Portugal	X	
Romania	X	
Slovakia	X	
Slovenia	X	
Spain	X	
Sweden	X	
United Kingdom	X	

4.3.2 Potential prohibitions on sexual orientation discrimination in social security

As it is for healthcare, in a number of Member States, although the law does not specifically prohibit sexual orientation discrimination in social security, it may be possible to identify such protections within alternative legal instruments.²⁶² Thus, in **Malta** and **Estonia**, general equality guarantees in Articles 45 and 12(1) of the national constitutions potentially act as safeguards against unequal treatment on the basis of sexual orientation in this field.²⁶³ Article 108 of the Maltese Social Security Act also recognises a right to appeal where there are allegations of discrimination, due to sex, in determining eligibility and entitlement for any benefit, pension, allowance and assistance payable under the Act. In **Latvia**, as noted for healthcare, Articles 2 and 2.¹(1) of the Law on Social Security may establish prohibitions within social security if sexual orientation is protected under the 'other circumstances' ground.²⁶⁴

In **Italy**, domestic law does not protect against unequal treatment in social security due to sexual orientation. However, Article 1, Paragraph 20, of Law No 76/2016 on Civil Unions has extended significant rights and duties, previously only enjoyed by spouses, to civil partners.²⁶⁵ Law No 76/2016 covers a broad range of areas, creating new entitlements regarding, inter alia, benefits, pensions and succession law.

²⁶⁰ In Estonia, Article 12(1) of the national Constitution sets out an explicit ban on discrimination on any ground.

²⁶¹ In Malta, Article 45 of the national Constitution outlaws discrimination attributable 'wholly or mainly' to the characteristics of 'race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity'.

²⁶² In Lithuania, unlike in the field of healthcare, the Equal Opportunities Ombudsperson has not interpreted social security as falling within access to, and supply of, goods and services in the Law on Equal Treatment. In Denmark, as noted above, public authorities, including those who provide public healthcare and social security services, are governed by a general principle of equality, which is applicable under administrative law and has the force of legislation.

²⁶³ See: Estonia, Constitutional Review Chamber of the Supreme Court of Estonia, Case No. 5-19-42, Decision of 18 December 2019.

²⁶⁴ Latvia, Law on Social Security, 7 September 1995. There is currently no case law on whether sexual orientation falls within the scope of 'any other circumstances'.

²⁶⁵ Italy, Law 20 May 2016, No. 76, Rules on Civil Unions between persons of the same sex and on cohabitations (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*), in OJ No. 118 of 21 May 2016.

Similarly, in **Greece**, Law 4356/2015 provides that couples who enter a civil partnership agreement, whether different-sex or same-sex, shall not be treated less favourably than married spouses in the sphere of social protection rights, including social security and healthcare rights.

4.4 Case law

As for healthcare, there is a dearth of case law across the Member States addressing sexual orientation discrimination in social security. In **Spain**, the Constitutional Court has, on a number of occasions, considered whether same-sex couples have a right to survivor pensions.²⁶⁶ Prior to the introduction of same-sex marriage,²⁶⁷ parties in long-term cohabiting relationships were unable to obtain survivor pensions because, under Article 174.1 of the General Law of Social Security (then in force), these benefits were only available to spouses.²⁶⁸ Same-sex couples, who could not form a marital union, were absolutely excluded from survivor pensions, and they argued that their omission violated Article 14 of the national Constitution.

The Spanish Constitutional Court, however, consistently rejected claims of discrimination.²⁶⁹ A majority of the court observed that the Constitution empowers (but does not require) the legislature to both differentiate between marriage and cohabitation, and to reserve marital status to different-sex couples. It was not impermissibly discriminatory under Article 14 for the General Law of Social Security to disfavour same-sex couples, as well as different-sex cohabitants who chose not to marry. In dissent, a minority of judges observed that the terms of Article 174.1 were indirectly discriminatory because, in requiring marriage as a condition for survivor pensions, the legislature had established prerequisites which, due to their sexual orientation, no same-sex couple would ever be able to satisfy.

In 2005, the Spanish Parliament introduced same-sex marriage,²⁷⁰ extending survivor pension entitlements to same-sex couples who have contracted a marital union. Subsequently, in 2007, such benefits were, under certain conditions, also made available to non-married stable couples.²⁷¹ A novel feature of the new law was that it would apply retroactively to situations where individuals who were in stable unions had died prior to the new legislation coming into force and where the surviving partners were now in positions of special need. In order to determine the existence of such need, Law 40/2007 on measures in the field of Social Security identified, among other requirements, the fact that a couple ‘had had children together’ either through natural conception or adoption.

In 2008, the National Institute of Social Security (NISS) refused a survivors pension to a man who had been in a stable relationship with his partner for 22 years. Despite the fact that same-sex adoption had not been legally possible for the majority of their relationship together, the NISS cited the absence of common children as a determining factor in the adjudication of the application. The Court No. 33 of Barcelona raised a question of unconstitutionality before the Spanish Constitutional Court,²⁷² observing that, although apparently neutral, the requirement for children disproportionately impacted same-sex couples, who could not biologically conceive children and who were legally excluded from adoption procedures. The Constitutional Court agreed.²⁷³ It noted that evidence that a couple had had children was not objectively related to the purpose of the survivors pension and would unduly burden those who

266 For all these sentences, see: Spain, Constitutional Court of Spain, Judgment 92/2014, 10 June 2014, BOE, 4 July 2014.

267 Spain, *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, BOE, 2 July 2005.

268 Spain, Royal Legislative Decree 1/1994.

269 Spain, Constitutional Court, Judgment 92/2014, 10 June 2014 (BOE, 4 July 2014).

270 Spain, *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*, BOE, 2 July 2005.

271 Spain, *Ley 40/2007, de 4 de diciembre, de medidas en materia de Seguridad Social*, BOE, 5 December 2007. For the present law, see: Royal Legislative Decree 8/2015, of October 30, approving the revised text of the General Law of Social Security (*Real Decreto Legislativo 8/2015, de 30 de octubre, Ley General de la Seguridad Social*).

272 Spain, Court No. 33 of Barcelona, 18 November 2008.

273 Spain, Constitutional Court of Spain, Judgment 41/2013, 14 February 2013.

cannot (for legal or biological reasons) have children. As such, the requirement was incompatible with the principle of equality under Article 14 of the Spanish Constitution. However, it did not constitute sexual orientation discrimination, as it impacted all couples, different-sex and same-sex, without children.

In **Ireland**, the former Equality Tribunal, rejected a claim about the conduct of a staff member at a local social welfare office.²⁷⁴ The Department for Social Protection had internally investigated the complaint. It had issued an apology to the complainant, acknowledging that a staff member had acted inappropriately by calling him a ‘muppet’.²⁷⁵ However, the Equality Tribunal accepted that the staff member had not used the homophobic slur, ‘faggot’, nor was there evidence that the incident was linked to the complainant’s sexual orientation.²⁷⁶ There was also insufficient evidence to substantiate claims of discrimination due to gender and age.²⁷⁷

In 2006, the former Irish equality body, the Equality Authority, had been involved in the settlement of a significant equal status complaint concerning social welfare payments.²⁷⁸ The Department of Social and Family Affairs sought to rely upon an exemption, set out in the Equal Status Act 2000, to refuse an adult dependent allowance to a gay man who had left paid employment to care for his partner.²⁷⁹ Following intervention by the Equality Authority, the Irish government paid the allowance to the individual on an ex gratia basis. The Equality Authority highlighted that Section 2(2) of the Social Welfare (Consolidation) Act 2005 allows the relevant minister to specify persons as adult dependents. It argued that the Minister’s failure to exercise that discretion to specify the claimant and his partner as a couple in this case amounted to discrimination under the Equal Status Acts 2000-2018.

In **Slovenia**, there has been no case law applying the Protection against Discrimination Act to sexual orientation discrimination in the sphere of social security. However, in 2009, the Constitutional Court of the Republic of Slovenia found that the Registration of Same Sex Partnerships Act violated the principle of equality, under Article 14 of the national Constitution, to the extent that it treated registered partners differently compared to different-sex spouses in terms of inheritance rights.²⁸⁰ In Slovenia, the right to inheritance derives, inter alia, from the need to ensure social protection for the survivors of a deceased individual. Similarly, in 2013, the Constitutional Court, once again relying on Article 14, declared that part of the Inheritance Act was unconstitutional because it did not provide a right of inheritance to non-registered de facto same-sex couples.²⁸¹

4.5 Conclusion

Section 4 has explored the extent to which national laws across the 27 EU Member States and the United Kingdom prohibit sexual orientation discrimination in social protection. It has focused specifically on legal safeguards against this form of unequal treatment in healthcare and social security.

In 17 EU jurisdictions, and the UK, there are protections against sexual orientation discrimination in healthcare and social security. These prohibitions show a considerable degree of geographic diversity, with law-makers in all corners of the Union adopting relevant safeguards. There is also evidence that increasing recognition of same-sex relationships, through marriage and civil partnership, is enhancing protections against unequal treatment due to sexual orientation in social protections.

274 Ireland, *Hanlon v Department of Social Protection*, DEC-S2012-017, 14 May 2012.

275 Ireland, *Hanlon v Department of Social Protection*, DEC-S2012-017, 14 May 2012, [3.2].

276 Ireland, *Hanlon v Department of Social Protection*, DEC-S2012-017, 14 May 2012, [4.4].

277 Ireland, *Hanlon v Department of Social Protection*, DEC-S2012-017, 14 May 2012, [4.5].

278 Equality Authority. (2007). *Annual Report 2006*, p. 30.

279 See: Ireland, Section 14(1)(a)(i) of the Equal Status Act 2000.

280 Slovenia, Constitutional Court, Decision No. U-I-425/06.

281 Slovenia, Constitutional Court, Decision No. U-I-212/10-15, 14 March 2013.

Yet, in the absence of EU-level legal guarantees, numerous Member States continue to withhold legal safeguards. In such jurisdictions, a person may still experience unfair practices in healthcare and social security without access to substantive remedies. Moving forward, there is a need for minimum EU standards in this field so that all individuals, irrespective of their sexual orientation, have equal enjoyment of social protection rights.

In some EU countries, it is uncertain whether national law protects against sexual orientation discrimination. While there is no express prohibition in healthcare and social security, unequal treatment may be incompatible within alternative guarantees in the domestic legal system. In such jurisdictions, law-makers should adopt explicit legal safeguards against sexual orientation discrimination in social protection. Expressly naming sexual orientation as a protected ground not only has important symbolic value; it also reduces uncertainty and informs both victims and perpetrators that there is a legal remedy where unequal treatment arises.

In common with other areas addressed in this report, there is a notable lack of national case law applying protections against sexual orientation discrimination in healthcare and social security. For both elements of social protection, in a significant number of EU Member States, there were no public judgments where courts, ombudspersons or national equality bodies had considered unequal treatment due to sexual orientation. While this dearth of case law could reflect the dissuasive impact of expanding legal prohibitions, it may also signal the limited capacity of those prohibitions to address sexuality-motivated bias. The absence of case law deprives judges and other adjudicators of the opportunity to assess the contours of existing national protections and to explain how those safeguards should apply in practice.

Moving forward, at the EU and national levels, there is a need both to investigate whether and/or why claimants cannot, or will not, use current non-discrimination frameworks and to safeguard practical enjoyment, irrespective of sexual orientation, of social protection rights. It is also necessary to consider recurring themes, such as indirect discrimination, assisted reproduction services and MSM blood donation bans, and to ensure that any restriction on access to healthcare and social security pursues legitimate aims and is proportionate, not simply reflecting animus towards certain sexual orientations.

5 Social advantages

At present, national laws in 17 EU jurisdictions and the United Kingdom prohibit sexual orientation discrimination in social advantages. As for healthcare and social security (Section 4), protection in the field of social advantages has been achieved through a range of statutory, government ordinance and judicial interventions.

5.1 Existence of prohibitions on sexual orientation discrimination in social advantages

5.1.1 Explicit and implicit prohibitions against discrimination

In **Sweden**, Section 14 of the Discrimination Act explicitly safeguards against unequal treatment ‘with regard to social insurance and related benefit systems, unemployment insurance, and state financial aid for studies’. Similar prohibitions exist in **Czechia**,²⁸² **France**,²⁸³ **Germany**,²⁸⁴ **Luxembourg**,²⁸⁵ and **Romania**.²⁸⁶ In **Slovenia**, Article 1, Paragraph 1 of the Protection against Discrimination Act defines the applicable personal grounds to include sexual orientation, while Article 2, Paragraph 1 (Indent 6) extends coverage to social advantages.

In **Portugal**, the law does not explicitly mention sexual orientation protections in the sphere of social advantages – but there is a common understanding that relevant prohibitions do exist.²⁸⁷ The Portuguese Code of Administrative Procedure was revised in 2015 and Article 6 now identifies sexual orientation as one of the grounds on which discrimination is impermissible in all spheres of public administration.²⁸⁸ A similar position applies in **Croatia** where, although the Anti-Discrimination Act (ADA) does not establish an express prohibition, the unlimited nature of that statute extends coverage to all areas, including social advantages.²⁸⁹

Croatian law also provides for equal treatment of same-sex partners in the sphere of tax advantages. This protection is achieved through a general non-discrimination clause in the Same-Sex Life Partnership Act, which, despite not specifically mentioning social advantages, is, like the ADA, not limited to certain areas.²⁹⁰ Under the Same-Sex Life Partnership Act, same-sex life partners are, for certain tax benefits, entitled to an equal position with different-sex spouses.²⁹¹ Similar protections and benefits are available for same-sex civil partners in both **Greece**²⁹² and **Italy**²⁹³ – although neither of those Member States provide general prohibitions against sexual orientation discrimination in social advantages.

282 Czechia, Section 2(3), together with Section 1(1)(g) of the Anti-Discrimination Act.

283 France, Articles 1 and 2, 3^e of Law No. 2008-496 of 27 May 2008.

284 Germany, Article 3.1 of the Basic Law; Section 2.1.6, 19 of the General Act on Equal Treatment; Section 19(a) of the Social Code IV.

285 Luxembourg, Article 2(1)(f) of the Law of 28 November 2006.

286 Romania, Article 6 letter c, Article 8 and (in general) Article 10 letter h) of the Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31 August 2000.

287 In Finland, the Non-discrimination Act outlaws unequal treatment due to sexual orientation in all public and private activities. See: Finland, Section 2 (Scope of application) and Section 8 (Prohibition of discrimination) of the Non-Discrimination Act (*Yhdenvertaisuuslaki*) 1325/2014. Social advantages, which are available to the public, fall within that scope of protection in Finland. In Bulgaria, the Protection against Discrimination Act sets out a universal material scope – banning discrimination on all protected grounds in all fields. See Article 4(1) and 6(1) of the Protection against Discrimination Act.

288 Portugal, Decree-Law 4/2015 approves the New Code of Administrative Procedure (*aprova o novo Código do Procedimento Administrativo*), 7 January 2015, *Diário da República*, Série I, No. 4, 7 January 2015.

289 Croatia, Article 8 of the Anti-discrimination Act, 9 July 2008.

290 Croatia, Article 6(3) of the Same-sex Life Partnership Act, 15 July 2014.

291 Croatia, Article 60 of the Same-sex Life Partnership Act, 15 July 2014.

292 See Greece, Law 4356/2015.

293 Italy, Article 1, Paragraph 20 of Law No. 76/2016 on civil unions.

In the **Netherlands**, as for social protection, Article 429quater (1) of the Criminal Code, protects against sexual orientation discrimination in the exercise of one's office, job or enterprise.²⁹⁴ This is understood to bind public servants who are tasked with implementing legislation on social advantages. In **Great Britain**, Section 29 of the Equality Act 2010 prohibits sexuality-motivated unequal treatment by public or private sector organisations in the provision of goods, facilities and services to the public or a section of the public. In addition, it covers all functions of public authorities.²⁹⁵

In **Hungary**, Articles 7-10 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities ensure protection against direct and indirect sexual orientation discrimination in social advantages offered by all public actors and certain private actors. If an Act of the Hungarian Parliament, or a lower ranking decree, providing social advantages, contravenes this protection, it is possible to submit a complaint to the Constitutional Court under Article XV of the Fundamental Law of Hungary.²⁹⁶ Article XV sets out a comprehensive equality guarantee for the Hungarian legal system. Although sexual orientation is not explicitly listed as a ground in Article XV, it is protected through the jurisprudence of the Constitutional Court.

Where an individual's rights are impacted by the judicial application of a law which unconstitutionally discriminates due to sexual orientation in social advantages, the person can, within 60 days, petition the Hungarian Constitutional Court, seeking either to quash the judicial decision or to have the unconstitutional law abolished.²⁹⁷ In circumstances where there is no judicial remedy because the unconstitutionality arises directly from the law, rather than the judicial application thereof, it is possible for the individual to petition the Constitutional Court – but only within 180 days of the law coming into force. After this point, a person can ask the Ombudsman to seek constitutional review of the law – although the Ombudsman has no obligation to accede to such requests.

5.1.2 Regional prohibitions against discrimination

In **Belgium** and **Spain**, both national and regional law set out prohibitions against unequal treatment due to sexual orientation in social advantages.²⁹⁸ At the national level, Article 5, para. 1, 3°, Article 4, 4° and Article 14 of **Belgium's** Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination establish relevant protections against direct and indirect sexual orientation discrimination. These safeguards are reinforced by the Flemish Community,²⁹⁹ the French Community,³⁰⁰ the Walloon

294 Netherlands, Staatsblad 1991, 623.

295 In Northern Ireland, see Regulations 5 and 12 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. NI as above, the provisions relating to provision of goods and services would cover social protection.

296 Hungary, Fundamental Law of Hungary (*Magyarország Alaptörvénye*) 25 April 2011. Under the provisions of Act CLI of 2011 on the Constitutional Court, that institution is entitled to subsequently examine the constitutionality of any legal provision (with the exception of certain provisions relating to the central budget and taxes); see Act CLI of 2011 on the Constitutional Court (2011. évi CLI. törvény az Alkotmánybíróságról), 21 November 2011.

297 Hungary, Article 26 of Act CLI of 2011 on the Constitutional Court (2011. évi CLI. törvény az Alkotmánybíróságról), 21 November 2011.

298 In Austria, as for social protection, federal legislation does not prohibit sexual orientation discrimination in social advantages. There are regional protections for the public provision of social advantages. However, contracts between private actors remain exclusively governed by federal law.

299 Belgium, Article 20, 7°, Article 16, para. 3, Article 16, para. 1 and Article 16, para. 2 of the Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008 (*Decreet houdende een kader voor het Vlaamse gelijkheids- en gelijkebehandelingsbeleid*).

300 Belgium, Article 4, 4°, Article 3, 1°, Article 5, al. 2, 1° and Article 5, al. 2, 2° of the Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*).

Region³⁰¹ and the German-speaking Community,³⁰² which explicitly refer to social advantages in the material scope of their legislation.

In **Spain**, the case law on Article 14 of the Constitution, Law 62/2003 of 30 December 2003 and the Criminal Code (see Section 4.1.1), supplemented by Article 2 of the General Social Security Act of 2015 (see Section 4.3.1), create national protections against unequal treatment based on sexual orientation in social advantages. However, in **Catalonia**, Article 17 of Law 11/2014 also requires public administrations to ‘take special care to support LGBTI adolescents and young people who are in a situation of vulnerability or social isolation...’. Under Article 17, there is an obligation to adopt ‘prevention measures’ for ‘LGBTI persons who may suffer multiple discrimination, in order to avoid situations of discrimination, risk of social exclusion and vulnerability’. Furthermore, Catalan law provides that ‘[s]ocial services, and specifically residences for the elderly, both public and private, should ensure that situations of discrimination against LGBTI people do not occur’.

5.1.3 Uncertainty regarding the scope of prohibitions against discrimination

In **Ireland** and **Slovakia**, there remains some uncertainty about the precise scope of protection. Although the Irish Equal Status Acts 2000–2018 do not specifically mention social advantages, there is protection for such advantages through the general prohibition against discrimination in access to goods and services.³⁰³ The former Equality Tribunal and the Workplace Relations Commission have defined ‘services’ to include numerous benefits provided by public and private actors, including free travel passes on public transport³⁰⁴ and sports scholarships.³⁰⁵ However, a 2011 judgment of the Irish Circuit Court, concerning an *ex gratia* payment scheme, set up by the Irish Government to compensate people affected by the liberalisation of the taxi industry, casts doubt on the application of anti-discrimination laws to public sector social advantages.³⁰⁶ In *Pobal v Hoey*, the Circuit Court held that ‘the Tribunal had no jurisdiction to entertain the complaint because to do so was “in effect, to purport to review a decision of the Government, which... falls outside the scope of the powers conferred on it by the 2000 Act.”’³⁰⁷

In **Slovakia**, Section 5(2)(a), read in conjunction with Section 5(1), of the Anti-Discrimination Act (ADA), outlaws unequal treatment due to sexual orientation in access to, and the provision of, social advantages. However, the duty to respect this equality guarantee only applies ‘in connection with special laws’ in this field. As such, there is a need for judicial clarification as to whether the ADA protections apply to social advantages arising out of legislation/regulations other than laws. There is also a need for further practice and case law to define the scope of social advantages.

301 Belgium, Article 5, para. 1, 2°, Article 4, 5°, Articles 15, 1° and Article 15, 2° of the Decree of 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (*Décret de la Région wallonne du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes et les hommes, en matière d'économie, d'emploi et de formation professionnelle*).

302 Belgium, Article 4, 6°, Article 3, 1°, Article 5, al. 1, 1° and Article 5, al. 1, 2° of the Decree of 19 March 2012 to combat certain forms of discrimination (*Dekret zur Bekämpfung bestimmter Formen von Diskriminierung*).

303 Ireland, Section 5 of Equal Status Acts 2000–2018.

304 Ireland, Equality Tribunal, *Thompson v Iarnród Éireann*, DEC-S2009-015, 2 March 2009.

305 Ireland, Equality Tribunal, *MacMahon v Department of Physical Education and Sport, University College Cork*, DEC-S2009-014, 2 March 2009.

306 Ireland, Circuit Court of Ireland, *Pobal v Hoey*, unreported judgment, 14 April 2011.

307 See Fennelly, D. (2012), *Selected issues in Irish equality case law 2008–2011*, p. 91, Equality Authority.

5.1.4 Potential alternative protections

In **Cyprus**,³⁰⁸ **Estonia**³⁰⁹ and **Malta**,³¹⁰ there is no explicit national law prohibition of unequal treatment due to sexual orientation in social advantages. However, in all three jurisdictions constitutional protections (see Section 4.1.2) may apply.

Table 4 Prohibition on discrimination due to sexual orientation in social advantages

Country	Yes	No
Austria		X
Belgium	X	
Bulgaria	X	
Croatia	X	
Cyprus		X ³¹¹
Czechia	X	
Denmark		X
Estonia		X ³¹²
Finland	X	
France	X	
Germany	X	
Greece		X
Hungary	X	
Ireland	X	
Italy		X
Latvia		X
Lithuania		X
Luxembourg	X	
Malta		X ³¹³
Netherlands	X	
Poland		X
Portugal	X	
Romania	X	
Slovakia	X	
Slovenia	X	
Spain	X	
Sweden	X	
United Kingdom	X	

³⁰⁸ Cyprus, Constitution, Article 28.

³⁰⁹ Estonia, Constitution, Article 12(1).

³¹⁰ Malta, Constitution, Article 45.

³¹¹ It may be possible to identify relevant protections in social advantages in Article 28 of the Constitution. In addition, unequal treatment on the basis of sexual orientation comes within the mandate of the Equality Body.

³¹² In Estonia, Article 12(1) of the national Constitution sets out an explicit ban on discrimination on any ground.

³¹³ Article 45 of the national Constitution outlaws discrimination attributable 'wholly or mainly' to the characteristics of 'race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity'.

5.2 Case law

Consistent with other topics addressed in this report, there is a paucity of case law on sexual orientation discrimination in social advantages. Among the jurisdictions where there were no relevant public judgments are **Belgium, Bulgaria, Croatia, Czechia, Finland, Greece, Latvia, the Netherlands, Romania, Slovakia, Slovenia** and **Sweden**. Although prohibitions against unequal treatment due to sexual orientation exist in a majority of these Member States, there is currently no recorded instance where courts, ombudspersons or equality bodies have applied those safeguards in the field of social advantages.

The limited case law which is available focuses on inequalities for same-sex couples in access to social advantages. In **Hungary**, the Ombudsman recently concluded that there was impermissible discrimination where the National Tax and Customs Office (NTCO) refused to acknowledge the equivalence of same-sex registered partnerships and different-sex marriages, withholding tax and contribution exemptions and reductions from the former.³¹⁴ Under Article 3 of Act XXIX of 2009 on Registered Partnership, Hungarian laws relating to marriage should also be applied to registered partners unless it is expressly stipulated otherwise (e.g. adoption rights).³¹⁵ The Ombudsman observed that the NTCO practice violated current law and constituted discrimination due to sexual orientation. NTCO subsequently announced that it would change the policy with immediate effect.³¹⁶

The Hungarian Equal Treatment Authority also recently condemned the Ministry of Human Capacities, and the company responsible for its website, because they had failed to publicly advertise that a tax benefit for newlyweds was also available to recently registered same-sex partners. The Equal Treatment Authority found that there was direct discrimination, obliged the respondents to end the inequality within 30 days and required that it be notified within eight days of the violation ending.³¹⁷ In another case before the Equal Treatment Authority, there was a complaint that a privately-run spa was only offering family tickets to different-sex married couples with children. As part of a friendly settlement, the spa operators agreed to provide family tickets to any two adults, irrespective of sex, who had children.³¹⁸

In **Ireland**, the former national equality body, the Equality Authority, was involved in a settlement in 2003 where a man had been refused a travel pass for his cohabiting same-sex partner under the non-statutory Free Travel Scheme. The man successfully reached an agreement in an action against the Irish Department of Social and Family Affairs,³¹⁹ which accepted that the refusal amounted to sexual orientation discrimination under the Equal Status Act 2000 (ESA). Although, under Section 14(1)(a)(i) ESA, statutory social welfare schemes were immune from challenge, the Free Travel Scheme was an administrative policy and, therefore, fell outside the exemption. However, in March 2004, the Irish parliament amended social laws so that the pre-existing definition of 'spouse' or 'qualified adult' – limited to different-sex spouses and different-sex cohabiting couples – would also apply to specified administrative social welfare policies, including the Free Travel Scheme.³²⁰ The amendment was designed to ensure that, for those programmes, same-sex couples would essentially be treated as single persons under law. This change was only reversed following the introduction of same-sex civil partnerships in Ireland.³²¹

314 Hungary, Commissioner for Fundamental Rights, Report No. AJB-4819/2016, December 2016.

315 Act XXIX of 2009 on Registered Partnership and the Amendment of Laws Related to this and the Facilitation of Certifying the Existence of Partnerships (2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatokról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról), 8 May 2009.

316 Hátér Society, 'A heteró élettársaknak is járjon az öröklési illetékmentesség', Hátér Society website, 26 January 2017, available at: <http://www.hatter.hu/hirek/sajtokozlomeny-a-hetero-elettarsaknak-is-jarjon-az-oroklesi-illetekmentesseg>.

317 Hungary, Equal Treatment Authority, Decision No. EBH/456/2017, 2017.

318 Hungary, Equal Treatment Authority, Decision No. EBH/80/2019, 26 February 2019.

319 Equality Authority. (2004). *Annual Report 2003*, pp. 32-33 (Equality Authority).

320 Ireland, Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 (25 March 2004).

321 In 2011, the social welfare code was amended following the introduction of civil partnership; Ireland, Social Welfare and Pensions Act 2010, 21 December 2010. The sections dealing with civil partners were commenced by the Social Welfare and Pensions Act 2010 (Sections 15 to 26) (Commencement) Order 2010 (SI 673/2010).

In both **France** and **Germany**, there has also been case law with relevance for prohibitions against sexual orientation discrimination in social advantages. However, it is important to acknowledge that such litigation is more directly grounded in EU employment law protections, thus falling outside the specific scope of this report.

A recent judgment of the **French** Court of Cassation concerned a male individual, who, following his same-sex civil partnership, unsuccessfully asked for vacation days and benefits which, according to a national collective agreement for employees, were awarded to persons who contracted a different-sex marriage.³²² At the time, same-sex couples were excluded from civil marriage in France. The former French Equality Body concluded that refusing the benefits constituted indirect discrimination.³²³ Following a preliminary reference to the Court of Justice of the European Union (see Section 2.2.2),³²⁴ the Court of Cassation similarly ruled that Directive 2000/78/EC, as well as Articles 8 and 14 of the European Convention on Human Rights, directly applied to the national collective agreement. Omitting same-sex civil partners from the relevant benefits was incompatible with Labour Code guarantees against sexual orientation and family status discrimination.³²⁵

In **Germany**, it is unlawful for employers to provide benefits only to those employees who are married. Consistent with the freedom to engage in collective bargaining,³²⁶ contracting partners are entitled to include provisions based on marriage in their collective agreements. However, there must be an actual connection to professional tasks or working conditions,³²⁷ and marriage should only refer to family status (not to its reproductive function). At present, the German law on the remuneration of civil servants now covers registered life partners.³²⁸ Prior to this reform, the relevant case law had adopted a restrictive approach. However, following the preliminary ruling of the European Court of Justice in *Maruko* (see Section 2.2.2),³²⁹ the Federal Constitutional Court clarified that same-sex life partners and spouses, who were in a comparable position for the purposes of benefits, must be treated equally.³³⁰ As such, the Federal Labour Court and other courts have subsequently brought their jurisprudence into line with this interpretation. Since 2017, same-sex couples in Germany have been able to contract civil marriages.

5.3 Conclusion

Section 5 has addressed national laws against sexual orientation discrimination in social advantages. Like the preceding discussion on social protection in Section 4, it reveals a complex picture of equality guarantees across the 27 Member States and the United Kingdom. On the one hand, it is positive that a majority of jurisdictions now prohibit unequal treatment due to sexual orientation in social advantages. Expanding protections in this sphere reflect changing attitudes towards sexuality and a growing commitment to equality.

Yet, at the same time, Section 5 also highlights continuing lacunae across the European Union, significant legal ambiguity and a comparative absence of judicial interventions. It makes clear (like Section 4) that, despite progress, a core group of Member States continue to withhold important safeguards. Furthermore, even in countries where it is understood that the law confers protection against sexual orientation discrimination in social advantages, this is often a matter of interpretation or imputation rather than unambiguous legal guarantees. Moving forward, there is a need for minimum EU standards so that everyone within the EU, irrespective of sexual orientation and location, has equal access to social advantages.

322 France, Court of Cassation, Social Chamber, No. 15-21924, 5 July 2017.

323 France, *Haute autorité de lutte contre les discriminations*, Deliberation N°2011-11, 31 January 2011.

324 Judgment of 12 December 2013, *Hay*, C267/12, EU:C:2013:823.

325 France, Article L122-45 of the Labour Code was applicable at the time.

326 Germany, Article 9(3) of the Basic Law.

327 Germany, Federal Labour Court, 6 AZR 101/03, 29 April 2004.

328 Germany, Sections 17b and 40 of the Civil Servants Remuneration Act (*Bundesbesoldungsgesetz, BBesG*), 19 June 2009.

329 Judgment of 1 April 2008, *Maruko*, C267/06, EU:C:2008:179.

330 Germany, Federal Constitutional Court, 1 BvR 1164/07, 7 July 2009.

Section 5 also identifies a notable lack of case law – from courts, ombudspersons or equality bodies – which addresses sexual orientation discrimination in social advantages. While, as noted already, this absence of case law indicates broader systemic problems in the enforcement of sexual orientation protections, it does require meaningful action so that individuals not only enjoy nominal safeguards against discrimination, but also have practical recourse to redress when unequal treatment in social advantages arises.

A positive note, however, is the extent to which greater recognition of same-sex couples, either through marriage or civil partnerships, is extending equal access to social advantages in numerous jurisdictions. Section 5 reveals that, even in countries where the law does not expressly prohibit sexual orientation discrimination, same-sex couples who have formalised their relationship status may be entitled to important social advantages because national laws require (complete or partial) equality between such couples and different-sex spouses. While relationship-related social advantages are not a panacea for the absence of more general safeguards against sexual orientation discrimination, they highlight tangible benefits which same-sex couples achieve when their relationship is formally acknowledged.

6 Education

This section explores national prohibitions against sexual orientation discrimination in education. At present, 18 EU Member States and the United Kingdom protect individuals against unequal treatment in this field. Safeguards against sexuality-motivated discrimination are achieved in education through explicit prohibitions, a mixture of focused and general legal protections, and judicial interventions. As for social protection (Section 4) and social advantages (Section 5), in some EU countries, there is uncertainty as to whether domestic law outlaws sexual orientation inequalities in education. In these jurisdictions, it may be possible to identify partial or complete safeguards in alternative legal sources – however, judicial clarification is required.

6.1 Protection against sexual orientation discrimination in education

6.1.1 Express prohibitions against discrimination

In a number of Member States, national law expressly prohibits sexual orientation discrimination in education.³³¹ This is the case in, among other jurisdictions, **Czechia**,³³² **Luxembourg**,³³³ **Romania**,³³⁴ **Slovakia**³³⁵ and **Slovenia**.³³⁶ Explicit prohibitions also exist in **Great Britain**³³⁷ and in **Northern Ireland**.³³⁸ In all of these jurisdictions, the protection against unequal treatment covers both access to, and treatment within, education. This is also the position in **Croatia**³³⁹ where, although the Anti-discrimination Act provides general safeguards against sexual orientation discrimination, it particularly identifies education among ten grounds for special attention.³⁴⁰ Furthermore, it may be possible to interpret the Croatian Gender Equality Act – which stipulates that the public body in charge of education, agencies for training and education and institutions dealing with discrimination as their primary activity shall systematically implement measures to ensure equal access to education – as outlawing unequal treatment due to sexual orientation in this sphere.³⁴¹

In **Lithuania**, in contrast to social protection and social advantages, national law does explicitly protect against sexual orientation discrimination in education.³⁴² Under Article 6 of the Law on Equal Treatment, all

331 See also Articles 4(1) and 6(1) of the Bulgarian Protection against Discrimination Act, which outlaw sexual orientation discrimination in education (access to and treatment within) through prohibitions on all forms of unequal treatment for all protected grounds in all fields. Similarly, in Finland, Section 2 and Section 8 of the Non-Discrimination Act (*Yhdenvertaisuuslaki*) 1325/2014 safeguard against discrimination due to sexual orientation in all public and private activities (excluding private life, family life and the practice of religion). Education, which is available to the public, clearly falls within the scope of protection.

332 Czechia, Section 2(3), together with Section 1(1)(i), of the Anti-Discrimination Act.

333 Luxembourg, Article 2(1)(g) of the Law of 28 November 2006.

334 Romania, Article 11 of Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31 August 2000. The prohibition in the Anti-discrimination Law is reinforced through the Education Law (Law 1/2011).

335 Slovakia, Sections 5(1) and 5(2)(c) of the Anti-discrimination Act. See also Sections 3(c) and 3(d) of the Schools Act (Schools Act, 245/200), which establish 'equal access to education, taking into account the special educational needs of the individual and her/his responsibility for her/his education', as well as the 'prohibition of all forms of discrimination, and especially segregation', as two of the principles on which education should be based.

336 Slovenia, Article 1, Paragraph 1, [personal grounds] and Article 2, Paragraph 1 (Indent 7), [fields] of Protection against Discrimination Act.

337 United Kingdom, Sections 84–99 of the Equality Act 2010.

338 United Kingdom, Regulations 9–11 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

339 For Croatia, see also Croatia, Article 77(2) of the Science and Higher Education Act, which provides that enrolment requirements are determined in a way that guarantees equality for all applicants regardless of, among other grounds, sexual orientation. This protection specifically focuses on access to education (Science and Higher Education Act, 15 August 2003, Official Gazette 123/03, 198/03, 105/04, 02/07, 46/07, 45/09, 63/11, 94/14, 139/13, 101/14, 60/15, 131/17, *Zakon o znanstvenoj djelatnosti i visokom obrazovanju*).

340 Croatia, Article 8(2) of the Anti-discrimination Act, 9 July 2008.

341 Croatia, Article 14(1) of the Gender Equality Act, 15 July 2008, Official Gazette 82/08, 69/17.

342 See also: Article 5(1) of the Law on Education, which identifies equal opportunities as one of the principles of the education system.

educational, scientific and academic institutions³⁴³ must guarantee non-discrimination rights, irrespective of sexual orientation, when making admissions decisions, awarding study grants, drafting educational programmes, selecting curricula and assessing knowledge with regard to all of the grounds listed in the Law on Equal Treatment. That law also requires educational providers and research establishments to positively ensure, within their competence, that learning programmes, textbooks and teaching aids do not contain or promote discrimination on any ground.

Positive obligations also arise in **Sweden**. Under Chapter 2, Section 7 of the Discrimination Act,³⁴⁴ education providers – who become aware that a student applying for or participating in their activities is experiencing harassment or sexual harassment – must investigate the circumstances and, where appropriate, take measures that can reasonably be demanded to prevent a reoccurrence. Chapter 2, Section 5 of the Discrimination Act sets out a general prohibition against unequal treatment, including sexual orientation discrimination, in education.

In **Hungary**, Articles 7, 8, 9 and 10 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA) establish general safeguards against direct and indirect discrimination, including on the basis of sexual orientation, as well as against harassment and instructions to discriminate. Article 27 ETA then identifies specific issues of importance for education. Under Article 27(1) ETA, the principle of equal treatment extends to any care, education or training: (a) which is carried out according to requirements approved or ordered by the Hungarian State; (b) whose organisation is supported by the State, either by direct normative budgetary subsidy or indirectly (especially by releasing or clearing taxes or through tax credit).

Article 27(2) ETA identifies the areas of Hungarian education where the principle of equal treatment shall be particularly, but not exclusively, enforced. This includes determining the conditions for accessing education and assessing applications, defining and setting the requirements for education, evaluating performance, providing and using services related to education, accessing benefits related to education, providing accommodation and subsistence in dormitories, issuing academic certificates and diplomas, accessing vocational guidance, and terminating the relationship related to participation in education.

6.1.2 Prohibitions against discrimination emerging from numerous legal sources

In some Member States, protections against sexual orientation discrimination in education emerge from numerous legal sources. In **France**, for example, Articles 1 and 2 3° of Law No. 2008-496 of 27 May 2008 establish express prohibitions in this field. However, there are also applicable safeguards in the Preamble to the Constitution of 1946,³⁴⁵ Article L111-2 of the Code of Education³⁴⁶ and Article 2 of Law No. 2013-595 of 8 July 2013.³⁴⁷ In **Germany**, Sections 2.1.7 and 19 of the General Act on Equal Treatment outlaw sexuality-motivated unequal treatment in education entered into through private contract. The relevant guarantees in public education in Germany are set out in Article 3.1 of the Basic Law. In the **Netherlands**, both Article 7(1) of the General Equal Treatment Act and Article 429quater (1) of the Criminal Code³⁴⁸ are understood to prohibit sexual orientation discrimination in this sphere – although neither explicitly refer to education.³⁴⁹

343 The obligations under Article 6 of the Law of Equal Treatment apply to both public and private institutions.

344 Sweden, Discrimination Act, 2008:567.

345 The Preamble to the Constitution of 1946 provides for a universal right to education.

346 Article L111-2 of the Code of Education provides for a universal right to education.

347 Article 2 of the Law No. 2013-595 of 8 July states that the public service of education provides for the inclusion of all children without distinction.

348 Article 429quater (1) of the Criminal Code prohibits discrimination, including on the basis of sexual orientation, in the exercise of one's office, job or enterprise. The term 'office' was added in 1991 to include discrimination by public servants (Staatsblad 1991, 623). The provision must therefore be understood to cover sexual orientation discrimination by professionals and public servants working in the field of education.

349 Article 7(1) of the General Equal Treatment Act prohibits discrimination on the basis of sexual orientation with regard to access to and the supply of goods and services, including in the field of education.

In **Portugal**, Article 12(2)(a) of Law 46/86³⁵⁰ establishes democracy, equity and equality of opportunity as principles governing access to education. Although Article 12(2)(a) does not specifically mention sexual orientation discrimination in education, there is an understanding – given the open-ended nature of that provision and the scope of Article 13(2) of the national Constitution – that it does prohibit such unequal treatment. Furthermore, Article 7(1)(a) of Law 51/2012,³⁵¹ which applies to all primary and secondary level public educational institutions, prohibits school communities from discriminating against students due to sexual orientation. Under Article 2(f) and 2(l) of Law 60/2009,³⁵² those institutions, as well as private and cooperative establishments that have an association contract with the State, have an obligation to teach students about the prohibition of unequal treatment based on sexual orientation.

In **Spain**, the case law on Article 14 of the Constitution, Law 62/2003 of 30 December 2003 and the Criminal Code (see Section 4.1.1) also creates national protections against sexual orientation discrimination in education. However, there has additionally been statutory intervention to consolidate equality and non-discrimination as basic tenets of the Spanish education system. The first three principles of quality, as listed in Article 1 of Organic Law 2/2006 on Education,³⁵³ refer to equal treatment and equal opportunity as follows: (a) quality in education for all pupils, regardless of their social condition and circumstances; (b) fairness, guaranteeing equality of opportunities, educational inclusion and non-discrimination, and acting to offset personal, cultural, economic and social inequalities, especially those due to disability; and (c) transmission and implementation of values that foster personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and helping to overcome discrimination of any kind.

6.1.3 Regional prohibitions against discrimination

In **Belgium**, education is a competence of the Communities,³⁵⁴ which have the exclusive right to prohibit sexual orientation discrimination in this field. Relevant protections have been in place in both the Flemish-speaking³⁵⁵ and French-speaking³⁵⁶ communities since 2008, with the German-speaking³⁵⁷ community enacting similar safeguards in 2012. In **Austria**, the nine federal provinces have also adopted prohibitions against sexual orientation discrimination in the public provision of education.³⁵⁸ However, as noted in Section 4, education is not an exclusive prerogative of the Austrian provinces and it would be open to the national legislature to enact federal guarantees.³⁵⁹ In **Catalonia**, an autonomous community in Spain, Article 12 of Law 11/2014 has introduced the concept of ‘coeducation’ – ‘the educational action that enhances real equality of opportunities and the elimination of any type of discrimination based on sexual orientation, gender identity or gender expression’. Under Article 12, ‘coeducation’ should be applied

350 Portugal, Law 46/86, Basic Law of the Educational System (*Lei de Bases do Sistema Educativo*), 14 October, Diário da República, Série I, No. 237, 14 October 1986.

351 Portugal, Law 51/2012, 5 September, Diário da República, Série I, No. 172, 5 September 2012.

352 Portugal, Law 60/2009 establishes a framework for sex education in schools (*Estabelece o regime de aplicação da educação sexual em meio escolar*), 6 August 2009, Diário da República, Série I, No. 151, 6 August 2009.

353 Spain, *Ley Orgánica 2/2006, de 3 de mayo, de Educación*, BOE, 4 May 2006.

354 Belgium, Article 127, para. 1, al. 1, 2° of the Constitution.

355 Belgium, Article 16, para. 3, Article 16, §1, Article 16, para. 2, and Article 20, 5° of the Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008 (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*).

356 Belgium, Article 4, 2°, Article 3, 1°, Article 5, al. 2, 1°, and Article 5, al. 2, 2° of the Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*).

357 Belgium, Article 4, 2°, Article 3, 1°, Article 5, al. 1, 1°, and Article 5, al. 1, 2° of Decree of 19 March 2012 to combat certain forms of discrimination (*Dekret zur Bekämpfung bestimmter Formen von Diskriminierung*).

358 See: Viennese Anti-Discrimination Act, Wr LGBl No. 35/2004, (para. 1); Burgenlandian Anti-Discrimination Act, Bgl LGBl No. 84/2005, (para. 23); Carinthian Anti-Discrimination Act, Kntn LGBl No. 63/2004, (para. 12); Lower Austrian Anti-Discrimination Act, NÖ LGBl No. 24/2017, (para. 3); Upper Austrian Anti-Discrimination Act, OÖ LGBl No. 50/2005, (para. 2); Salzburgian Equal Treatment Act, Slzb LGBl No. 31/2006, (para. 28); Styrian Equal Treatment Act, Stmk LGBl No. 66/2004, (para. 32); Tyrolian Anti-Discrimination Act, T LGBl No. 25/2005, (para. 3); Vorarlbergian Anti-Discrimination Act, Vlbgl LGBl No. 17/2005, (para. 1).

359 See e.g. the federal Equal Treatment Act, which prohibits discrimination in education on the ground of ethnic affiliation [Section 31(3)(3)].

throughout the Catalan education system, including in school materials, school and leisure activities, resources for education and information provided to parents.³⁶⁰

Table 5 Prohibition on discrimination due to sexual orientation in education

Country	Yes	No
Austria		X
Belgium	X	
Bulgaria	X	
Croatia	X	
Cyprus		X ³⁶¹
Czechia	X	
Denmark		X
Estonia		X ³⁶²
Finland	X	
France	X	
Germany	X	
Greece		X
Hungary	X	
Ireland	X	
Italy		X
Latvia		X
Lithuania	X	
Luxembourg	X	
Malta		X ³⁶³
Netherlands	X	
Poland		X
Portugal	X	
Romania	X	
Slovakia	X	
Slovenia	X	
Spain	X	
Sweden	X	
United Kingdom	X	

6.1.4 Prohibitions against discrimination: educational levels

In the vast majority of jurisdictions where protections against sexual orientation discrimination in education exist, those prohibitions cover primary, secondary and third-level institutions.³⁶⁴ In some Member States, such extensive coverage is understood from the fact that, in establishing the relevant

³⁶⁰ Article 13 of Law 11/2014 states that '[t]he principles of non-discrimination and respect for sexual orientation, gender identity or gender expression are applicable to the university environment' and Article 14 extends those principles to the activities of culture, free time and sport.

³⁶¹ It may be possible to identify relevant protections in education in Article 28 of the Constitution. In addition, unequal treatment on the basis of sexual orientation comes within the mandate of the Equality Body.

³⁶² In Estonia, Article 12(1) of the national Constitution sets out an explicit ban on discrimination on any ground.

³⁶³ Article 45 of the national Constitution outlaws discrimination attributable 'wholly or mainly' to the characteristics of 'race, place of origin, political opinions, colour, creed, sex, *sexual orientation* or gender identity' [emphasis added].

³⁶⁴ See e.g. Belgium, Bulgaria, Czechia, Finland, France, Germany, Hungary, Lithuania, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

safeguards, national laws have not differentiated between different levels within the education sector.³⁶⁵ In **Croatia**, for example, the Anti-Discrimination Act sets no limits to the scope of application – indicating that the Act outlaws unequal treatment by all educational providers.

In **Portugal**, the constitutional protection against unequal treatment extends to all sectors of education, but the specific guarantees in Law 51/2012 and Law 60/2009 do not apply to universities. In **Austria**, the provincial safeguards for sexual orientation in education cover educational systems run or financed by the respective province. In practice, this means kindergartens, but it also extends to some primary and secondary schools and adult education institutions, as well as to province-run third-level education.

In **Ireland**,³⁶⁶ the prohibition against sexual orientation discrimination extends to ‘educational establishments’ which are defined to include preschool services (‘within the meaning of Part VII of the Child Care Act, 1991’), primary or post-primary schools, institutions providing adult, continuing or further education, or universities or any other third-level or higher-level institutions – irrespective of whether these establishments are supported by public funds.³⁶⁷ Section 7(2) of the Equal Status Acts 2000–2018 protects against sexual orientation discrimination in admissions to educational establishments, the terms and conditions of admission, access to courses, facilities or benefits provided by educational establishments, any other terms or conditions of participation in the establishment by students, or the expulsion of a student from the establishment or any other sanction against the student.³⁶⁸

6.1.5 Prohibition of discrimination by association

While there is broad protection across the European Union for students in relation to discrimination motivated by their own sexual orientation, it is less clear that national laws safeguard students who experience unequal treatment due to their parents’ sexuality. In **Bulgaria, Portugal, Slovenia, Spain** and **Sweden**, equality guarantees do extend to cover such associative discrimination. In **Croatia**, Section 1(2) of the Anti-Discrimination Act condemns unequal treatment against an individual for impermissible reasons, as well as against persons in a kinship or other relationship with that individual.

In other EU Member States – including **Czechia, Germany, Lithuania** and **Luxembourg** – the relevant legal framework is uncertain and further judicial clarification on the law is necessary.³⁶⁹ In **Romania**, Article 11 of the Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination does not differentiate between discrimination due to personal or parental sexual orientation. As such, it would be for either the domestic courts or the National Council for Combating

365 See e.g. Luxembourg.

366 Research suggests that LGBT-related bullying is widespread in Irish secondary schools (see generally: Pizmony-Levy, O. and BeLonG To Youth Services (2019), *The 2019 School Climate Survey Report: The experience of lesbian, gay, bisexual and trans young people in Ireland's schools*, Dublin: BeLonG To Youth Services). However, relatively few queries on the sexual orientation ground (in any field covered by the Equal Status Acts 2000–2018) are processed by the Irish Human Rights and Equality Commission’s legal information service each year. It also appears that there is little (if any) case law on the subject matter. According to the national expert, amending the legislation to enable NGOs to take own-name cases could assist in driving compliance, as could the provision of civil legal aid for such litigation.

367 Section 7(1) of the Equal Status Acts 2000–2018.

368 Under Section 61 of the Education Acts 1998 (inserted by Section 9 of the Education (Admissions to Schools) Act 2018, 18 July 2018), the admissions policies of a school must include a statement to the effect that the school shall not discriminate in admissions on, inter alia, the sexual orientation ground (re: either the applicant or the student). The ground is to be construed in accordance with Section 3 of the Equal Status Acts 2000–2018, which defines the prohibitions of direct and indirect discrimination.

369 In Ireland, for example, Section 7 of the Equal Status Acts 2000–2018 (ESA) only refers to students or prospective students. However, other people, such as parents of pupils, can refer cases against schools or other educational establishments under Section 5 ESA (provided that they are accessing a service, good or facility); see Equality Tribunal, *A Separated Father v A Community School*, DEC-S2010-049, 5 November 2010: access to students’ records was a service provided to parents having regard to both ESA and the Education Act 1998. The Irish Department of Education and Skills is not an ‘educational establishment’ but may be regarded as providing goods and services under Section 5 ESA, as may other entities involved in providing facilities or setting policies in the area of education; see Equality Tribunal, *Two Named Complainants v Minister for Education and Science*, DEC-S2006-077, 3 November 2006; see also Workplace Relations Commission, *A Mother on behalf of her Son v Department of Education & Skills/State Examinations Commission*, DEC-S2016-040, 9 June 2016. At present, there is no relevant case law on the sexual orientation ground.

Discrimination (NCCD) to offer guidance. It may be instructive that, although the anti-discrimination law does not specifically outlaw discrimination by association, the Romanian courts have explored this form of unequal treatment in previous case law.³⁷⁰ Similarly, while Article 7(1) of the **Dutch** General Equal Treatment Act does not distinguish between discrimination arising from students' and parents' sexuality, the Netherlands Institute for Human Rights does generally recognise associative discrimination.³⁷¹

In **Belgium**, guarantees against direct discrimination in the Flemish-speaking Community, including unequal treatment due to sexual orientation in education, incorporate discrimination by association.³⁷² Similarly, the *travaux préparatoires* for Belgium's federal anti-discrimination legislation make clear that the law should be construed in compliance with the ruling of the Court of Justice of the European Union in *Coleman v Attridge Law (A Firm)*.³⁷³ That judgment has also impacted the definition of direct discrimination in the **United Kingdom**, which would extend to unequal treatment arising from parents' sexual orientation. However, at present, UK law only prohibits indirect discrimination against persons who have the protected characteristic. Likewise, in **Slovakia**, the Anti-Discrimination Act nominally only encompasses discrimination against persons whose rights are set up in law. As such, there is a need for judicial interpretation to determine whether the Slovak rules prohibit associative discrimination in education.

6.1.6 Alternative sources of prohibitions on sexual orientation discrimination in education

As for social protection (Section 4) and social advantages (Section 5), in those EU Member States which do not specifically prohibit sexual orientation discrimination in education, it may nonetheless be possible to identify protection in alternative legal sources.³⁷⁴

In **Cyprus**,³⁷⁵ **Estonia**,³⁷⁶ **Latvia**³⁷⁷ and **Malta**,³⁷⁸ constitutional equality guarantees may offer relevant safeguards in this sphere. In **Cyprus**, the mandate of the Equality Body³⁷⁹ and the UN Convention on

370 Romania, Court of First Instance No. 4, Bucharest, *D.Z. v Distrigaz Sud*, Decision 4222, 1 August 2007. Upheld on appeal by the Bucharest Court of Appeal, 17 September 2008.

371 Netherlands Institute for Human Rights, Opinion NIHR 2018-115, 2018.

372 Belgium, Article 16 of the Framework Decree for the Flemish equal opportunities and equal treatment policy (*Decreet houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) of 10 July 2008.

373 Judgment of 17 July 2008, *Coleman v Attridge Law (A Firm)*, C303/06, EU:C:2008:415. It should, however, be remembered that the Belgian federal anti-discrimination law does not prohibit sexual orientation discrimination in education because this subject is, under Article 127, §1, al. 1, 2° of the Constitution of Belgium, an exclusive competence of the Communities.

374 In addition, in Italy, education is one of the four pillars of the Italian strategy to prevent and fight discrimination on the grounds of sexual orientation and gender identity, developed by the national equality body, UNAR, to implement the Council of Europe Recommendation CM/Rec (2010)5. Although UNAR had promoted educational activities in this field, such as the publication of educational materials, disapproval expressed by religious and political actors has led to the cessation of these activities.

375 Article 28 of the Constitution of Cyprus.

376 Estonia, Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), Riigi Teataja 1992, 26, 349. Riigi Teataja – Official State Gazette.

377 In Latvia, the Law on Education applies to both the public and private spheres. However, it contains a closed-list non-discrimination clause, which omits sexual orientation. This absence of protection may, potentially, be remedied through Article 91 of the Latvian Constitution. According to legal doctrine, the list of protected non-discrimination grounds should not be narrower than those set out in the Charter of Fundamental Rights of the European Union, which expressly enumerates sexual orientation in Article 21(1).

378 See Article 45 of the Maltese Constitution. Article 45(2) provides that '[s]ubject to the provisions of sub-Articles (6), (7) and (8) of this article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'. Article 45(3) goes on to clarify that '[i]n this article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description' [emphasis added].

379 Cyprus, Law on combating racial and other forms of discrimination (Commissioner) N. 42(I)/2004, Article 6(2)(e). The Equality Body is mandated with addressing sexual discrimination orientation in education without reference to the level of education, age of the victim or whether it concerns public or private education.

the Rights of Child³⁸⁰ – ratified by Cyprus in 1991 – may also be applicable sources of protection. The Cypriot Equality Body and the Commissioner for the Rights of the Child have both addressed incidents of homophobic bullying, hate speech and harassment. Rather than sanctioning individual perpetrators in such cases, these actors have preferred more systemic solutions, advocating, inter alia, training, information campaigns and data collection. Following evidence that school authorities were insufficiently handling allegations of homophobia, supported by data from the Ministry of Education, the Equality Body published recommendations on how school professionals should approach homophobic incidents in their institutions, avoiding detailed discussion of the alleged failings of individual schools in specific cases.³⁸¹

In **Denmark**, public authorities are governed by a general principle of equality which is applicable under administrative law. This principle has the force of legislation, requires public authorities to treat similar matters equally and has relevance within Danish public schools. Furthermore, although it falls outside the scope of this report, Danish law also prohibits discrimination due to sexual orientation in vocational and/or business education.

In **Poland**, the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment does not outlaw sexuality-motivated unequal treatment in education – although there is a general prohibition on discrimination in that field. The Act on Education Law refers, in the Preamble, to the Constitution of Poland, as well as to core international human rights instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child.³⁸² However, the Act on Education Law has no standalone non-discrimination provision listing protected grounds, nor is there a general equality clause in the Polish legislation on higher education.³⁸³

6.2 Case law

In common with other areas covered in this report, there is only limited case law across EU Member States and the United Kingdom addressing sexual orientation discrimination in education.³⁸⁴

In *R (Amicus & Ors) v Secretary of State for Trade and Industry*,³⁸⁵ the High Court of **England and Wales** held that the exceptions which allow discrimination on grounds of sexual orientation in employment by organised religions do not apply to employment in schools – in the process confirming that unequal treatment due to sexual orientation in education is impermissible. In **Sweden**, a District Court in 2017 issued a ruling, without an oral hearing, confirming that a university would pay compensation where a lecturer was accused of harassment in a complaint connected to sexual orientation.³⁸⁶ Although agreeing to the compensation, the university did not accept that discrimination had taken place.

In *A Student v An Educational Establishment*, the former **Irish** Equality Tribunal rejected a claim, from a gay male student on an adult education programme, that the behaviour of staff and other students constituted less favourable treatment and harassment because of his sexual orientation.³⁸⁷ The Equality

380 Article 28, in conjunction with Article 2, of the UN Convention on the Rights of the Child recognises the right to education without discrimination on any ground. The Convention may be used only in respect of children who are under the age of 18 years in Cyprus and, as such, is practically inapplicable to university students.

381 Cyprus, Anti-discrimination Authority of the Equality Body, Ref. AKR 63/2011, AKR 131/2011, 20 November 2012.

382 Poland, Act on Education Law (*Ustawa z dnia 14 grudnia 2016 r. Prawo oświatowe*), 14 December 2016, in force since 1 September 2017, Dz.U.2017.59. This Act partially replaced the previous Act on the Education System (*Ustawa z dnia 7 września 1991 r. o systemie oświaty*, Dz. U. 2016. poz. 1943, 1954, 1985, 2169, 7 September 1991. The 1991 Act is still partly in force, in the version published in 2017 (Dz.U.2017.2198 t.j.).

383 Poland, Act on Higher Education and Science (*Ustawa z 20 lipca 2018 r. prawo o szkolnictwie wyższym i nauce*), Dz.U.2018.1669, 20 July 2018.

384 EU Member States in which national experts were unable to identify relevant case law include: Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Finland, France, Germany, Greece, Latvia, Netherlands, Romania and Slovenia.

385 United Kingdom, [2004] EWHC 860 (Admin).

386 Sweden, District Court, ANM 2015/2431, 5 October 2017.

387 Ireland, Equality Tribunal, *A Student v An Educational Establishment*, DEC-S2009-084, 8 December 2009.

Tribunal observed that the respondent's account of the relevant events had been more credible – backed up with contemporaneous notes and written records.³⁸⁸ Although there was evidence that, on one occasion, the complainant was 'subjected to a verbal attack by another student which included remarks in relation to his sexual orientation',³⁸⁹ all the students had attended a presentation about the establishment's Safety Statement and had signed an undertaking that they understood (and would abide by) the terms. The respondent had investigated allegations of harassment committed against the complainant and, in one instance, had issued a sanction. The respondent had organised a class meeting and the college manager had tried to reinforce the importance of maintaining an atmosphere of respect and tolerance. As such, the respondent could invoke a defence under Section 11(3) of the Equal Status Acts 2000-2018 because it had taken reasonably practicable steps to deal with the complaint and to prevent harassment at the college.³⁹⁰

In **Hungary**, in 2016, the Metropolitan Court of Budapest found that there was unlawful discrimination when a child was denied access to an educational establishment because he was being raised by two women in a same-sex registered partnership.³⁹¹ The Equal Treatment Authority had already confirmed that there was a violation of the national equality protections but the parents believed that the low fine imposed was disproportionate to the severity of the infringement.³⁹² On appeal, the Metropolitan Court of Budapest concluded that there had been a breach of the inherent personal right to non-discrimination – refusing admission based on the sexual orientation of the parents.³⁹³ The court rejected arguments that exclusion would promote the best interests of the child. If there was a possibility that the young person would encounter bullying or harassment due to his family status, the school authorities had an obligation to use appropriate measures to prevent that abuse.³⁹⁴ It is not permissible to confer a disadvantage upon persons with specific characteristics simply because 'an educational institution or a form master is not willing or able to take into consideration their special needs and facilitate their integration to the community of students'.³⁹⁵ The Metropolitan Court of Budapest awarded increased non-pecuniary damages and legal fees.

In **Lithuania**, the Ombudsperson had begun to investigate a complaint of, inter alia, sexual orientation discrimination in the provision of materials for an online course for sex education teachers.³⁹⁶ However, the Ombudsperson ultimately decided to discontinue the case because there was a lack of objective information on which to determine whether a violation of the Law on Equal Treatment had taken place.³⁹⁷ Both the director of the online programme and the lecturer who had prepared the course content were unable to confirm that the materials provided to the Ombudsperson formed part of their module. Furthermore, the Human Rights Organisation Coalition had submitted the complaint to the Ombudsperson on the basis of course materials received from an anonymous source.

388 The respondent's manager presented documentary evidence of its interaction with the complainant including references to the verbal warnings and a copy of the written warning that the college served on [the complainant] for his behaviour. The documents presented included contemporaneous notes recording the events that led to the serving of these warnings on [the complainant]. The evidence refers to numerous verbal insults aimed at the management, staff and student population'; Ireland, Equality Tribunal, *A Student v An Educational Establishment*, DEC-S2009-084, 8 December 2009, [4.6].

389 Ireland, Equality Tribunal, *A Student v An Educational Establishment*, DEC-S2009-084, 8 December 2009, [5.9].

390 In Ireland, harassment on all the discriminatory grounds, including sexual orientation, is prohibited under Section 11 of the Equal Status Acts 2000-2018.

391 Hungary, Metropolitan Court of Budapest, Judgment No. 31.P.25.499/2015/16/1, 24 June 2016.

392 Hungary, Equal Treatment Authority, Decision No. EBH/366/2014 (2014).

393 Hungary, Metropolitan Court of Budapest, Judgment No. 31.P.25.499/2015/16/1, 24 June 2016.

394 Hungary, Metropolitan Court of Budapest, Judgment No. 31.P.25.499/2015/16/1, 24 June 2016.

395 Hungary, Metropolitan Court of Budapest, Judgment No. 31.P.25.499/2015/16/1, 24 June 2016.

396 Lithuania, Equal Opportunities Ombudsperson, No. (18)SN-193)SP-2, 4 January 2019 (*Lygių galimybių kontrolieriaus sprendimas dėl galimos diskriminacijos propagavimo lyties, lytinės orientacijos ir negalios pagrindu VšĮ 'Švietimo tinklas' skelbtoje mokymo programoje*).

397 Lithuania, Equal Opportunities Ombudsperson, No. (18)SN-193)SP-2, 4 January 2019 (*Lygių galimybių kontrolieriaus sprendimas dėl galimos diskriminacijos propagavimo lyties, lytinės orientacijos ir negalios pagrindu VšĮ 'Švietimo tinklas' skelbtoje mokymo programoje*).

6.3 Conclusion

Section 6 has explored national prohibitions against sexual orientation discrimination in education. At present, 18 EU Member States and the United Kingdom provide relevant protections in this field. In many of these jurisdictions, the law establishes explicit guarantees – creating express safeguards for individuals in both accessing and enjoying education. Prohibitions against sexual orientation discrimination across the Union are notable for the extent to which they cover the full educational spectrum (pre-primary to third-level) and are reinforced through complementary legal instruments. Overall, the level of protection is comparatively robust when considered against current safeguards in social protection and social advantages (see Section 4 and Section 5).

Yet there are still a number of key concerns. In nine Member States, the position regarding sexual orientation discrimination in education remains incomplete: either national law does not outlaw such unequal treatment or there remains ambiguity in the current legal framework. This status quo is unsatisfactory, failing to protect existing or prospective students, and emboldening discriminatory actions through equivocation. Considering the central importance of education, particularly for young people, there is a need for common, minimum standards throughout the Union so that all individuals, irrespective of sexual orientation, can enjoy the right to education.

There is also a requirement for clearer protections against discrimination by association. While Section 6 reveals increasing prohibitions against unequal treatment due to students' sexual orientation, in many jurisdictions, there is doubt whether current law prevents discrimination against students because of their parents' sexuality. In many of the countries surveyed for this report, the existing rules do not specifically outlaw such associative discrimination and any prohibition would require judicial intervention. This is worrying as, in some situations, particularly in primary schools, unequal treatment may be as likely (if not more likely) to arise from parental rather than student sexuality. In order to ensure comprehensive and meaningful protections against sexual orientation discrimination, Member States must prohibit discrimination by association in education.

Finally, as for social protection and social advantages, there is a notable absence of case law on prohibitions against unequal treatment due to sexual orientation in education. While this may be a consequence of numerous factors, it does suggest that, despite growing legal safeguards, individuals are still struggling to enforce their right to education. Lack of case law reduces the opportunities for national judiciaries to define existing protections and to clarify how far sexual orientation guarantees extend – the ambiguous status of discrimination by association being an important example. Moving forward, there is a need for both domestic and EU policy makers to adopt meaningful action so that, where they experience sexual orientation discrimination in education, individuals feel sufficiently empowered to enforce their rights.

7 Access to and the supply of goods and services

Section 7 addresses prohibitions against unequal treatment due to sexual orientation in access to and the supply of goods and services. Across the various topics considered within this report, national laws concerning goods and services show the highest levels of protection for sexual orientation. At present, 20 EU Member States and the United Kingdom outlaw discrimination in this field. In many jurisdictions, the relevant safeguards are express – with specific enumeration of the goods and services which must be available irrespective of sexual orientation. In contrast with social protection (Section 4), social advantages (Section 5) and education (Section 6), there is also a substantial body of case law where courts, ombudspersons and equality bodies have applied guarantees against unequal treatment in this sphere.

7.1 Prohibitions on sexual orientation discrimination

7.1.1 Explicit protections in access to and the supply of goods and services

Across the European Union,³⁹⁸ national laws in a majority of countries explicitly outlaw sexual orientation discrimination in access to and the supply of goods and services. This is the case in, among other Member States, **Czechia**,³⁹⁹ **Germany**,⁴⁰⁰ **Luxembourg**,⁴⁰¹ **Slovakia**,⁴⁰² **Slovenia**⁴⁰³ and **Sweden**.⁴⁰⁴

In **Belgium**,⁴⁰⁵ the Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination prohibits unequal treatment relating to all goods and services which are available to the public.⁴⁰⁶ There is also partial coverage against sexual orientation discrimination in the laws of the Flemish-speaking,⁴⁰⁷ French-speaking⁴⁰⁸ and German-speaking⁴⁰⁹ communities, as well as in the Walloon⁴¹⁰ and Brussels-

398 See also Section 29 of the Equality Act 2010 and Regulation 5 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. The national expert notes the exclusion of protection against sexuality-motivated harassment in goods and services from the Equality Act 2010. Although subjecting a service user to unwanted behaviour because of sexual orientation will usually amount to unlawful direct discrimination, this may be an important omission.

399 Czechia, Section 2(3), together with Section 1(1)(j), of the Anti-Discrimination Act.

400 Germany, Sections 2.1.8 and 19 (contract law) of the General Act on Equal Treatment.

401 Luxembourg, Article 2(1)(h) of the Law of 28 November 2006.

402 Slovakia, Section 5(2)(d), read in conjunction with Section 5(1), of the Anti-discrimination Act. The equality guarantee in this area only applies 'in connection with special laws'. As such, judicial clarification is required for access to and the supply of goods and services provided by pieces of legislation/regulations other than laws (e.g. public services provided by municipalities and self-governing regions). Furthermore, in Slovakia, national legislation does not apply to discrimination in access to goods and services that are provided by natural persons who are not entrepreneurs.

403 Slovenia, Article 1, Paragraph 1, (personal grounds) and Article 2, Paragraph 1 (Indent 8), (fields) of the Protection against Discrimination Act.

404 Sweden, Chapter 2, Section 12 of the Discrimination Act, 2008:567.

405 The position in Belgium, where there is both federal and community legislation, can be contrasted with the current law in Austria. In that country, federal legislation does not prohibit sexual orientation discrimination in access to and supply of goods and services. There are regional protections for the public provision of goods and service. However, contracts between private actors remain exclusively governed by federal law. In Austria, the federal legislature is competent to adopt national anti-discrimination protections for sexual orientation in access to and supply of goods and services.

406 Belgium, Article 5, §1, 1°, Article 4, 4° and Article 14 of the Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*).

407 Belgium, Article 20, 6°, Article 16, para. 3, Article 16, para. 1 and Article 16, para. 2 of the Framework Decree for the Flemish equal opportunities and equal treatment policy of 10 July 2008 (*Décret houdende een kader voor het Vlaamse gelijkekansen en gelijkebehandelingsbeleid*) [FLED].

408 Belgium, Article 4, 6°, Article 3, 1°, Article 5, al. 2, 1° and Article 5, al. 2, 2° of the Decree of the French Community adopted on 12 December 2008 on the fight against certain forms of discrimination (*Décret de la Communauté française du 12 décembre 2008 relatif à la lutte contre certaines formes de discrimination*).

409 Belgium, Article 4, 7°, Article 3, 1°, Article 5, al. 1, 1° and Article 5, al. 1, 2° of the Decree of 19 March 2012 to combat certain forms of discrimination (*Dekret zur Bekämpfung bestimmter Formen von Diskriminierung*).

410 Belgium, Article 5, para. 1, 9°, Article 4, 5°, Articles 15, 1° and Article 15, 2° of Decree of 6 November 2008 on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (*Décret de la Région wallonne du 6 novembre 2008 relatif à la lutte contre certaines formes de discrimination, en ce compris la discrimination entre les femmes et les hommes, en matière d'économie, d'emploi et de formation professionnelle*) [WEMD].

Capital⁴¹¹ regions.⁴¹² In **Croatia**, the Anti-Discrimination Act identifies access to and the supply of goods and services as among the areas which benefit from special attention.⁴¹³ The Croatian Same-Sex Life Partnership Act also expressly protects same-sex life partners who access goods and services – either in the public or private sectors.⁴¹⁴

7.1.2 Criminal law protections

In **Denmark** and **Greece** – two jurisdictions which do not provide prohibitions in social protection, social advantages and education – national laws *do* outlaw sexual orientation discrimination in access to and the supply of goods and services. Under the **Danish** Act on the Prohibition of Discrimination due to Race etc, it is a criminal offence to refuse, in connection with a commercial or non-profit business, to serve or allow entrance to a person on the basis of, inter alia, sexual orientation.⁴¹⁵ In **Greece**, Article 11 of Law 4443/2016 similarly confirms that refusing goods and services because of, inter alia, sexual orientation may create liability for a term of imprisonment ranging from three months to five years, and for a fine ranging from EUR 1 000 to EUR 5 000.⁴¹⁶

Danish and Greek law are comparatively novel in that they establish protection against sexual orientation discrimination through the criminal law. This is also partly the case in the **Netherlands**, where Article 429quater (1) of the Criminal Code prohibits discrimination, including on the basis of sexual orientation, in the exercise of one's office, job or enterprise. With this provision the legislator aimed to combat discrimination in the entire socio-economic sphere, including the provision of goods and services.⁴¹⁷ As already noted, the term 'office' was added in 1991 to include discrimination by public servants.⁴¹⁸ However, Dutch law also creates relevant safeguards through Article 7(1) of the General Equal Treatment Act (GETA). In **France**, a similar mix of civil and criminal prohibitions emerge from Articles 1 and 2 3° of Law No. 2008-496 of 27 May 2008, as well as Articles 225-1 and 225-2 of the Criminal Code. Article 432-7 of the Criminal Code is also relevant as regards the denial and subordination of access to a right by a person holding public authority or implementing a function of public service.

7.1.3 Enumerating specific goods and services for protection

In a number of EU Member States, domestic laws provide guidance on specific aspects of access to and the supply of goods and services to which non-discrimination protections apply.

In **Romania**, for example, Article 10 of Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination⁴¹⁹ refers to public administrative and legal services,⁴²⁰ selling or

411 Belgium, Article 4, 3°, Article 5, 2°, Article 7, 1° and Article 7, 2° of the Ordinance of 5 October 2017 aiming to combat discrimination and promote equal treatment in the Region of Brussels- Capital (*Ordonnance tendant à lutter contre certaines formes de discriminations et à promouvoir l'égalité de traitement*).

412 Discrimination on the basis of sexual orientation is also prohibited in access to housing and is covered by the FLED (Article 20, 6°) and the WEMD (Article 5, §1, 9°), as well as the Housing Code of the Region of Brussels-Capital; see Article 2, Article 193, 1°, Article 193, 3° and Article 193, 5° of the Brussels Housing Code, 17 July 2003, lastly modified on 21 December 2018, OJ (Moniteur belge), 31 January 2019.

413 Croatia, Article 8(6) and 8(8) of the Anti-discrimination Act, 9 July 2008.

414 Croatia, Article 71(1) of the Same-sex Life Partnership Act, 15 July 2014.

415 Denmark, Act on the Prohibition of Discrimination due to Race etc. (*Lov om forbud mod forskelsbehandling på grund af race etc.*), Consolidated Act No. 626 of 29 September 1987 with later amendments. The Act is a criminal law, which does not cover indirect discrimination, harassment or victimisation.

416 The specific crime is prosecuted *ex officio*. There is no relevant case law.

417 See: Ten Voorde, J. M., *Commentaar op artikel 429quater Sr*, in C.P.M. Cleiren et al (eds), *Tekst & Commentaar Strafrecht*, online edition (login required), last updated on 1 July 2020.

418 Netherlands, Staatsblad 1991, 623.

419 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31 August 2000.

420 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter a).

renting a building or a flat,⁴²¹ granting credit or any other contract,⁴²² access to theatres, movie theatres, libraries, museums and exhibitions,⁴²³ access to shops, hotels, restaurants, pubs, discos or any service providers,⁴²⁴ public transportation services,⁴²⁵ and access to rights and facilities in general.⁴²⁶

Similarly, in **Lithuania**, Article 8(1) of the Law on Equal Treatment (LET) guarantees equality, irrespective of sexual orientation, in 'access to the same products, goods and services, including housing' and in 'conditions of payment and guarantees for the same products, goods and services or for products, goods and services of equal value'.⁴²⁷ Furthermore, according to Article 8(1) LET, 'when providing consumers with information about products, goods and services or advertising them, [there is a requirement to] ensure that such information does not convey humiliation, contempt or restriction of rights or extension of privileges on the grounds of... sexual orientation... and that it does not form public opinion that these qualities make a person superior or inferior to another'.

In **Ireland**, Section 5(1) of the Equal Status Acts 2000-2018 (ESA) prohibits discrimination in 'disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public'. The ESA defines the concept of services to include a 'service or facility of any nature which is available to the public generally or a section of the public',⁴²⁸ giving the following (non-exhaustive) examples: access to and the use of any place, facilities for banking, insurance, grants, loans, credit or financing, facilities for entertainment, recreation or refreshment, facilities for cultural activities, facilities for transport or travel, services or facilities provided by a club,⁴²⁹ which is available to the public generally or a section of the public, whether on payment or without payment, and a professional or trade service.⁴³⁰

In **Hungary**, Articles 7, 8, 9 and 10 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA) establish general safeguards against direct and indirect discrimination, including on the basis of sexual orientation, as well as against harassment and instructions to discriminate. However, under Article 30(1) ETA, it is a 'particular violation of equal treatment' where, 'at premises open to customers, particularly in catering, commercial, cultural and entertainment establishments', there is, due to sexual orientation, denial or neglect in the provision of goods or services,⁴³¹ sale or provision of inferior goods and services,⁴³² or a notice implying that certain individuals are excluded from the sale or provision of goods and services.⁴³³

421 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter c).

422 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter d).

423 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter e).

424 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter f).

425 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter g).

426 Romania, Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), Letter h).

427 In Lithuania, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants or banks) and those that are only available privately (e.g. limited to members of a private association).

428 Ireland, Section 2(1) of the Equal Status Acts 2000-2018.

429 Under Section 2(1), this is so, whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999.

430 According to Section 2(1), 'service' does not include pension rights (within the meaning of the Employment Equality Act, 1998) or a service or facility in relation to which that Act applies.

431 Hungary, Article 30(1)a) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003 [ETA].

432 Hungary, Article 30(1)b) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003 [ETA].

433 Hungary, Article 30(1)c) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003 [ETA].

7.1.4 Multi-source and general protections in access to and the supply of goods and services

In **Portugal** and **Spain**, prohibitions on sexual orientation discrimination in access to and the supply of goods and services are located in a number of statutory provisions and have been reinforced through judicial intervention.

Following revisions to the **Portuguese** Code of Administrative Procedure in 2015,⁴³⁴ Article 6 now prohibits unequal treatment due to sexual orientation in public administration.⁴³⁵ Under Article 2(1) of the Basic Law on Housing,⁴³⁶ all persons, irrespective of sexual orientation, have a right to housing for themselves and for their families. Furthermore, the newly-inserted⁴³⁷ Article 1067-A of the Portuguese Civil Code,⁴³⁸ concerning access to leases, outlaws, inter alia, sexual orientation discrimination and prevents advertising a lease with restrictions, specifications or preferences based on numerous protected grounds. In **Spain**, the case law on Article 14 of the Constitution, Law 62/2003 of 30 December 2003 and the Criminal Code (see Section 4.1.1) also creates national protections against sexual orientation discrimination in access to and the supply of goods and services.⁴³⁹ However, in addition, Articles 4 and 6 of Law 11/2007 on electronic access for citizens to public services⁴⁴⁰ also acknowledge a general principle of equal treatment (and non-discrimination) in this area.

In **Bulgaria** and **Finland** – in common with social protection, social advantages and education – prohibitions on discrimination in access to and the supply of goods and services form part of broader safeguards covering numerous fields. The Bulgarian Protection against Discrimination Act outlaws all unequal treatment for all reasons in any field.⁴⁴¹ Similarly, goods and services, which are available to the public, clearly fall within the comprehensive protection against discrimination in all public and private activities – set out in Sections 2 and 8 of the Finnish Non-Discrimination Act.⁴⁴² Furthermore, in **Cyprus**,⁴⁴³ **Estonia**⁴⁴⁴ and **Malta**,⁴⁴⁵ it may also be possible to locate relevant protections in existing constitutional guarantees – although judicial clarification would be required in this regard.

Table 6 National prohibitions on discrimination due to sexual orientation in access to and the supply of goods and services

Country	Yes	No
Austria		X
Belgium	X	
Bulgaria	X	
Croatia	X	

434 Portugal, Decree-Law 4/2015, approves the New Code of Administrative Procedure (*aprova o novo Código do Procedimento Administrativo*), 7 January 2015, Diário da República, Série I, No. 4, 7 January 2015.

435 Sexual orientation is also protected under the general principle of non-discrimination, enshrined in Article 13(2) of the Constitution of Portugal, which applies to all areas covered by law, including access to and supply of goods and services available to the public, even if provided by private persons.

436 Portugal, Law 83/2019, Basic Law on Housing (*Lei de Bases da Habitação*), Diário da República Série I, No. 168, 3 September 2019.

437 See: Law 13/2019, 12 February, that establishes measures to correct imbalance situations between tenants and landlords, to reinforce security and stability in urban lease, and to protect particularly vulnerable tenants (Lei 13/2019, 12 Fevereiro, que estabelece medidas destinadas a corrigir situações de desequilíbrio entre arrendatários e senhorios, a reforçar a segurança e a estabilidade do arrendamento urbano e a proteger arrendatários em situação de especial fragilidade).

438 Portugal, Decree-Law 47344/66, Civil Code (*Código Civil*) Diário do Governo, Série I, No. 274, 25 November 1966.

439 For regional protections in Catalonia, see Article 26 of Law 11/2014.

440 Spain, Ley 11/2007, de 22 de junio, de acceso electrónico de los ciudadanos a los Servicios Públicos, BOE, 23 June 2007.

441 Bulgaria, Article 4(1) and Article 6(1) of the Protection against Discrimination Act (Закон за защита от дискриминация).

442 Finland, Section 2 (Scope of application) and Section 8 (Prohibition of discrimination) of the Non-Discrimination Act (*Yhdenvertaisuuslaki*), 1325/2014.

443 Cyprus, Article 28 of the Constitution. See also the mandate of the Equality Body; Article 6(2)(f) of the Law on combating racial and other forms of discrimination (Commissioner) N. 42(I)/2004.

444 Estonia, Article 12(1) of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), Riigi Teataja 1992, 26, 349, Riigi Teataja – Official State Gazette.

445 Malta, Article 45 of the Constitution.

Country	Yes	No
Cyprus		X ⁴⁴⁶
Czechia	X	
Denmark	X	
Estonia		X ⁴⁴⁷
Finland	X	
France	X	
Germany	X	
Greece	X	
Hungary	X	
Ireland	X	
Italy		X
Latvia		X
Lithuania	X	
Luxembourg	X	
Malta		X ⁴⁴⁸
Netherlands	X	
Poland		X
Portugal	X	
Romania	X	
Slovakia	X	
Slovenia	X	
Spain	X	
Sweden	X	
United Kingdom	X	

7.2 Case law

There exists a comparatively healthy body of case law across the EU, which applies national prohibitions on sexual orientation discrimination in access to and the supply of goods and services. Although courts, equality bodies and ombudspersons in a number of Member States are still waiting for the opportunity to review and enforce relevant protections, tribunals and adjudicators in at least 11 countries have already addressed allegations of unequal treatment in this sphere. Below is a brief summary of key cases from EU jurisdictions relating to goods and services. There is also further consideration of cases from this field in the discussion of ‘Exceptions’ in Section 8.

7.2.1 Case law in countries with protections for access to and the supply of goods and services

In **France**, both the civil courts and the former equality body have identified violations of criminal law protections against sexual orientation discrimination. In separate cases, the High Court of Bourges and the High Court of Marseille imposed criminal liability upon an individual who refused to sell land to a same-sex couple⁴⁴⁹ and a mayor who refused to conduct a same-sex marriage.⁴⁵⁰ Previously, the former French

⁴⁴⁶ It may be possible to identify relevant protections in access to and the supply of goods and services in Article 28 of the Constitution. In addition, unequal treatment on the basis of sexual orientation comes within the mandate of the Equality Body.

⁴⁴⁷ In Estonia, Article 12(1) of the national Constitution sets out an explicit ban on discrimination on any ground.

⁴⁴⁸ Article 45 of the national Constitution outlaws discrimination attributable ‘wholly or mainly’ to the characteristics of ‘race, place of origin, political opinions, colour, creed, sex, *sexual orientation* or gender identity’ [emphasis added].

⁴⁴⁹ France, Tribunal de Grande Instance of Bourges, No. 11089000031, 26 October 2012.

⁴⁵⁰ France, Tribunal de Grande Instance of Marseille, No. 15125000055, 29 September 2015.

equality body had identified an infringement of Article 225-1 and 2 of the Criminal Code when a bed and breakfast owner informed clients that, although she was willing to honour their reservation, she did not usually accept same-sex couples and would have expected prior notification of their sexual orientation.⁴⁵¹ The former equality body found that there was direct discrimination against the couple and it requested that the professional organisation, 'Gîtes de France', to which the bed and breakfast belonged, inform its general membership about the applicable laws governing the provision of accommodation services.⁴⁵² A similar case recently arose in **Croatia**⁴⁵³ where, upon discovering his apartment had been reserved by a same-sex couple, the owner refused to proceed with the booking. The State Attorney's Office has now charged the owner with a criminal violation of equality laws.⁴⁵⁴ The legal process is ongoing.

In the **Netherlands**, the District Court of Arnhem imposed criminal liability where the owner of a construction company refused to provide services to a same-sex couple.⁴⁵⁵ However, there is also substantial civil law jurisprudence in that jurisdiction, with the Netherlands Institute for Human Rights (NIHR) assessing claims through Article 7(1) of the General Equal Treatment Act (GETA).

In 2014, the NIHR ruled that a church board and an intermediary organisation violated Article 7(1) when they refused to rent space in a church building to an LGBT+ civil society organisation.⁴⁵⁶ The NIHR also found indirect sexual orientation discrimination where a beach club refused entry to men who were unaccompanied by a woman. The NIHR concluded that the stated justification, maintaining an appropriate atmosphere at the club, could have been achieved through non-discriminatory means. On the other hand, in 2006, the District Court of The Hague rejected a claim under Article 7(1) GETA where same-sex couples were excluded from dancing competitions.⁴⁵⁷ Rather than reinforcing a heterosexual norm (as the former Equal Treatment Commission⁴⁵⁸ had initially ruled), the District Court concluded that the decision to omit same-sex couples reflected sex-based distinctions. As the burden of proof fell upon the applicants, who had not disproved the existence of relevant differences due to sex, the District Court judged that there was no unlawful discrimination under Article 7(1).⁴⁵⁹

In **Lithuania** and **Romania**, where national legislation sets out detailed safeguards against unequal treatment, the Office of the Equal Opportunities Ombudsperson and the National Council for Combating Discrimination (NCCD) have both investigated allegations in the sphere of goods and services.

In 2005, the NCCD found that there was unlawful discrimination when the Romanian national airline offered a special promotion for 'two passengers of the opposite sex' on St Valentine's Day.⁴⁶⁰ The concession clearly disadvantaged same-sex couples. Yet, as the NCCD believed that the airline 'did not intend to discriminate', it issued a comparatively low fine of approximately EUR 139.⁴⁶¹ In a subsequent case, a long-term member of a sports club was subjected to homophobic hate speech and, following a rule change, prevented from assisting his three-year-old daughter in the male dressing rooms.⁴⁶² The NCCD held that there was discrimination due to sexual orientation and published an administrative warning – although it did not impose a monetary penalty.⁴⁶³

451 France, *Haute autorité de lutte contre les discriminations*, 2005-90, 19 December 2005.

452 France, *Haute autorité de lutte contre les discriminations*, 2005-90, 19 December 2005.

453 In 2014, there was a court case relating to discrimination in housing based on sexual orientation where an owner of an apartment refused to rent it to an individual because of sexual orientation. However, there is no available information regarding the conclusion of that case.

454 Raic Knezevic, A. (2019) 'Napokon: podignuta je optužnica protiv Zadrana koji je odbio gay paru iznajmiti apartman', *Telegram*, 30 September 2019: <https://www.telegram.hr/politika-kriminal/napokon-podignuta-je-optuznica-protiv-zadranina-koji-je-odbio-gay-paru-iznajmiti-apartman/#>.

455 Netherlands, District Court of Arnhem, ECLI:NL:RBARN:2010:BN8113 (23 September 2010).

456 Netherlands Institute for Human Rights, Opinions 2014-109 and 2014-110 (2014).

457 Netherlands, District Court of The Hague, ECLI:NL:RBSCG:2006:AY5005, 26 July 2006.

458 The Equal Treatment Commission was the predecessor to the Netherlands Institute for Human Rights.

459 Netherlands, District Court of The Hague, ECLI:NL:RBSCG:2006:AY5005, 26 July 2006.

460 Romania, National Council for Combating Discrimination, Decision 39/01.03.2005 *ACCEPT v TAROM*.

461 Romania, National Council for Combating Discrimination, Decision 39/01.03.2005 *ACCEPT v TAROM*.

462 Romania, National Council for Combating Discrimination, Decision 680/12.11.2014 J.G. and *ACCEPT v World Class Romania*.

463 Romania, National Council for Combating Discrimination, Decision 680/12.11.2014 J.G. and *ACCEPT v World Class Romania*.

In Lithuania, in 2015, the Ombudsperson issued an administrative sanction (warning) to a bus company when it refused to rent a vehicle to an LGBT+ organisation for a Pride event.⁴⁶⁴ Although the company claimed that there were no buses available, there was evidence that it subsequently accepted an alternative reservation to hire out the requested vehicle on the same day. The Ombudsperson had already issued a warning in a similar case where a company delayed communication with an LGBT+ group and ultimately refused to rent a bus.⁴⁶⁵ In 2016, the Ombudsperson closed an investigation into a website advertisement which purported to offer discounts for gay individuals⁴⁶⁶ – using homophobic descriptors.⁴⁶⁷ The Ombudsperson's inquiries were actually focused on whether such discounts unlawfully discriminated against heterosexual clients and it ended because the discounts were withdrawn.⁴⁶⁸ However, there does not appear to have been consideration of whether, contrary to Section 8(1) of the Law on Equal Treatment, the advertisements conveyed 'humiliation' or 'contempt' due to sexual orientation or encouraged public opinion that certain sexual orientations are 'inferior' (see Section 7.1.3).

In **Ireland**, the Workplace Relations Commission (WRC) and the former Equality Tribunal have established an extensive body of case law on sexual orientation discrimination in access to and the supply of goods and services. In 2018, the WRC made an award of EUR 2 000 for harassment where a store employee behaved aggressively towards an individual, audibly telling her, in front of other customers, that she was 'only a lesbian'.⁴⁶⁹ This decision built upon earlier judgments of the Equality Tribunal which had required compensation for a woman who was denied service in a public house due to her sexual orientation⁴⁷⁰ and a man who was asked to leave a hotel because he was gay.⁴⁷¹ In *A Hotel Guest v A Dublin Hotel*, the Equality Tribunal awarded EUR 1 500 where, on the balance of probabilities, a hotel receptionist had, on at least one occasion, made insulting comments referencing the complainant's sexuality.⁴⁷²

In *McGuffin and Harte v Eyre Square Hotel*, the Equality Tribunal found that a hotel had cancelled social functions because the owner objected to gay-friendly events.⁴⁷³ Although the respondent argued that the decision was taken for financial reasons, there was insufficient evidence that the alleged losses, which had arisen at previous events, were so large or frequent that a reasonable person would accept that they justified cancelling future functions.⁴⁷⁴ The hotel had, at the direction of the owner, sent a member of its staff to remove posters advertising one of the events. As such, there was a prima facie case of discrimination.⁴⁷⁵ The complainants were awarded EUR 1 500 each for the effects of the discrimination and the respondent was ordered to implement an equal status policy and appropriate training.⁴⁷⁶ In *Merriman v O'Flaherty's Ltd*, where the complainant, a gay man, was involved in a commercial dispute with the respondent, an employee of the respondent sent texts with the letters 'xxx'. The Equality Tribunal

464 Lithuania, Equal Opportunities Ombudsperson, Decision No. (15)SN-136)SP-72, 14 May 2015 (*Lygių galimybių kontrolieriaus pažyma dėl galimos diskriminacijos lytinės orientacijos pagrindu teikiant autobuso nuomos paslaugas*).

465 Equal Opportunities Ombudsperson. (2013). *Annual Report for 2012*.

466 Lithuania, Equal Opportunities Ombudsperson, Decision No. (16)SI-7)SP-26, 24 March 2016 (*Lygių galimybių kontrolieriaus pažyma dėl papildomų nuolaidų taikymo*).

467 The advertisement for the discounts on the website stated: 'This month gays, 'gėjoms' and faggots are given addition discounts.'

468 Lithuania, Equal Opportunities Ombudsperson, Decision No. (16)SI-7)SP-26, 24 March 2016 (*Lygių galimybių kontrolieriaus pažyma dėl papildomų nuolaidų taikymo*).

469 Ireland, Workplace Relations Commission, *A Complainant v A Respondent*, ADJ-00014149, 29 November 2018.

470 Ireland, Equality Tribunal, *A Female v A Publican*, DEC-S2005-026, 15 April 2005. The respondent had argued that the woman was refused service for reasons unrelated to sexual orientation (a previous incident involving spillage of drinks by a person in the complainant's company). However, on the basis of the total evidence, including witness statements, the Tribunal was satisfied that the complainant was treated less favourably because of sexual orientation. The Equality Tribunal awarded EUR 1 000 in compensation.

471 Ireland, Equality Tribunal, *O'Regan v The Bridge Hotel, Waterford*, DEC-S2004-037, 20 April 2004. In this case, the findings were based on the credibility of the parties. The Equality Tribunal awarded EUR 1 000 in compensation. It also made an order that arrangements be put in place to ensure that the complainant was made welcome, on an equal basis to heterosexual customers, should he decide to frequent the premises in the future. There was also an order that all staff were made fully aware of their obligations under the Equal Status Act 2000 to ensure that incidents of this nature did not occur again.

472 Ireland, Equality Tribunal, *A Hotel Guest v A Dublin Hotel*, DEC-S2011-040, 19 September 2011.

473 Ireland, Equality Tribunal, *McGuffin and Harte v Eyre Square Hotel*, DEC-S2008-051, 29 August 2008.

474 Ireland, Equality Tribunal, *McGuffin and Harte v Eyre Square Hotel*, DEC-S2008-051, 29 August 2008.

475 Ireland, Equality Tribunal, *McGuffin and Harte v Eyre Square Hotel*, DEC-S2008-051, 29 August 2008.

476 Ireland, Equality Tribunal, *McGuffin and Harte v Eyre Square Hotel*, DEC-S2008-051, 29 August 2008.

upheld a complaint of harassment on the sexual orientation ground.⁴⁷⁷ Although the literal meaning of the texts would normally be sexual or benign, given the ongoing dispute, their intended meaning in these circumstances was ‘to undermine the complainant (and his masculinity) on the basis of his sexual orientation’.⁴⁷⁸ The Equality Tribunal awarded EUR 500 in compensation.

In two cases, the Equality Tribunal held that the claimed discrimination fell outside its statutory scope of competence. In *Woodhead and Sparkes v Swinford Garda Station*, the complainants alleged that they were treated less favourably by a member of the Irish police force when they asked to view CCTV footage.⁴⁷⁹ They further maintained that the police officer had directly discriminated against and harassed them (due to sexual orientation and race) on subsequent occasions. However, because ‘all of the incidents complained of refer[red] to incidents involving the [police] carrying out their policing duties and/or making decisions under the delegated authority of the DPP [Director of Public Prosecution]’,⁴⁸⁰ the activities were not services within the meaning of Section 2 of the Equal Status Acts 2000-2018.⁴⁸¹ In *Gloria – Ireland’s Gay and Lesbian Choir v Cork International Choral Festival Ltd*, the complainant choir referred a claim to the Equality Authority when the respondent removed the description of Gloria as Ireland’s gay and lesbian choir from promotional material.⁴⁸² Having reviewed the relevant legislation and principles of statutory interpretation, the Equality Tribunal concluded that the specific legislative intent was that the Equal Status Acts 2000-2018 would ‘protect individuals and not bodies from discrimination’.⁴⁸³

In **Hungary**, the Equal Treatment Authority – in an administrative decision which was subsequently affirmed by the Metropolitan Court⁴⁸⁴ – held that there was impermissible discrimination when a sports complex, operated by the subsidiary company of a local authority, withheld the use of swimming facilities from an LGBT+ sports club.⁴⁸⁵ The defendant had initially confirmed the club’s reservation for two lanes in the swimming pool but withdrew the booking upon learning that the club catered for the LGBT+ community. The Equal Treatment Authority observed that this constituted unlawful discrimination due to sexual orientation and gender identity.⁴⁸⁶ Contrary to the claims of the company, there was no evidence that the swimming pool was overbooked or that it would have violated house rules for the club to use its own coach.⁴⁸⁷ The authority imposed a fine of approximately EUR 3 000, and it ordered the decision to be published on both the company and the local authority’s websites.⁴⁸⁸ In a subsequent decision, the Equal Treatment Authority found that there was sexuality-motivated harassment where security guards required a male same-sex couple to stop kissing in a bar.⁴⁸⁹ The guards claimed that there had been complaints made by other patrons – although the bar was relatively empty at the time.⁴⁹⁰ Similarly, in **Sweden**, a District Court awarded approximately EUR 930 each to a female same-sex couple who were also told to stop kissing by a security guard.⁴⁹¹

477 Ireland, Equality Tribunal, *Merriman v O’Flaherty’s Ltd. t/a Reads Print Design and Photocopying Bureau*, DEC-S2011-049, 8 November 2011.

478 Ireland, Equality Tribunal, *Merriman v O’Flaherty’s Ltd. t/a Reads Print Design and Photocopying Bureau*, DEC-S2011-049, 8 November 2011, [5.6].

479 Ireland, Equality Tribunal, *Woodhead and Sparkes v Swinford Garda Station*, DEC-S2008-064, October 2008.

480 Ireland, Equality Tribunal, *Woodhead and Sparkes v Swinford Garda Station*, DEC-S2008-064, October 2008, [5.2].

481 See also: Ireland, Equality Tribunal, *Donovan v Donnellan*, DEC-S2001-011, 17 October 2001.

482 Ireland, Equality Tribunal, *Gloria – Ireland’s Gay and Lesbian Choir v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28 October 2008.

483 Ireland, Equality Tribunal, *Gloria – Ireland’s Gay and Lesbian Choir v Cork International Choral Festival Ltd.*, DEC-S2008-078, 28 October 2008, [5.5.].

484 Hungary, Metropolitan Court, 11 July 2018. The respondent subsequently requested an extraordinary review by the Supreme Court of Hungary (Curia). However, it withdrew that application in February 2020.

485 Hungary, Equal Treatment Authority, Decision No. EBH/199/2018, July 2018.

486 Hungary, Equal Treatment Authority, Decision No. EBH/199/2018, July 2018.

487 The Equal Treatment Authority found that the swimming pool house rules had been modified to exclude external swimming instructors only after the sports club had initiated legal action.

488 Hungary, Equal Treatment Authority, Decision No. EBH/199/2018, July 2018.

489 Hungary, Equal Treatment Authority, Decision No. EBH/362/2018, 5 November 2018.

490 Hungary, Equal Treatment Authority, Decision No. EBH/362/2018, 5 November 2018.

491 Sweden, District Court, T 4652-07, 12 June 2009.

7.2.2 Cases in countries without protections for access to and the supply of goods and services

Two particularly interesting jurisdictions are **Latvia** and **Poland** where, although national law does not prohibit sexual orientation discrimination in relation to access to and the supply of goods and services, it is nonetheless possible to identify relevant jurisprudence from courts and ombudspersons. In 2016, the **Latvian** Ombudsman found that there was discrimination against a female same-sex couple when they were expressly excluded from a St Valentine's Day promotion, which offered partners a free ride on the Riga Minibus Service if they kissed in front of a minibuss driver.⁴⁹² The Ombudsman's Office also commented publicly in 2017 that refusing to provide photography services to same-sex couples and their families may violate constitutional equality guarantees – although it has not issued a formal opinion on the matter.

In **Poland**, the Supreme Administrative Court in Warsaw recently overturned a decision of the Minister of the Interior to refuse permission to purchase property in that country to a Chilean national, who was living in a same-sex relationship with a Polish citizen in the UK where the couple had previously entered a civil partnership.⁴⁹³ The minister argued that the couple's life circumstances, including their formalised relationship in the UK, did not illustrate that the Chilean national had sufficient ties with Poland, as required by Article 1a, Paragraph 1, of the Act of 24 March 1920 on the acquisition of real estate by foreigners.⁴⁹⁴ Forming a civil partnership in the UK, a legal institution not recognised in Poland, did not, according to the minister, have the same impact, for the purposes of the national permit law, as entering into a valid different-sex marriage.⁴⁹⁵

Although this decision was upheld by the Provincial Administrative Court,⁴⁹⁶ it was ultimately set aside on appeal to the Supreme Administrative Court in Warsaw, by which time the Ombudsman had joined the litigation in support of the same-sex couple. The Supreme Administrative Court observed that the minister, as an administrative authority, was obliged to carry out investigations – in this case, whether the Chilean national had sufficient ties to Poland – in a proper manner, considering all appropriate evidence, and taking into account both the public interest and the legitimate interests of citizens.⁴⁹⁷ In this instance, the minister had not undertaken the required investigations and, as such, had violated the applicable procedural rules.

In particular, the minister had failed to consider that, in addition to the relationship with his Polish civil partner, the Chilean national had offered evidence of additional social and geographical connections to the Polish state, and that he was seeking to purchase property to meet future housing needs when he eventually moved to Poland.⁴⁹⁸ The mere fact of cohabiting with a Polish citizen did not unequivocally create links to the country.⁴⁹⁹ However, given that domestic law did not require a different-sex marriage, the minister should have considered whether the Chilean national's relationship with the Polish citizen – characterised by emotional, physical and economic ties – had given rise to the necessary connection with Poland.⁵⁰⁰ The Supreme Administrative Court set aside the decision under challenge and awarded costs to the Chilean national.

492 Latvia, Ombudsman of the Republic of Latvia *ATZINUMS pārbaudes lietā No.2016-3-26G* (2016). The company subsequently decided not to continue the promotion in 2018.

493 Poland, Supreme Administrative Court in Warsaw, II OSK 2982/14, 14 September 2016.

494 Poland, Decision of the Minister of the Interior, September 2013.

495 Poland, Decision of the Minister of the Interior, September 2013.

496 Poland, Provincial Administrative Court in Warsaw, IV SA/Wa 2457/13, 29 January 2014.

497 Poland, Supreme Administrative Court in Warsaw, II OSK 2982/14, 14 September 2016.

498 Poland, Supreme Administrative Court in Warsaw, II OSK 2982/14, 14 September 2016.

499 Poland, Supreme Administrative Court in Warsaw, II OSK 2982/14, 14 September 2016.

500 Poland, Supreme Administrative Court in Warsaw, II OSK 2982/14, 14 September 2016.

In an earlier judgment, the Supreme Court of Poland – on a question submitted by the Regional Court of Warsaw⁵⁰¹ – had ruled that same-sex couples can come within the definition of *de facto* cohabitants for the purposes of succeeding to a tenancy from a municipal authority.⁵⁰² The Supreme Court observed that, under Article 691 para. 1 of the Polish Civil Code, *de facto* cohabitation requires emotional, physical and economic bonds.⁵⁰³ This can also exist between same-sex couples, who are not explicitly excluded by the relevant Civil Code provisions.⁵⁰⁴

7.3 Conclusion

Section 7 has explored national prohibitions on sexual orientation discrimination in access to and the supply of goods and services. As for the other topics addressed in this report, it has identified a number of concerns, including no or only partial protection in some Member States, ambiguity regarding legal guarantees in other jurisdictions, and the absence of case law to address unequal treatment. Like social protection (Section 4), social advantages (Section 5) and education (Section 6), safeguards in this field would be substantively enhanced through minimum EU standards, ensuring that all persons, irrespective of sexual orientation, can access goods and services without prejudice. Furthermore, there is a need for additional measures to ensure that, where discrimination does arise, individuals have practical mechanisms to enforce those legal protections which already exist.

Yet Section 7 also reveals positive indicators. At present, 20 EU Member States and the United Kingdom prohibit unequal treatment due to sexual orientation. It may be possible to identify further safeguards in the national constitutions of at least three other countries. There is also a comparatively healthy body of jurisprudence – where domestic courts have acknowledged and censured sexuality-motivated discrimination in areas such as property leasing and purchasing, marriage administration, sports and recreation, hospitality, relationship-based activities and commercial services. While this case law has emerged from a minority (11) of the Member States, there is evidence that courts, equality bodies and tribunals are positively engaging with equality guarantees. This is so, even in jurisdictions where there are not yet explicit safeguards against sexual orientation discrimination. Moving forward, while much remains to be done in access to and the supply of goods and services, there are baseline safeguards in numerous Member States upon which national and EU policies makers can develop enhanced protections and legal safeguards in this field.

501 Poland, Regional Court in Warsaw, 27 February 2012. The Regional Court was hearing an appeal from an earlier decision of the Warsaw Mokotów District Court, 13 October 2011, which had ruled that the law on *de facto* cohabitation (*konkubinat*) did not cover same-sex relationships.

502 Poland, Supreme Court of Poland, 28 November 2012.

503 Poland, Supreme Court of Poland, 28 November 2012.

504 Poland, Supreme Court of Poland, 28 November 2012.

8 Exceptions

As sexual orientation protections have increased in recent years – both across the European Union and farther afield – there have been growing concerns about how national policy makers and judiciaries should address dissent or disapproval. In particular, there have been debates as to whether, and to what extent, individuals should be exempted from non-discrimination guarantees because they hold moral, philosophical or religious objections to specific sexual orientations. With widening calls for the European Union to create minimum safeguards for sexual orientation in areas beyond the labour market, the potential inclusion (or exclusion) of exceptions to those protections remains a point of contention. In that context, Section 8 considers the current law in the 27 Member States and the United Kingdom, exploring whether and how legal systems permit or justify deviation from the prohibition of sexual orientation discrimination.

8.1 Absence or existence of statutory exceptions to sexual orientation protections

8.1.1 *Absence of exceptions to prohibitions on discrimination*

Throughout the jurisdictions surveyed for this report, there is little evidence that national policy makers or judiciaries are instituting broad exceptions to sexual orientation non-discrimination rights. Jurisdictions where national experts identified no relevant exceptions to sexual orientation guarantees in social protection include **Belgium, Cyprus, Finland, France, Ireland, Luxembourg, Portugal, Romania, Slovakia, Spain and Sweden**. Similarly, for social advantages, there were no exceptions cited in, among other jurisdictions, **Belgium, Cyprus, Finland, France, Ireland, Luxembourg, Portugal, Romania, Slovakia, Spain and Sweden**. In the field of education, no exceptions arose, inter alia, in **Austria, Belgium, Cyprus, Finland, France, Ireland, Luxembourg, Slovakia, Spain and Sweden**. Finally, jurisdictions where national experts identified no relevant exceptions to sexual orientation protections in access to and the supply of goods and services include **Austria, Belgium, Cyprus, Denmark, Finland, Greece, Ireland, Luxembourg, Portugal, Romania, Slovakia, Spain and Sweden**.

8.1.2 *Proportionality analysis*

In certain EU Member States, there are general qualification provisions, which apply to all or most protected characteristics, and which permit differentiation subject to proportionality analysis.⁵⁰⁵ In **Czechia**, for example, under Section 7 of the Anti-Discrimination Act, unequal treatment due to sexual orientation, does not constitute unlawful discrimination if there is an objective justification, which pursues a legitimate aim by proportionate and necessary means. Similarly in **Estonia**, to the extent that Article 12(1) of the Constitution might prohibit sexual orientation discrimination (see Section 4.1.2), that protection can be limited as is ‘necessary in a democratic society’ in ways that would ‘not distort the nature of the rights

505 In Slovenia, Article 13, Paragraph 1, of the Protection against Discrimination Act permits exceptions to the prohibition on sexual orientation discrimination in the fields covered in this report where they pursue a legitimate aim and the means to achieve that aim are appropriate, necessary and proportionate. In Belgium, under federal law, a ‘direct distinction’ may be permitted if it is objectively justified by a legitimate objective, which it seeks to fulfil by means which are both appropriate and necessary. A ‘direct or indirect distinction’ may also be justified by the fact that the adoption of such measures is imposed by, or by virtue of, other legislation (Article 7 and Article 11, para. 2 of the Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*)). According to Belgian federal law, an ‘indirect distinction’ may be justified by the fact that it is objectively justified by a legitimate objective which it seeks to fulfil by means which are both appropriate and necessary (Article 9) or by the fact that the adoption of such measures is imposed by, or by virtue of, other legislation (Article 11, para. 2) (Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*)).

and freedoms restricted'.⁵⁰⁶ In practice, the Estonian courts assess limits on non-discrimination rights by reference to three characteristics: suitability, necessity and proportionality in the narrowest sense.⁵⁰⁷

In **Croatia**, the Anti-discrimination Act (ADA) does not permit any justification of direct discrimination – save for the specific exceptions which are listed within the law. At present, no such exceptions for sexual orientation exist in the fields covered by this report. The ADA does, however, permit indirect discrimination, including on the basis of sexual orientation, where there is a legitimate aim and the means of achieving that aim are appropriate and necessary.⁵⁰⁸ This is also the position in the **Netherlands** where Article 2(1) of the General Equal Treatment Act (GETA) recognises justifications for indirect distinctions, including on the basis of sexual orientation, which further a legitimate aim to be achieved through suitable and necessary means. The same proportionality test applies under Article 7(3) GETA, which allows differentiations (direct and indirect) made by private actors in private relationships.

8.1.3 Education

Education is an area, which has given rise to specific exemptions from sexual orientation protections. In **Portugal**, where domestic rules do not generally permit exceptions from the prohibition on sexual orientation discrimination, there is no obligation on private schools without an association contract with the State to incorporate awareness of sexual orientation equality into their curricula. In **Romania**, Article 11(5) of the Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination makes clear that safeguards against, inter alia, sexual orientation discrimination do not prevent educational units or institutions which train religious personnel from limiting admission to persons of particular faiths.

In **Lithuania**, Article 3 of the Law on Equal Treatment establishes broad powers for religious communities, including religious educational establishments, to ensure that employees act in good faith and with loyalty to religious ethos, and where appropriate, to determine that religion or belief constitutes a genuine, legitimate and justified occupational requirement with regard to organisational ethos. There is evidence that, at least in the national Parliament, some policy makers view these powers as a potential 'self-defence tool' for removing people with 'non-traditional' sexual orientations from the education system.⁵⁰⁹ At present, the Law on Equal Treatment does not apply to the admissions practices of schools which have been established by religious communities or schools fostering certain values, nor is it applicable to the content of education programmes, textbooks and teaching aids where religious instruction is provided to traditional religious communities and associations.⁵¹⁰ This may have important consequences as there is evidence that some educational materials provided by teachers of these religious classes discriminate on the grounds of sexual orientation.⁵¹¹

506 Estonia, Article 11 of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), Riigi Teataja 1992, 26, 349. Riigi Teataja – Official State Gazette.

507 See e.g. Poleshchuk, V. (2014), 'Older age, employment and equality in legislation: A "progressive" Estonian approach?', *The Equal Rights Review*, Vol. 12, 2014; Poleshchuk, V. (2018), 'Professional linguistic requirements, proportionality and challenges for Estonia', *European Equality Law Review*, No. 1, 2018.

508 Croatia, Article 2(2) of the Anti-discrimination Act, 9 July 2008.

509 Transcript of the plenary session of the Parliament of the Republic of Lithuania, 18 September 2007, available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=304466.

510 Lithuania, Articles 3(4) and (5) of the Law on Equal Treatment (*Lietuvos Respublikos Lygių galimybių įstatymas*), 2003, No. 114-5115.

511 Lithuania, Equal Opportunities Ombudsperson, Decision of 13 June 2017.

8.1.4 Positive action

In a number of EU Member States, there are specific provisions which permit different treatment on the basis of sexual orientation as part of policies to promote positive action.⁵¹² In **Bulgaria**, under Article 7 of the Protection against Discrimination Act, general exceptions to achieve special equalising measures apply to all protected grounds, including sexual orientation. In **Croatia**, Article 9 of the ADA allows for the placing of individuals in less favourable positions, when such action is achieved through laws, subordinate regulations, programmes, measures or decisions with the goal of improving the status of individuals who experience discrimination on protected grounds, including sexual orientation.⁵¹³ Treating a person less favourably in such circumstances must be proportionate to the aim pursued.⁵¹⁴

In **Lithuania**, Article 2 LET permits both '[s]pecial temporary measures, established by law, which are taken to ensure equality and prevent the violation of equal treatment on the grounds of... sexual orientation' and '[s]pecial measures in the field of healthcare... as established by law with the view of creating and applying conditions and opportunities guaranteeing and promoting integration into the working environment'. In the **Netherlands**, Article 429quater (1) of the Criminal Code does not include an exception for positive action because it was understood that such measures would clearly not constitute unlawful discrimination.

8.1.5 Specific national regimes for exceptions

In **Germany**, **Hungary** and the **United Kingdom**, there are specific exceptions that apply – each of which reflect the complex balancing exercises taking place within domestic non-discrimination regimes.

In **Germany**, the Federal Constitutional Court initially applied a strict interpretation to Article 3 of the Basic Law – prohibiting only arbitrary treatment within the limits of material justice.⁵¹⁵ However, in recent years, the Constitutional Court has adopted a more expansive approach, recognising that, because the principle of equality ultimately seeks to prevent unequal treatment, there should be strict review where such treatment arises. According to the Constitutional Court, the applicable level of review will depend upon the extent to which the characteristics, which motivate a difference in treatment, resemble the characteristics set out in Article 3(3) of the Basic Law. The greater the resemblance, the more likely it is that any unequal treatment due to those characteristics will constitute unlawful discrimination. This is so, irrespective of whether the different treatment impacts individuals or broader groups of people.

In Germany, the strictness of review which courts apply to unequal treatment is also dependent upon the mutability of the motivating characteristic. There will be more onerous control of distinctions and differentiations due to factors that individuals cannot change. Similarly, courts will question more forcefully unequal treatment which negatively impacts the enjoyment of basic liberties.⁵¹⁶ As such, direct discrimination is allowed in Germany but it will, depending upon the precise nature of the inequality, be subject to a sliding scale of review, from a test of arbitrariness to strict scrutiny of proportionality. Under

512 In Belgium, the Federal Act of 10 May 2007 pertaining to the fight against certain forms of discrimination (*Loi tendant à lutter contre certaines formes de discrimination*) provides that differences in treatment based on a protected ground (such as sexual orientation) do not amount to discrimination when a measure of positive action is concerned (Article 10, para. 1). Such a measure has to respect four conditions (Article 10, para. 2): first, any positive action should be a response to situations of *manifest inequality* (i.e. it must be based on a demonstration that a clear imbalance between the groups will remain in the absence of such action); secondly, the removal of this inequality should be identified as a public goal. In this respect, the federal Government must authorise the adoption of positive action measures through an executive regulation (Article 10, para. 3); thirdly, the 'corrective measures' must be of a temporary nature. As a response to a situation of proven manifest imbalance, these measures must be abandoned as soon as their objective – to remedy this imbalance – is reached; fourthly, these corrective measures should not disproportionately restrict the rights of others. Similar positive actions are permitted under the laws of the communities in Belgium.

513 Croatia, Article 9(2.2) of the Anti-discrimination Act, 9 July 2008.

514 Croatia, Article 9(3) of the Anti-discrimination Act, 9 July 2008.

515 Federal Constitutional Court of Germany, BVerfGE 1, 14(52); 25, 101(105).

516 Germany, Federal Constitutional Court, BVerfGE 88, 87(96).

Section 20(1) of the General Act on Equal Treatment, which is relevant to contracts under private law, it is possible to engage in unequal treatment on grounds of, inter alia, sexual identity, so long as there is a sufficient objective reason for the difference. Section 20(1) offers a non-exhaustive list of such reasons, including the avoidance of dangers, the prevention of damage or other comparable aims,⁵¹⁷ the protection of privacy or personal security,⁵¹⁸ and the granting of special advantages when there is no specific interest in enforcing equal treatment.⁵¹⁹

In Germany, the question of ‘exceptions’ is particularly relevant to housing and tenancy policies. Section 19(3) of the General Act on Equal Treatment (AGG) permits unequal treatment, on all grounds, which serves to create and maintain stable social relations regarding inhabitants, and balanced patterns of settlement and economic, social and cultural relations. According to the explanatory report, Section 19(3) should not be interpreted as justifying the under-representation of any racial or ethnic minority.⁵²⁰ Under Section 19(5) AGG, the prohibition of unequal treatment, including due to sexual orientation, does not apply to legal relations of a personal nature or if there is a special relationship of trust between the parties concerned or their relatives.⁵²¹ For housing, this is understood to be the case where the parties or their relatives also live at the same premises.⁵²² Furthermore, the prohibition should also not apply (in principle, although there are exceptions) if a landlord does not let more than 50 dwellings.⁵²³ In such situations, a large business is not assumed to exist.⁵²⁴

In **Hungary**, the rules regarding exceptions to the principle of non-discrimination are established in Articles 7(2) and (3) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA).⁵²⁵ According to Article 7(2)(a) ETA, actions, conduct, omissions, requirements, orders and practices which restrict a fundamental right, do not violate equality guarantees provided that the restriction enforces another fundamental right, in a manner which is ‘absolutely necessary’, ‘suitable for achieving the aim’ and ‘proportionate with the aim’. On the other hand, if actions, conduct, omissions, requirements, orders and practices differentiate against individuals in ways that do not implicate fundamental rights, then – save in cases of race, colour of skin, nationality (not in the sense of citizenship) and belonging to a national minority⁵²⁶ – such distinctions are not unlawful discrimination if, on ‘objective consideration’, they ‘have a reasonable ground directly related to the relevant legal relation’.⁵²⁷ Thus, in Hungary, there are stricter controls for distinctions that affect fundamental rights than other legal protections.

In **Great Britain**, Section 193 of the Equality Act 2010 allows charities to restrict benefits to individuals with certain protected characteristics, but only where this is a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage. In practice, it is difficult to envisage that this could legitimise discrimination on the basis of sexual orientation. For example, it is unlikely that courts in England, Wales and Scotland would agree that withholding healthcare because of sexual orientation is proportionate to a legitimate aim. Indeed, case law suggests that courts do not usually allow charities to refuse services on the basis of sexual orientation.⁵²⁸ This has recently

⁵¹⁷ Germany, Section 20(1)(1) of the General Act on Equal Treatment.

⁵¹⁸ Germany, Section 20(1)(2) of the General Act on Equal Treatment.

⁵¹⁹ Germany, Section 20(1)(3) of the General Act on Equal Treatment.

⁵²⁰ Germany, Bundestag, *Bundestagsdrucksache* 16/1780, p. 42.

⁵²¹ Germany, Article 19(5)(First Sentence) of the General Act on Equal Treatment.

⁵²² Germany, Article 19(5) of the General Act on Equal Treatment, Second Sentence.

⁵²³ Germany, Article 19(5) of the General Act on Equal Treatment, Third Sentence.

⁵²⁴ Germany, Article 19(5) of the General Act on Equal Treatment.

⁵²⁵ Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003.

⁵²⁶ As Directive 2000/43/EC does not allow for a general objective justification in the case of direct discrimination based on racial or ethnic origin, the Hungarian Parliament removed the grounds of ‘racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority’ from the scope of Article 7(2) ETA [see Article 7(3) ETA].

⁵²⁷ Hungary, Article 7(2)(b) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities.

⁵²⁸ See e.g. *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* [2012] UKUT 395 (TCC). A Roman Catholic charity failed to show that there were weighty and convincing reasons which justified a change to its memorandum of association, which would have enabled it to lawfully continue a discriminatory practice under the exemption in the Equality Act 2010, restricting its adoption services to heterosexual couples.

been confirmed by the High Court of England and Wales, which, in July 2020, confirmed that it was not a proportionate means of achieving a legitimate aim to exclude gay and lesbian persons from providing fostering services.⁵²⁹ It is possible that the exception in Section 193 could potentially result in indirect discrimination due to sexual orientation. However, considering the current case law of the UK Supreme Court (see Section 8.2), it is doubtful that any such unequal treatment would be justified. In **Northern Ireland**, on the other hand, Regulation 26 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 explicitly provides that it would not be 'unlawful for a person to provide benefits only to persons of a particular sexual orientation' if the person 'acts in pursuance of a charitable instrument' and the restriction 'is imposed by reason of or on the grounds of the provisions of the charitable instrument'.

8.2 Case law

There is a small body of jurisprudence which considers exceptions to prohibitions on sexual orientation discrimination. In some instances, these cases have considered the same or comparable issues, with distinct approaches or conclusions emerging from different jurisdictions.

In **Ireland**, the case of *Brennan v Tuite t/a Beulah Print* concerned allegations of unequal treatment and harassment where a company refused to print invitations for a same-sex civil partnership ceremony.⁵³⁰ The respondent company denied sexual orientation discrimination, arguing that it was expressing disagreement with same-sex marriage. According to the respondent, it would have refused all requests relating to same-sex civil partnerships – irrespective of the sexual orientation of individuals placing the order. However, the Workplace Relations Commission found that there had been direct discrimination. The tribunal observed that the company was willing to print invitations for different-sex weddings. The complainant would have been able to order invitations had he been a heterosexual male marrying a woman. In those circumstances, the company did discriminate against the complainant due to sexual orientation. The Workplace Relations Commission awarded EUR 2 500 in compensation.

In the **United Kingdom**, the Supreme Court recently came to a different conclusion in a similar litigation involving the refusal to provide a cake bearing the slogan 'Support Gay Marriage'.⁵³¹ In this case, the Supreme Court was satisfied that there was no sexual orientation discrimination because the company, whose owners had a strong Christian ethos, objected to the proposed message rather than to the sexual orientation of the individual who made the request. There was evidence that, had a heterosexual individual submitted the order, the company would also have withheld the required services. However, the Supreme Court did confirm that, in circumstances where service providers discriminate because of sexual orientation, this would violate the applicable law in Northern Ireland (as well as the comparable provisions in the Equality Act 2010). Indeed, in the earlier case of *Bull v Hall and Preddy*, the Supreme Court had found that it was unlawful for Christian hotel owners to refuse a room with a double bed to same-sex civil partners.⁵³²

These issues have also been recently considered by the highest courts in **Poland**. In 2018, the Supreme Court of Poland upheld a conviction⁵³³ under Article 138 of the Code of Petty Crimes⁵³⁴ when a printing company refused to provide a roll-up banner for the LGBT Business Forum (a civil society organisation

529 United Kingdom, *Cornerstone (North East) Adoption And Fostering Service Ltd, R (On the Application Of) v The Office for Standards In Education, Children's Services And Skills* [2020] EWHC 1679 (Admin). The High Court accepted that the applicant was acting in pursuance of a charitable instrument.

530 Ireland, Workplace Relations Commission, *Brennan v Tuite t/a Beulah Print*, DEC-S2018-020, 9 November 2018.

531 United Kingdom, *Lee (Respondent) v Ashers Baking Company Ltd and others* (Appellants) (Northern Ireland) [2018] UKSC 49.

532 United Kingdom, *Bull v Hall and Preddy* [2013] UKSC 73.

533 Poland, Łódź-Widzew District Court, *Police v Printing House* (July 2016) [simplified procedure]. Łódź-Widzew District Court (31 March 2017) [standard procedure]. Łódź Regional Court (26 May 2017).

534 Article 138 of the Code of Petty Crimes reads as follows: '[a]nyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine'.

(CSO)).⁵³⁵ The Supreme Court observed that while, in appropriate situations, freedom of conscience and religion can justify withholding services, there must be a proper balancing with the right to non-discrimination and that the courts must have regard to all the circumstances of the case. Where delivering a service would obviously compromise religious beliefs, the provider can lawfully issue a refusal, even if this conflicts with other constitutional values, such as equality. However, it is not permissible to deny a service solely by reference to the personal characteristics, such as sexual orientation, of a client. The Supreme Court held that, in the present case, there was no legitimate reason to refuse to print the roll-up banner. The task was merely technical, not requiring artistic originality, and the proposed image was an advertisement for the CSO, not a substantive message which required the printing company to compromise religious beliefs.

Following the Supreme Court ruling, the Prosecutor General/Minister of Justice challenged the validity of Article 138 of the Code of Petty Crimes before the Constitutional Tribunal. In June 2019, by a majority of three judges to two judges, the tribunal found that this provision did violate the Constitution of Poland. The Prosecutor General/Minister of Justice had argued that, under Article 138, there was insufficient proportionality between the results of applying that statute and the burdens placed upon service providers. The Constitutional Tribunal agreed⁵³⁶ – concluding that the power to penalise any professional provider who withholds services went beyond the legislative aims of Article 138. It was incompatible with Article 2 of the Constitution, which guarantees that Poland will be a ‘democratic state ruled by law and implementing the principles of social justice’. In particular, the Constitutional Tribunal was concerned that the notions, under Article 138, of ‘being obliged to provide a service’ and of engaging in an ‘unjustified refusal to provide a service’ were so imprecise that they could, when applied, result in impermissible restrictions on constitutional principles and values. As it was not possible to remove this imprecision through a constitutionally compatible interpretation of the law, the Constitutional Tribunal struck down Article 138 of the Code of Petty Crimes.

In **Hungary**, the Faculty of Theology at Károli Gáspár Calvinist University expelled a student due to his sexual orientation and published a general declaration that the Church ‘may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life’. A Hungarian civil society organisation, the Háttér Society issued proceedings claiming that the actions of the Faculty were incompatible with Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA). On appeal,⁵³⁷ the Supreme Court acknowledged that the university had differentiated between students based on sexual orientation and that, in principle, this could fall within the prohibition against sexual orientation discrimination.⁵³⁸ However, under Article 7(2) ETA, distinctions due to protected characteristics are compatible with the requirements of equal treatment if, on objective analysis, they have a reasonable ground directly related to the relevant legal relation. In this case, the Supreme Court concluded that it was objectively reasonable for a religious university to exclude homosexual individuals from theological education considering that such students may later become pastors⁵³⁹ – although such a career path is not inevitable and the university policy excluded even gay individuals who did not intend to pursue this career.

Finally, in **Lithuania**, despite robust exceptions for religious schools in the education sphere, the Equal Opportunities Ombudsperson has confirmed that the content of religion classes and educational material used by particular church-approved teachers may be incompatible with prohibitions on sexual orientation discrimination. In a case concerning the visual and spoken content of educational materials used by an instructor of a religion class, the teacher, during a lesson for 10th-year pupils, depicted homosexuality in a highly unfavourable light – suggesting that gay and lesbian people are sadomasochists, child abusers and

535 Poland, Supreme Court, No. II KK 333/17, 14 June 2018.

536 Poland, Constitutional Tribunal, K 16/17, 26 June 2019.

537 Hungary, see Metropolitan Court, 19.P.21.788/2004 (first instance judgment); Metropolitan Appeals Court, 2.Pf.21.318/2004/4 (first appeal).

538 Hungary, Supreme Court, Pfv.IV.20.678/2005/5, 8 June 2005.

539 Hungary, Supreme Court, Pfv.IV.20.678/2005/5, 8 June 2005.

serial murderers. The Ombudsperson concluded that these activities violated the Law on Equal Treatment, and it recommended that the director halt any further conduct which might violate the right to equal opportunities.⁵⁴⁰

8.3 Conclusion

Section 8 has looked at exceptions to the prohibition on sexual orientation discrimination in the four substantive areas addressed by this report. It reveals that – despite concerns that national laws should accommodate people who hold moral, philosophical or religious objections to specific sexual orientations – policy makers and judiciaries in few EU Member States are actually instituting exemptions from sexuality guarantees in education, social advantages, social protection and access to and the supply of goods and services. In certain countries, there are general qualification provisions, which apply to all or most protected characteristics, and which permit differentiation subject to proportionality analysis. Similarly, limited exceptions are also identifiable in housing, education and positive actions, as well as in the case law on goods and services in two jurisdictions. Yet overall, across the Union, there is little evidence of legislative or judicial urgency for broad exceptions to sexual orientation protections. As EU and domestic policy makers move forward, considering the appropriateness and workability of minimum EU standards in this sphere, they should be led by existing national practices – reflecting upon the actual necessity of onerous exceptions in any future legislation.

540 Lithuania, Equal Opportunities Ombudsperson, 13 June 2017.

9 Conclusions and recommendations

This report has explored protections against sexual orientation discrimination beyond the labour market. It has considered whether, and to what extent, such safeguards exist in the 27 EU Member States and in the United Kingdom. Throughout the report, there has been a particular focus on four areas of investigation – social protection (Section 4), social advantages (Section 5), education (Section 6) and access to and the supply of goods and services (Section 7). The report has addressed these four issues through legislation, administrative practice, government policies and the case law of courts, national equality bodies and ombudspersons. It has revealed increasing levels of *de jure* protection for individuals across the Union, as well as limited engagement from judges and other decision makers. Yet there are many challenges which remain, including legislative lacunae, legal ambiguity and a lack of case law across the four areas surveyed. In this final section, the report draws out three central conclusions from the report, informed by the preceding analysis, and offers concrete recommendations for future reform.

9.1 Current levels of protection in the Member States: enhancing legal safeguards

A notable feature, across a majority of jurisdictions surveyed in this report, is the extent to which national laws currently prohibit sexual orientation discrimination. At present, 17 Member States and the United Kingdom provide legal safeguards in social protection and social advantages. That number rises to 18 EU countries for education, and there are protections against unequal treatment due to sexual orientation in 20 EU jurisdictions for access to and the supply of goods and services.⁵⁴¹

These statistics are welcome and they suggest a growing level of *de jure* visibility for sexual orientation. Although EU legislators have not yet enacted protections outside the labour market, a majority of Member States, acting upon their own initiative, have introduced prohibitions in a broader range of fields. In social protection, social advantages, education, and goods and services, individuals in most EU countries now enjoy, at least nominally, protection against sexuality-motivated discrimination.

These developments are important for a number of reasons. First, and perhaps most obviously, legal guarantees are a necessary (although not sufficient) step towards challenging sexual orientation discrimination. They should provide individuals with minimum protections and, if necessary, remedies when confronted with persistent inequality. Secondly, naming sexual orientation in non-discrimination laws holds symbolic value. It is an express acknowledgement that different experiences of sexuality are legitimate, and that those experiences should be protected like other characteristics, such as race or ethnic origin, sex, disability, age or religion. Finally, the growing recognition of sexual orientation in national laws, and case law, also indicates that EU Member States are being influenced by changing social attitudes and perceptions. As openness and acceptance towards sexual orientation (slowly) increases throughout the Union, so too national legal systems should embrace greater protections in this sphere.

As such, there are reasons to be positive when assessing the current legal situation for sexual orientation in EU Member States. Yet, as the preceding sections of this report have made clear, there is also cause for concern. Although safeguards for sexual orientation are undoubtedly expanding, there remains a sizeable minority of EU countries where relevant protections are either absent or unclear. This means that, in certain jurisdictions, there are currently no safeguards to prevent unequal treatment due to sexual orientation, nor will individuals have access to minimum remedies where discrimination arises. In areas, such as healthcare and education, vital to current and future personal development, national laws are, at best, indifferent to individuals who experience sexual orientation inequalities.

As noted in Sections 4-7, in certain EU jurisdictions, there remains doubt as to whether domestic law covers sexual orientation outside the labour market. While alternative legal sources, such as national

⁵⁴¹ The United Kingdom (both Great Britain and Northern Ireland) offers legal protection against sexual orientation discrimination in education and in access to and the supply of goods and services.

constitutions, may provide relevant safeguards, this is not certain and further judicial clarification would be required. Legal ambiguity regarding the prohibition of sexual orientation discrimination is, in a practical sense, preferable to rules which clearly exclude protection. However, such uncertainty is unsatisfactory in a number of key respects.

Where national law fails to clearly outlaw unequal treatment due to sexual orientation, this may indicate the absence of protection or it may be interpreted by courts and other adjudicatory bodies as such. Ambiguity facilitates uncertainty in the law – a phenomenon which, both across Europe and beyond, has often been used to reduce rather than enhance protection for lesbian, gay and bisexual (LGB) populations. Ambiguity can also have a chilling effect on the efficacy of non-discrimination protections, with individuals less likely to challenge discrimination because they are uncertain about their rights and perpetrators emboldened to engage in conduct which is not explicitly prohibited. Furthermore, like express inclusion, ambiguity in law has symbolic consequences. Even in countries where, if tested, non-discrimination protections would be interpreted as including sexual orientation, failing to name that characteristic sends a message: that LGB people, their identities and their experiences are less worthy of formal recognition.

Against this background, the report has identified a compelling justification for minimum EU standards for sexual orientation non-discrimination rules in social protection, social advantages, education and in access to and the supply of goods and services. To the extent that EU and national policy makers acknowledge that, within these four areas, everyone, irrespective of sexual orientation, should have equal enjoyment of rights, there is a compelling argument that EU-level intervention, similar to broad actions already taken for race and ethnic origin, is the most effective, appropriate and practical means to achieve that goal.

9.2 Lack of case law

This report illustrates that, despite growing legal protections for sexual orientation across the Member States, there is a notable absence of case law giving practical effect to these safeguards. In Sections 4-6, there is minimal evidence that courts, equality bodies and ombudspersons have had the opportunity to enforce relevant prohibitions in social protection, social advantages and education. In Section 7, there is a healthier body of jurisprudence and more substantive engagement with unequal treatment due to sexual orientation. Yet – even for access to and the supply of goods and services – the available case law covers only a minority of Member States and, as there are more EU jurisdictions with legal protections in this sphere, the percentage of countries where the applicable rules have been enforced remains strikingly low.

For policy makers, both EU and national, the existing statistics on case law should inspire pause for reflection. In particular, the lack of case law in all four areas raises legitimate questions about the efficacy of current protections and whether they are substantively improving lived experiences across the 27 Member States.

One potential reason for the absence of jurisprudence, at least in recent years, may be the dissuasive effect of expanding legal safeguards. As an increasing number of EU countries criminalise or attach civil liability to sexual orientation discrimination, this may encourage individuals to refrain from conduct or actions which manifest sexuality-motivated bias. In such a scenario, the lack of available case law would reflect the successes, rather than the failings, of existing domestic law prohibitions.

Yet this reasoning appears inconsistent with current research on experiences of and attitudes towards sexual orientation in the EU. As noted in the Introduction, over the past 12 months, the European Union Agency for Fundamental Rights (FRA) has published the results of its second survey on LGBTI people⁵⁴² and the European Commission has released the 2019 Eurobarometer on the social acceptance of LGBTI

542 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union.

people.⁵⁴³ While both projects reveal improving data for lesbian, gay and bisexual populations, they also highlight serious concerns.

According to the FRA survey results, for example, among respondents across the EU, 35 % of lesbian women, 40 % of gay men, 65 % of bisexual women and 77 % of bisexual men were almost never, or rarely, open about being LGBTI.⁵⁴⁴ In the 12 months prior to the survey, 39 % of lesbian women, 32 % of gay men, 36 % of bisexual women and 28 % of bisexual men across the EU felt discriminated against due to being LGBTI in areas other than employment.⁵⁴⁵ During that same period, 41 % of lesbian women, 38 % of gay men, 33 % of bisexual women and 30 % of bisexual men experienced harassment due to being LGBTI.⁵⁴⁶ These figures are extremely worrying, and they emphasise the continuing levels of discrimination directed towards individuals due to their sexual orientation throughout the Union.

The statistics are reinforced by the data on attitudes towards LGB communities revealed through the European Commission's 2019 Eurobarometer. In 11 Member States, more than 50 % of respondents totally disagreed (vast majority) with or did not know their opinion on the idea that there is 'nothing wrong in a sexual relationship between two persons of the same sex'.⁵⁴⁷ In 12 EU countries, a majority of respondents were 'totally uncomfortable' with two men showing affection in public.⁵⁴⁸ Similar levels of total discomfort were expressed by a majority of respondents in 10 Member States in relation to two women.⁵⁴⁹ Indeed, in 10 jurisdictions, a majority of respondents would even be 'totally uncomfortable' if their own child engaged in a same-sex relationship.⁵⁵⁰

Given the nature of the data in both the FRA survey results and the Eurobarometer, it is hard to draw precise or definitive conclusions – especially in relation to the experiences of lesbian, gay and bisexual populations in particular countries. However, what both projects do reveal is that, across the European Union, LGB individuals continue to experience multiple forms of oppression. Furthermore, in a sizeable minority of Member States, negative attitudes towards LGB communities remain commonplace.

Against that background, although not absolutely disproven, it seems improbable that the relative absence of case law on sexual orientation discrimination across the Union is solely a reflection of the enhanced or more effective legal protections which Member States have instituted. Rather, it is more likely that unequal treatment due to sexual orientation continues to take place in the four areas covered by this report, including in EU countries with explicit legal prohibitions, but that, for certain reasons, these incidents of discrimination and harassment are neither being brought before, nor publicly reviewed by, national courts, equality bodies and ombudspersons.

As such, for policy makers, both national and EU, a priority consideration must be whether and why existing legal safeguards are not being invoked and applied where instances of sexual orientation discrimination arise. In particular, there is a need to explore whether specific dynamics within national non-discrimination frameworks discourage or stifle individuals who experience unequal treatment. In this regard, policy makers should, inter alia, investigate the following (non-exhaustive) list of factors. Is there

543 European Commission (2019), *Eurobarometer on the social acceptance of LGBTI people in the EU*, available at: https://ec.europa.eu/info/sites/info/files/ebs_493_data_fact_lgbti_eu_en-1.pdf.

544 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union, p. 24.

545 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union, p. 34.

546 European Union Fundamental Rights Agency (2020), *EU-LGBTI: A long way to go for LGBTI equality*, Luxembourg, Publications Office of the European Union, p. 44.

547 European Commission (2019), *Eurobarometer on the social acceptance of LGBTI people in the EU*, available at: https://ec.europa.eu/info/sites/info/files/ebs_493_data_fact_lgbti_eu_en-1.pdf, p. 2.

548 European Commission (2019), *Eurobarometer on the social acceptance of LGBTI people in the EU*, available at: https://ec.europa.eu/info/sites/info/files/ebs_493_data_fact_lgbti_eu_en-1.pdf, p. 6.

549 European Commission (2019), *Eurobarometer on the social acceptance of LGBTI people in the EU*, available at: https://ec.europa.eu/info/sites/info/files/ebs_493_data_fact_lgbti_eu_en-1.pdf.

550 European Commission (2019), *Eurobarometer on the social acceptance of LGBTI people in the EU*, available at: https://ec.europa.eu/info/sites/info/files/ebs_493_data_fact_lgbti_eu_en-1.pdf, p. 13.

a general public awareness of legal safeguards against sexual orientation discrimination and is there a need for further public education? Are members of the national LGB population aware of the applicable laws and can steps be taken to enhance knowledge among these communities? Are there reasons why LGB individuals might be reluctant to report discrimination or to seek enforcement of legal protections (e.g. historic mistrust of state institutions, such as the police force, press coverage, lack of anonymity and involuntary public disclosure of sexual orientation)? If yes, what measures can be implemented to overcome these reasons and to increase confidence among LGB populations in enforcement processes? Are investigatory bodies, including police and courts services, properly equipped to review LGB-related claims in a sensitive manner and are there training courses which might improve their capacities in this field? Each of these questions, and the actions that they require, would assist policy makers in moving beyond nominal prohibitions and in identifying substantive reforms which give practical effect to sexual orientation protections.

Such action must be a priority for policy makers, both domestic and EU, because the current absence of case law on unequal treatment due to sexual orientation has a number of potentially significant consequences.

It reduces the scope for judges, equality bodies and ombudspersons to explain and define the precise contours of non-discrimination guarantees. Where adjudicators are not presented with the opportunity to review sexual orientation protections, they cannot develop a comprehensive jurisprudence on how those safeguards should operate, nor can they resolve ambiguities in the law. This can give rise to uncertainty about both the scope and the meaning of domestic protections. It may ultimately result in individuals, who genuinely experience unequal treatment due to their sexual orientation, foregoing claims for discrimination because, without the necessary judicial clarifications, they are unclear, from the bare language of the statute, whether their situations meet the requirements of the law.

Furthermore, the absence of case law may also undermine faith in the implementation of national prohibitions. If there is no publicly available record of courts or adjudicatory bodies censoring unequal treatment in this field, it may encourage perceptions that the law has only symbolic rather than practical value. Again, there is a risk of, in such circumstances, individuals foregoing genuine claims for discrimination because they lack confidence in the enforceability of the law. Why raise an allegation of unequal treatment where there is no reasonable prospect of redress – particularly where pursuing a claim may precipitate further harassment or necessitate public disclosure of sexual orientation? These are legitimate concerns and it is incumbent upon policy makers to adopt meaningful actions which allow individuals, where they experience discrimination outside the labour market, to enforce their legal rights in clear, accessible and meaningful ways.

9.3 Understanding and assessing objections to enhanced sexual orientation protections

Since the European Commission published its proposal for a ‘Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’ in 2008, there has been considerable debate over the practicality and the desirability of such legislation. While many EU jurisdictions have cautiously welcomed expanding safeguards for these four characteristics, there is also ongoing concern about the potential unintended or unforeseen consequences. For religion or belief, disability, age and sexual orientation, national policy makers have raised different objections to EU-wide intervention – anxious about how increased restrictions or obligations will affect current domestic rules. In the sphere of sexual orientation, Member States’ concerns have focused on, inter alia, the need for proper exceptions to any new safeguards and the potential impact of enhanced EU law requirements on formalised relationships.

9.3.1 Exceptions

As noted in Section 8, while sexual orientation protections in EU Member States have been increasing in recent years, there have also been growing concerns about how national policy makers and judiciaries should address dissent or disapproval. In particular, there are ongoing debates as to whether, and to what extent, individuals should be exempted from non-discrimination guarantees because they hold moral, philosophical or religious objections. With widening calls for the EU legislature to adopt Proposal 2008/0140, establishing minimum safeguards for sexual orientation beyond the labour market,⁵⁵¹ the potential inclusion (or exclusion) of exceptions in any new directive has been a point of contention.

What this report reveals, however, is that, when creating expanded sexual orientation protections in their own national legal systems, Member States have shown a notable willingness to omit exceptions outside the labour market. Policy makers across the Union are undoubtedly sensitive to the genuine convictions of people who – for religious, moral, political or philosophical reasons – oppose sexual orientation protections. Yet in many EU countries, national experts for this report have not been able to identify specific exceptions to sexual orientation non-discrimination protections. In certain countries, there are general exemptions, which permit proportionate limits on equality guarantees. Although these would extend to sexual orientation, they apply to all other protected characteristics, and were not introduced to accommodate specific objections to homosexuality or bisexuality. Indeed, even in jurisdictions where exceptions are permitted, the available case law is as likely to focus on situations where such limitations do not apply.

In those circumstances, considering existing national practices, there is little evidence, in the various EU jurisdictions, of legislative or judicial urgency for broad exceptions to prohibitions on sexual orientation discrimination. There are limited examples where national courts have prioritised religious expression over sexuality. Yet in general, national legislation and case law appear capable of functioning appropriately without significant limitations on sexual orientation equality. As national representatives and EU policy makers move forward, considering the desirability and workability of minimum EU standards, they should be led by current experience in EU jurisdictions – reflecting upon the actual necessity of onerous exceptions in any future legislation.

9.3.2 Legal relationship recognition

A second concern for extending EU-level protections on sexual orientation relates to the potential impact for national rules on legal relationship recognition. If EU law requires greater safeguards for sexual orientation, it may become increasingly untenable, so the argument goes, for Member States to withhold legal status from same-sex couples. The question of same-sex relationship recognition holds great sensitivity in many EU countries – touching issues of equality, basic dignity, national autonomy and social norms. It has been a source of important discussion within the European Union and the Council of Europe for more than a decade, particularly as an increasing number of jurisdictions adopt same-sex marriage and civil partnership. Yet in the context of debates on sexual orientation protections in social protection, social advantages, education and goods and services, the issue of legal relationship recognition has only limited relevance.

Article 19 of the Treaty on the Functioning of the European Union empowers ‘the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, [to] take appropriate action to combat discrimination based on... sexual orientation’ [emphasis added]. That provision (nor any other article within the treaties) does not, however, create jurisdiction for the EU to legislate on general same-sex relationship recognition.

⁵⁵¹ 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, Brussels, 2 July 2008, COM(2008) 426 final, 2008/0140 (CNS).

In recent years, for very limited purposes, EU law rules, such as Article 2 of Directive 2004/38/EC⁵⁵² and the recent *Coman* judgment,⁵⁵³ have required Member States to acknowledge foreign same-sex marriages and registered partnerships. In her recent ‘State of the Union’ address, European Commission President, Ursula von der Leyen, also expressed her intention to ‘push for mutual recognition of family relations in the EU’.⁵⁵⁴ Yet, subject to the obligations of Articles 8 and 14 of the European Convention on Human Rights, EU countries can currently continue to determine their own rules on relationship recognition – a legal reality which is most clearly illustrated by the fact that, despite *Coman*, Romania remains one of only six EU jurisdictions to withhold formal status for same-sex couples. Indeed, it may be instructive that four of those six jurisdictions⁵⁵⁵ – **Bulgaria, Lithuania, Romania and Slovakia** – have been able to prohibit sexual orientation discrimination in all or most of the areas covered by this report without also being required to change their legal relationship recognition rules. Without assessing the merits of the current same-sex relationship laws in these Member States, which is outside the scope of this report, it is clear that establishing broader sexual orientation protections does not require EU countries to extend formal recognition to same-sex couples.

Nevertheless, it is worth noting the extent to which, throughout the European Union, the introduction of legal recognition for same-sex relationships, where Member States have exercised their discretion to adopt such laws, has increased non-discrimination rights in social protection, social advantages and access to and the supply of goods and services. In a number of EU jurisdictions, entering into a same-sex marriage, civil partnership or registered relationship confers access to the same or similar rights, which have previously been reserved for different-sex spouses. In the sphere of social protection, for example, this may mean that same-sex married individuals or civil partners cannot be discriminated against in next-of-kin decision-making and that they should benefit from survivor pensions. Similarly, in social advantages, formalising relationships may improve tax status or create entitlements to publicly available concessions. This has been so, even in EU Member States where national laws may not yet prohibit sexual orientation discrimination in these spheres. For national policy makers, considering whether to exercise their discretion in favour of relationship recognition, the equality dimensions of such recognition should be a factor in their deliberation – providing safeguards so that all couples, irrespective of sexual orientation, enjoy basic safety and security.

552 See Article 2(2)(a) and (b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

553 Judgment of 5 June 2018, *Coman*, C673/16, EU:C:2018:385.

554 ‘State of the Union Address by President von der Leyen at the European Parliament Plenary’, 16 September 2020, European Union website, available at: https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655.

555 The other two jurisdictions are Latvia and Poland.

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