



The European Union and rights of LGBT people

SUMMARY *The prohibition of discrimination and the protection of human rights are important elements of the EU legal order. Nevertheless, discrimination against lesbians, gay, bisexual and transgender (LGBT) persons persists throughout the EU, taking various forms including verbal abuse and physical violence.*

Sexual orientation is now recognised by EU law as grounds of discrimination; the scope of protection is however limited and does not cover social protection, healthcare education and access to goods and services – areas where LGBT people are often discriminated against.

Moreover, EU competence does not extend to recognition of marital or family status. National regulations vary, with some Member States having opened the institution of marriage to same-sex couples, others allowing alternative forms of registration, and yet others not providing any legal status for same-sex couples. This has implications for such couples moving to another Member State.

Combating discrimination has become part of EU internal and external policies and the subject of numerous resolutions of the European Parliament. But it remains problematic when it touches on issues pertaining to areas traditionally reserved to Member States, such as marital status and family law.



© Lisa F. Young / Fotolia

This is an updated version of a Briefing published in May 2010.

In this briefing:

- Context
- EU legal framework
- The European Parliament's position
- Stakeholder opinions
- Further reading
- Annex

Context

In some parts of the world, negative perceptions of LGBT people are reflected in harsh laws. Consensual same-sex acts among adults are illegal in at least 76 countries, and in seven of them, they are punishable by death.¹

Set against this background, Europe appears an LGBT-friendly continent. The EU Member States (MS) are parties to a whole range of international instruments² – including the [European Convention on Human Rights](#) (ECHR) – which set out a catalogue of fundamental rights for all. At the same time, the EU boasts one of the most extensive sets of anti-discrimination legislation in the world. Moreover, the EU promotes the rights of LGBT people internationally. Amongst numerous examples, it initiated a UN [declaration](#) calling for the worldwide decriminalisation of homosexuality.

Opinion polls suggest that more and more Europeans see their respective countries as more or less discrimination-free. The most recent [Eurobarometer Discrimination Survey](#) reveals that in 2012 Europeans were on average less inclined to see discrimination based on sexual orientation (see Annex) as widespread than they were when the previous surveys were conducted (in 2006, 2008 and 2009).

Nevertheless, almost half of the respondents (46%) still believed that it was widespread, which makes sexual orientation the third

most commonly indicated ground for discrimination in the EU.

A report by the [EU Agency for Fundamental Rights](#) (FRA) – drafted on the request of the European Parliament in 2008 and partly [updated](#) in 2010 – confirms the latter opinion, pointing to homophobia, transphobia and discrimination experienced by LGBT people throughout the whole of Europe. Attitudes towards transgender people seem to be particularly negative, even when compared to the perception of lesbians, gay men or bisexuals.³ According to the report, verbal and physical attacks on LGBT people have occurred in all MS.⁴ A 2012 [EU LGBT survey](#) launched by the FRA revealed that 90% of such incidents go unreported to the authorities.

It may be argued that these social phenomena are reflected at a political level: in some MS intolerant statements by politicians and religious leaders ('hate speech') have been reported in recent years, while public demonstrations in favour of LGBT rights have often met with resistance from the authorities (as illustrated by difficulties encountered by the organisers of the Baltic Pride event held in Lithuania in 2010 and 2013).

This social and political context, combined with major differences in national laws (e.g. in respect of same-sex unions), raises questions as to the actual extent to which LGBT people can exercise their rights in the EU.

EU legal framework

Discrimination on the grounds of sexual orientation in EU primary law

The principle of equality and the prohibition of discrimination on the basis of sexual orientation have, today, an extensive legal basis in the Treaties (e.g. Article 10 [TFEU](#), Articles 2 and 3 [TEU](#)).

Those Treaty provisions are complemented by the [Charter of Fundamental Rights](#) of the EU which – under the Lisbon Treaty – has the same legal value as the Treaties. The

Charter was the first international human-rights charter to explicitly prohibit discrimination on the grounds of "sexual orientation" (Article 21(1)).

Sexual orientation has however acquired this status only recently. Until the [Treaty of Amsterdam](#) of 1999, the relevant EC Treaty provisions concerned only discrimination on the grounds of nationality and sex. At the same time, the case law of the Court of Justice of the EU (CJEU) defining the scope of the general principle of equality was not uniform – whether discrimination based on sexual orientation was prohibited under this principle remained contentious⁵.

The breakthrough **Article 13 ECT** – introduced by the Amsterdam Treaty (now [Article 19](#) TFEU) – empowered the EU to adopt measures to deal with discrimination based on other grounds, including sexual orientation.

Anti-discrimination Directives: scope and implementation

Two landmark anti-discrimination Directives were adopted on the basis of Article 13 ECT in 2000:

- [Race Equality Directive](#) implementing the principle of equal treatment irrespective of racial or ethnic origin.
- [Framework Employment Directive](#) prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation.

There is a notable difference in the scope of application of these two Directives. The former has a very broad scope as it obliges MS to adopt relevant anti-discrimination legislation in the areas of:

- social protection (including social security and healthcare);
- education; and
- access to and supply of goods and services available to the public (including housing).

The Framework Employment Directive, on the other hand, is restricted to employment, occupation and vocational training.

However, LGBT people experience various forms of discrimination in those areas, including:

- impossibility to visit partners in hospitals;
- higher premiums on health insurance;
- no access to social benefits reserved for married couples;
- bullying and harassment, discriminatory content in educational materials; and
- degrading treatment by neighbours, or refusal to rent.⁶

Moreover, the question arises as to whether this difference in the scope of protection ('hierarchy of grounds') is legitimate and consistent with international human rights law.⁷

The Commission sought to remedy the situation by making a [proposal](#) for a new horizontal directive, which would extend the prohibition of discrimination on the grounds of religion or belief, disability, age or sexual orientation outside employment. The European Parliament adopted its [opinion](#) on the proposal in April 2009 under the consultation procedure. However, following the entry into force of the Lisbon Treaty, the proposal falls under [Article 19 TFEU](#) which requires the EP's [consent](#) in addition to unanimity in the Council. Such unanimity has not been achieved and the proposal has been blocked in the Council for several years.

Nevertheless, some MS, when implementing the Framework Employment Directive, extend the protection on the basis of sexual orientation to cover some or all fields to which the Race Equality Directive applies.

Moreover, there is a general tendency among MS to create a single equality body, dealing with all grounds of discrimination, while only the Race Equality Directive and the 2004 [Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services](#) require such an institution.⁸

Discrimination of transgender people

EU law does not provide for a specific prohibition of discrimination on the grounds of transgenderism. Some MS see it as a form of sex discrimination. Such an approach is corroborated by extensive case law of the CJEU, which has adopted a definition of sex discrimination covering people who have undergone sex reassignment, but not other transgender persons (e.g. transvestites). In other MS this type of discrimination is treated as discrimination on the basis of sexual orientation. The third group of MS considers it as neither one nor the other. In those MS transgender people can only rely on the general principle of equality and cannot benefit from the more far-reaching protection of the anti-discrimination Directives.

Source: [Fundamental Rights Agency](#), 2009.

EU anti-discrimination legislation and same-sex unions

According to Recital 22 of the [Framework Employment Directive](#), its provisions do not affect national laws on marital status and benefits reserved for married couples. In the same vein, the proposal for the new anti-discrimination directive leaves the recognition of marital or family status, adoption and reproductive rights to national laws, supposedly reflecting diverse national traditions and policy choices.⁹

Indeed there are substantial differences between MS in social perception of same-sex marriage and of the adoption of children by same-sex couples. National laws also vary considerably with respect to the legal recognition of same-sex unions. Eight MS allow same-sex marriage, including the Netherlands (since 2001), Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013) and UK (England and Wales, 2013). Others (e.g. Luxembourg and Slovenia) recognise unions similar to marriage or some weaker form of contracts or registration. However, a number of states have not provided for any legal scheme for same-sex couples.

It could be argued that the refusal of those countries, which do not allow same-sex

couples to marry, to grant them certain benefits in the areas covered by the Framework Employment Directive is a discriminatory practice.

According to CJEU case law, when an MS has created some form of union, comparable to marriage, for same-sex partners, it may not create an arbitrary difference in treatment between marriage, not open to such partners, and this form of union. This does not mean however that the Directive compels MS to create such an institution.¹⁰

Other Directives with implications for LGBT people

Among EU instruments with implications for the rights of LGBT people, three Directives deserve particular attention due to specific problems in their interpretation:

- [Free Movement Directive](#): the definition of 'spouse' and 'members of the family'; the recognition of same-sex marriages concluded and registered partnerships entered into in other MS;
- [Family Reunification Directive](#): entry and residence rights of LGBT third-country nationals; and
- [Qualification Directive](#): no uniform interpretation of the Directive when it comes to granting asylum to persons belonging to a 'social group' characterised by sexual orientation.

The European Parliament's position

The Parliament has addressed the problem of LGBT rights on numerous occasions, starting with the adoption of a resolution on the rights of homosexuals at the workplace, as early as 1984.

In a 2012 [resolution](#) on the fight against homophobia in Europe, the EP listed legal developments in the EU and some neighbouring countries that it considered alarming. It condemned the restrictions of freedom of expression and assembly, including through laws on the so-called "propaganda of homosexuality."

The [resolution](#) on the situation of fundamental rights in the EU (2010-11) encouraged, in turn, the combating of homophobia through a recast of the [Council Framework Decision](#) on racism and xenophobia, i.e. by criminal law measures. Furthermore, the Parliament once again spoke in favour of mutual recognition of legislation on same-sex partnerships as a means to guarantee the equal application of the right of free movement to same-sex and heterosexual couples.

While supporting the Commission's proposal for the horizontal anti-discrimination directive, the EP nevertheless suggested numerous [amendments](#) to it. One amendment would extend the directive's scope to include discrimination based on assumptions about a person's religion or belief, disability, age or sexual orientation, as well as discrimination based on a person's association with people with one or more of those characteristics.

Recently, the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) has been working on two initiative reports concerning, respectively, the [situation of fundamental rights in the EU](#) (2012), and the [EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity](#).

Stakeholder opinions

Positions in favour of LGBT rights

The issues debated in the Parliament have also been the focus of major stakeholders.

The [EP Intergroup on LGBT Rights](#) – an informal forum for MEPs – sets monitoring the Commission's work on LGBT rights among its five priorities for action. Recently the Intergroup [welcomed](#) a regulation adopted under [ordinary legislative procedure](#) which extended the financing from the [European Social Fund](#) (2014–2020) to combating discrimination, including that based on gender identity and sexual orientation.

[ILGA-Europe](#) – the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) – challenged those elected to the current Parliament in 2009, through the ten-point EP Elections [pledge](#), to combat discrimination based on sexual orientation, gender identity and gender expression. The pledge was initially addressed to candidates, but has remained open for signature by elected MEPs.

In previous years, ILGA-Europe strongly [supported](#) the proposed horizontal anti-discrimination directive, the position it reiterated during a [LIBE hearing](#) in December 2008. It considered however that the references in the proposal to marital and family status and reproductive rights were not justified and could be harmful to protection against discrimination based on sexual orientation and on other grounds.

This brings ILGA's position close to the views taken by [Amnesty International](#), which recognises the discriminatory character of civil marriage laws.

ILGA-Europe has also commented extensively on the Free Movement Directive. In its [Implementation Guidelines](#) it states that:

- restricting the notion of "spouse" to opposite-sex spouses amounts to discrimination on the grounds of sexual orientation; the prohibition of such discrimination is enshrined in the preamble to the Directive, which – even though not binding – the CJEU will take into account when interpreting the Directive; and
- if the national law provides for registered partnerships, national legislation must extend the right to enter and reside to individuals who formed such a partnership in another Member State.

Anti-LGBT positions

Reference to LGBT rights meets with particularly strong resistance when it takes place in the context of laws on marriage or family. This is illustrated by strong

[opposition](#) and mass protests in France sparked by a law of May 2013 which granted same-sex couples the right to marry and jointly adopt children.

Such a critical approach has been consistently taken by the Roman Catholic Church which [condemns](#) same-sex unions and considers their legal recognition as leading to "the devaluation of the institution of marriage". The Church has repeatedly confirmed this position, including in its [critical assessment](#) of one of Parliament's resolutions on human rights.

The [Exodus Global Alliance](#) – a non-profit worldwide Christian organisation – claims that reorientation of same-sex attraction is possible and supports such "conversion therapies." However, June 2013 saw the end of activities of its founder organisation (Exodus International) which issued an [apology](#) to the LGBT community for promoting stigmatising "reparative theories" about sexual orientation.

Main references

Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States:

Part I: - [Legal Analysis](#)

Part II - [The Social Situation](#) / Fundamental Rights Agency, June 2008 and March 2009.

[Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: 2010 Update](#) / Fundamental Rights Agency, 2010.

Disclaimer and Copyright

This briefing is a summary of published information and does not necessarily represent the views of the author or the European Parliament. The document is exclusively addressed to the Members and staff of the European Parliament for their parliamentary work. Links to information sources within this document may be inaccessible from locations outside the European Parliament network. © European Union, 2013. All rights reserved.



<http://www.library.ep.ec>

<http://libraryeuroparl.wordpress.com>

Annex

Terminology (derived from the [FRA report](#))

Discrimination: the less favourable treatment of one person or group than another on various grounds (**direct discrimination**), or the situation where an apparently neutral provision is liable to disadvantage a group of persons in comparison to others (**indirect discrimination**).

Hate speech: public expressions which spread, incite, promote or justify hatred founded on intolerance.

Sexual orientation: each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

Gender identity: each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body.

Transgender persons: include people with gender identity which is different to the gender assigned at birth and those people who wish to portray their gender identity in a different way to the gender assigned at birth. This includes, among many others, transgender persons who are between male and female, transsexual and transvestites.

Transsexual: a person who prefers another gender than their birth gender and feels the need to undergo physical alterations to their body to express this feeling, such as hormone treatment and/or surgery.

Cross-dresser/transvestite: a person who regularly, although part-time, 'dresses up' in clothes mostly associated with the opposite gender to their birth gender.

Homophobia: the irrational fear of and aversion to homosexuality and LGB people based on prejudice.

Transphobia: the irrational fear of gender non-conformity or gender transgression, such as a fear of, or aversion to, masculine women, feminine men, cross-dressers, transsexuals and others who do not fit into existing gender stereotypes matching their birth gender.

Endnotes

- ¹ [State-sponsored Homophobia. A world survey of laws: Criminalisation, protection and recognition of same-sex love](#) / L P Itaborahy and J Zhu, ILGA, 2013.
- ² These include UN, ILO and Council of Europe instruments, complemented by extensive jurisprudence of the European Court of Human Rights concerning discrimination on the grounds of gender and sexual orientation.
- ³ [Transphobic Hate Crime in the European Union](#) / L Turner, S Whittle and R Combs, p. 17, 2009.
- ⁴ [FRA report: part II](#) / Fundamental Rights Agency, March 2009, p. 127.
- ⁵ [EU law : text, cases, and materials](#) / Paul Craig and Gráinne De Búrca, Oxford University Press, 2008, p. 560.
- ⁶ [Study on discrimination on the grounds of religion and belief, age, disability, and sexual orientation outside of employment](#) / European Policy Evaluation Consortium (EPEC), June 2008, pp 16–25.
- ⁷ [Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity - 2010 Update \(Comparative legal analysis\)](#) / FRA, 2010, p. 19.
- ⁸ Ibid. pp 19 and 28–29.
- ⁹ [Impact Assessment](#) / European Commission, July 2008, p. 6.
- ¹⁰ CJEU [Maruko case](#) (C-267/06).