

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs	
Justice, Freedom and Security	
Gender Equality	
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Petitions	

**TOWARDS AN EU ROADMAP
FOR EQUALITY ON GROUNDS
OF SEXUAL ORIENTATION
AND GENDER IDENTITY**

STUDY



**DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Towards an EU roadmap for equality on grounds of sexual orientation and gender identity

STUDY

Abstract

This study presents an overview of problems faced by LGBTI persons as identified in EU studies, along with EU actions taken in this area to date. It focuses in particular on the areas of Equality (including in the fields of employment, health, education, access to goods and services and housing); specific trans and intersex issues; diverse families and freedom of movement; freedom of assembly and expression; hate speech, hate crime and violence; and fleeing homophobia and transphobia. Based on these findings, it proposes recommendations with a timeline which could be included in a roadmap for equality on grounds of sexual orientation and gender identity.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LINGUISTIC VERSION

Original: EN

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Manuscript completed in 2012.
Brussels, © European Parliament, 2012.

This document is available on the Internet at:

<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>
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LIST OF ABBREVIATIONS

- LGBTI** Lesbians, Gays, Bisexuals, Transsexuals and Intersex
- CJEU** Court of Justice of the European Union
- ECtHR** European Court of Human Rights
- EIGE** European Institute for Gender Equality
- FRA** Fundamental Rights Agency
- ILGA** International Lesbian and Gay Association
- IGLYO** International Lesbian, Gay, Bisexual, Transgender, Queer, Youth and Student Organisation
- MMF** Multiannual Financial Framework
- OMC** Open Method of Co-ordination
- NGO** Non Governmental Organisation
- TFEU** Treaty on the Functioning of the European Union
- UNHCR** Office of the United Nations High Commissioner for Refugees

1. INTRODUCTION

KEY FINDINGS

- Momentum to protect LGBTI persons has increased over the last two decades, including with the adoption of the Lisbon Treaty and Charter of Fundamental Rights.
- The EU has extended its actions on LGBTI rights in the areas of justice, asylum, freedom of expression and assembly, education as well as freedom of movement and mutual recognition of civil status.
- Problems are still endemic for LGBTI persons, as attitudes based on historical, cultural and religious perspectives are difficult to change.
- The European Parliament has repeatedly called for a roadmap to establish a coherent plan of action to establish priorities, momentum and follow-up.

The history of discrimination and violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is a long one. Yet the protection of such persons and the prevention of discrimination against them, whether nationally or at the EU or international level, is still in its infancy.

Nevertheless, momentum has increased in the last two decades, founded on the fundamental rights of all persons to equal treatment and to safety and security, as recognised by the European Convention on Human Rights (the Convention) and the Charter of Fundamental Rights. The case law of the European Court of Human Rights (ECtHR) has progressively recognised the application of the Convention to cases related to homophobia and transphobia, recognising that fundamental rights should be upheld regardless of sexual orientation and gender identity.

The European Union, under the Treaty on the Functioning of the European Union, states amongst its aims not only the elimination of inequalities but more specifically the combating of discrimination based inter alia on sexual orientation. The Lisbon Treaty also provides the Union with the specific legal basis, under Article 19, to combat discrimination and requires the consent of the European Parliament for any such action.

Yet progress has been difficult, slow and not without setbacks. Public and official perception and attitudes towards the LGBTI community can be likened to those of the gender equality movement in the 20th century. As such, whilst recognition of the rights of LGBTI persons is growing in a number of areas, reluctance for change remains in other areas often based on historical, cultural and religious perspectives. Such reluctance has manifested itself at the national level with limitations on, for example, the freedom of expression and right to assembly and at the EU level where, for example, the proposed Directive on anti-discrimination remains blocked after four years of negotiations. The effect is that across the EU, LGBTI persons face an array of varying rights and standards in treatment depending on protections afforded largely by national law.

With the European Union having been founded on economic union, it is not surprising that the EC's earliest action in the fight against discrimination based on sexual orientation was through the 1976 Equal Treatment Directive¹ which focused on equal treatment for men and women as regards access to employment. The European Court of Justice, subsequently recognised its application to transsexuals and gender reassignment.²

¹ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

² Case C-13/94, P. v. S and Cornwall County Council [1996] ECR I-2143.

Over the years, the EU has continued to extend its action on LGBTI rights to a range of areas including access to justice, asylum, freedom of expression and assembly, education and freedom of movement, and mutual recognition of civil status within the EU. The European Parliament has been a driving force behind such action adopting a range of resolutions calling for continued progress in this field. This includes the recent European Parliament resolution of 24 May 2012 on the fight against homophobia in Europe.³

Nevertheless, with such a diverse range of issues covering not only internal EU policy but also enlargement policy and external action (the EU discusses protection from discrimination based on sexual orientation and gender identity in negotiation agreements with accession countries, particularly Croatia), the European Parliament has for some time called on the European Commission to present a single roadmap establishing a coherent and overarching plan of action in this area as well as providing transparency regarding the work already done on LGBTI rights across and within the EU institutions. Through such a roadmap, priorities can be established, appropriate follow up ensured and momentum maintained through effective timetabling which in turn will allow progress to be monitored. This study considers the merits, scope and possible content of such a roadmap.

Aim and methodology of the study

For some time now, calls have been made for the development of a roadmap with respect to securing the rights of LGBTI persons and to the prevention of discrimination against such persons on the basis of their sexual orientation.

Strategic roadmaps establish a pathway to achieving long term goals through the development of time specific targets and actions. They can take many forms depending on the objectives to be achieved. They can range from highly detailed technical plans for the development of a company, to long range policy initiatives with clear targets such as the EU's Energy Roadmap 2050⁴. Or they can simply set out a series of legislative initiatives such as the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings⁵.

When done well a strategic roadmap can be a highly effective communication tool, can facilitate co-ordination of diverse policy issues, ensure momentum and action is achieved in an efficient and effective manner, and ultimately can ensure that objectives are met. However, without sufficient commitment to the process of developing a roadmap and follow through of actions, it can raise expectations and expend energy and resources whilst achieving relatively little.

The aim of this study is to examine the merits of a roadmap in relation to the achievement of LGBTI rights and to make recommendations for how such a roadmap, if merited, could be developed and what its content might be.

It does not involve detailed surveys or the establishment of new data. Rather, its aim is to apply a logical framework and process within the limits of the study's specifications. It seeks to provide an indication of why a roadmap might be needed, how such a roadmap might be developed and areas or actions which could be relevant.

The study is based on existing evidence and research on the areas of EU action. The study takes a thematic approach towards the key problems faced by LGBTI persons. It is

³ European Parliament Resolution of 24 May 2012 on the fight against homophobia in Europe (No 2012/2657(RSP)).

⁴ Available at : http://ec.europa.eu/energy/publications/doc/2012_energy_roadmap_2050_en.pdf.

⁵ Resolution of the Council 2009/C 295/01 of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

structured around those policy themes which have been identified as having the greatest impact on or relevance for LGBTI people. The primary issues can thus be summarised as:

- Equality and non-discriminatory access to employment, education, health, goods and services and housing
- Trans and intersex issues
- Diverse families and freedom of movement
- Hate speech, hate crime and violence
- Fleeing homophobia and transphobia

This paper first describes the objectives of strategic roadmaps and their benefits. It then briefly summarises the relevant areas an EU roadmap could address in view of the EU's legal competences. It also considers the key actors for whom a roadmap could be of value or to whom it could be directed.

A broad gap analysis is achieved through an examination of the problems which LGBTI persons continue to face and current and planned EU action. This section is developed based on existing research and reflects as far as possible the most recent position taking into account existing EU and national action in the field. It is not intended as an extensive analysis and discussion of the problems faced by LGBTI persons but rather summarises the key issues.

Finally, the study makes a number of recommendations on possible goals and actions for achieving the vision. These recommendations are based on the preceding analysis and take into account as far as possible the EU's legal competence to act, subsidiarity and proportionality principles.

2. JUSTIFICATION FOR A ROADMAP

KEY FINDINGS

Roadmaps can be an effective means of:

- Developing clear, long term goals and the process to achieve those goals;
- Co-ordinating positions and ensuring a coherent and comprehensive approach;
- Ensuring proper consideration of issues in areas which do not normally deal with those matters;
- Drawing together diverse issues in a single document and effectively communicating those issues;
- Promoting transparency and participation in decision making and accountability of institutions;
- Establishing long term goals and a programme of measures.

Strategic roadmaps can be a highly effective means for identifying and fulfilling policy objectives over a period of time. Their benefits can be particularly relevant when dealing with subject areas as wide ranging as LGBTI issues.

Understanding the potential uses and benefits of roadmaps will be at the core of determining whether such a roadmap would be of added value in the LGBTI field and how the roadmap might be focused. Below, a short breakdown of some of the key benefits of roadmaps is therefore provided.

2.1. Policy development and effective co-ordination of policies

EU roadmaps can play a crucial role in the development of clear, long term goals and the process to achieve those goals. In much the same way as the European Commission's impact assessments establish a process to determine appropriate EU action in a particular field and the impact of that action, the development of a roadmap requires a clear, logical process to determine objectives and detailed actions.

The process will by its nature bring relevant actors together since they will need to co-ordinate their positions to ensure a coherent and comprehensive approach whilst avoiding duplication of action.

In the field of LGBTI rights this process can be essential given the vast array of relevant issues to be addressed which cuts across the competences of most Commission Directorates and Member State Ministries. It is also particularly relevant given the varying levels of EU competence to act in this field and the different forms of action needed from legislation to practical projects and funding programmes. Thus a roadmap would also serve to support Member States in their own actions.

A roadmap will also facilitate the proper consideration of issues in decision making bodies which do not normally deal with those matters. A number of LGBTI issues may be considered of particular importance within the LGBTI field but may be lost when dealt with as a single issue within, for example, a Commission Directorate which has a different set of priorities. As such the development of a roadmap should facilitate the mainstreaming of a policy area and appropriate prioritisation.

Overall, a roadmap helps ensure that all policy areas are taken into account when planning future actions. This facilitates prioritisation of work and co-ordination between different

actors, and importantly helps raise the profile of specific issues within sectors that do not normally deal with such issues.

2.2. Leadership, transparency, accountability and communication

Roadmaps can provide an important mechanism by which key issues which relate to a single area can be drawn together and communicated through a single instrument despite their diverse character.

In doing so, the policies and priorities of the EU are made more easily accessible to EU institutional actors and for Member States, civil society, and citizens. An EU narrative can be more effectively communicated and a roadmap can provide inspiration to the international community for future action.

The approach of the relevant institutions can be understood quickly and inter-connections between policy areas can be identified. Moreover, the development process itself can afford interested parties an opportunity to comment through sector specific or wider public consultations. This not only adds greater legitimacy to any conclusions but it further promotes transparency. The Commission, Parliament, and Council would also benefit by having a comprehensive reference tool that identifies objectives and priorities for actions.

Finally, roadmaps ensure that institutions commit to action in a particular area and enable citizens to hold institutions to account by verifying what actions have and have not been carried out. In an area such as LGBTI rights, which is not necessarily a primary area of focus, this level of accountability can be crucial in ensuring actions are taken and ultimately in promoting democratic values.

2.3. Continuity and momentum

Roadmaps are highly effective when used to establish a programme of measures particularly where these need to be taken over a period of time. This can be especially relevant from the EU perspective where legislation or a specific action may be prioritised but once the action is completed, follow up work either does not occur or is limited.

This can also be important in areas where a change in cultures and attitudes is required, which can only be achieved through long term, concerted action. This is often taken forward through practical measures and projects but the impact of such actions are limited if they are only one off actions or only carried out in the short term.

Furthermore, in areas where limited data or evidence is available, roadmaps can be used to commit to a range of actions aimed at developing an evidence base before determining what the most appropriate EU policy or legislative action should be.

3. EU COMPETENCE TO ACT AND KEY ACTORS AT EU/INTERNATIONAL LEVEL

KEY FINDINGS

- The Treaty on the Functioning the European Union requires the EU to actively mainstream equality in its work and activities (TFEU Art 10);
- The Charter of Fundamental Rights of the EU prohibits discrimination based inter alia on sexual orientation. It also secures other fundamental rights at the core of LGBTI concerns;
- The European Commission, European Parliament, European Agencies such as the Fundamental Rights Agency.

3.1. Introduction

A roadmap for the EU on future measures to address homophobia and to protect LGBTI rights must take into consideration the EU's competence to act in the range of policy areas involved. It also needs to reflect the roles of the various institutions, organisations and governments which set policies and adopt legislation and which then have responsibility for implementation and enforcement.

This chapter reviews the legal basis for EU actions to combat homophobia and to ensure the rights of LGBTI persons. It then briefly reviews each of the actors that would be involved in the concrete actions recommended for an EU roadmap in this area. EU actions taken are described in further detail under each thematic section.

3.2. The EU as actor to safeguard LGBTI rights

3.2.1. EU competence to act

Under the principle of conferral set forth in Article 5(2) of the Treaty on European Union (TEU), the EU can only act within the limits of the powers assigned to it. The EU may have exclusive competence, shared competence or competence only to take supporting, coordinating or supplementary action. Areas relevant to LGBTI rights where the EU has shared competence with the Member States include social policy, freedom, security and justice, common safety concerns in public health matters (Article 3 TFEU). Areas where the EU has competence to carry out supporting, coordinating or supplementary action of Member States include education and protection and improvement of human health (Article 6 TFEU).

When the EU has competence to act, its actions still need to comply with the principle of subsidiarity, i.e. it should act only in the case where issues cannot be dealt with effectively at national, regional or local level.

The EU's power to act in the field of human rights was first introduced into the establishing texts of the Union in 1997, via the Treaty of Amsterdam amending the Treaty of Maastricht. In addition to establishing the notion of 'human rights and fundamental freedoms' as a founding principle of the Union, the Treaty of Amsterdam also gave the EU Council the

possibility to “take appropriate action to combat discrimination based on sexual orientation”, provided it acted unanimously on a proposal from the Commission.

In 2000 the EU took a further step in this area when the presidents of the Council of Ministers, the European Commission and the European Parliament signed and proclaimed the Charter of Fundamental Rights of the European Union. This Charter finally entered into force in 2009, as part of the Lisbon Treaty.

The Lisbon Treaty also brought the Treaty on the Functioning of the European Union (TFEU)⁶ into force. The TFEU places an obligation on the EU not only to tackle discrimination (TFEU Art 19; Charter Art 21), but also to actively mainstream equality in its work and activities (TFEU Art 10). Article 19(1), which provides the legal basis for mainstreaming non-discrimination in EU policies and legislation, requires the special legislative procedure for taking action, i.e. unanimity in the European Council, along with the consent of the European Parliament. This requirement of unanimity can make achieving agreement under this legal basis difficult.

Article 19(2), on the other hand, provides the possibility for the European Parliament and the Council to act in accordance with the ordinary legislative procedure, which basically requires a majority in the Parliament and a qualified majority in the Council. This is a lower threshold. However, Article 19(2) only empowers the EU to adopt ‘basic principles of Union incentive measures’ to support actions taken by Member States to combat discrimination. Nonetheless, incentive measures are an important way to foster cooperation between Member States via exchanges of information and experience.⁷ They can complement ongoing activities and practical measures by the European Commission and the Parliament to combat discrimination and raise awareness.

In addition to this general legal basis, action to protect LGBTI persons can also take place under specific legal bases depending on the nature of any legislative proposal. For example, Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status⁸ was adopted on the basis of Article 63 TEC (now Article 78 TFEU, in the chapter on policies on border checks, asylum and immigration). Similarly, the proposed Council Directive establishing minimum standards on the rights, support and protection of victims of crime⁹ is based on Article 82 TFEU (in the chapter on judicial cooperation in criminal matters).

In addition to EU action being possible under the Treaties, since the coming into force of the Charter of Fundamental Rights, all EU legislation must comply with the Charter and Member States must comply with the Charter when implementing EU law. Article 21 of the Charter prohibits any discrimination based inter alia on sexual orientation. It also details fundamental rights at the core of LGBTI concerns such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, right to liberty and security, respect for private and family life, freedom of expression and of assembly, right to education, right to engage in work and right to asylum.

Over the years, all institutions have promoted action to improve the situation of LGBT persons. The EU has been a leader on the international stage in this field and likewise has been influenced by international developments.

⁶ Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 83 of 30.3.2010.

⁷ See: http://europa.eu/legislation_summaries/other/c10243_en.htm for a description of Decision No 1145/2002/EC of the European Parliament and of the Council on Community incentive measures in the field of employment.

⁸ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁹ COM (2011) 275 final.

3.2.2. The European Commission

As holder of the 'right of initiative', only the European Commission can propose new laws for protection of the interests of EU citizens. The Commission manages the spending of EU funds and oversees the practical implementation of EU laws and policies. As 'guardian of the Treaties', it also checks how Member States apply EU laws and may refer instances of infringement to the Court of Justice for enforcement action.

Since the coming into force of the Charter on Fundamental Rights, the Commission is responsible for carrying out a fundamental rights check of all proposed EU legislation as well as monitoring their implementation by Member States. Ultimately it can enforce correct implementation through infringement procedures. This can have important implications for the development of legislation and policies which may not overtly have an impact on LGBTI persons.

The Commission also funds studies and issues communications to the European Parliament and the Council concerning policies relevant to LGBTI concerns, e.g., the *Thematic report on discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression* issued in 2011.¹⁰

Funding

In an effort to simplify funding procedures, in November 2011, the Commission submitted a proposal for the Rights and Citizenship Programme for the period 2014 to 2020 as part of the forthcoming multiannual financial framework (MFF)¹¹.

The Rights and Citizenship Programme is the successor of three current programmes: Fundamental Rights and Citizenship, Daphne III, and the sections "Antidiscrimination and Diversity" and "Gender Equality" of the Programme for Employment and Social Solidarity (PROGRESS). With a budget of €387 million the programme aims to also promote the rights of the child, the principles of non-discrimination (racial or ethnic origin, religion or belief, disability, age or sexual orientation) and gender equality (including projects to combat violence against women and children). The types of actions funded by the programme, as set out in Article 5(2) of the Proposal for a Regulation of the European Parliament and of the Council establishing for the period 2014 to 2020 the Rights and Citizenship Programme are:

(a) Analytical activities, such as collection of data and statistics; development of common methodologies and, where appropriate, indicators or benchmarks; studies, researches, analyses and surveys; evaluations and impact assessments; elaboration and publication of guides, reports and educational material; monitoring and assessment of the transposition and application of Union legislation and of the implementation of Union policies; workshops, seminars, experts meetings, conferences;

(b) Training activities, such as staff exchanges, workshops, seminars, train-the-trainers events, development of online/other training modules;

(c) Mutual learning, cooperation, awareness raising and dissemination activities, such as identification of, and exchanges on, good practices, innovative approaches and experiences, organisation of peer review and mutual learning; organisation of conferences and seminars; organisation of awareness-raising and information campaigns, media campaigns and events, including corporate communication of the political priorities of the European Union; compilation and publication of materials to disseminate information as

¹⁰ Available at: http://ec.europa.eu/justice/discrimination/files/trans_and_intersex_people_web3_en.pdf.

¹¹ COM(2011) 758 final.

well as results of the Programme; development, operation and maintenance of systems and tools using information and communication technologies;

(d) Support for main actors, such as support for Member States when implementing Union law and policies; support for key European level networks whose activities are linked to the implementation of the objectives of the Programme; networking among specialised bodies and organisations, national, regional and local authorities at European level; funding of experts' networks; funding of European level observatories.

The Rights and Citizenship programme can play an important role in furthering LGBTI rights. However, it should be ensured that the annual programmes and annual calls for proposal continue to recognise the importance of action in the area of LGBTI issues. Moreover, whilst the current proposal mentions discrimination based on sexual orientation, it does not explicitly mention gender identity issues.

Legal network

The European Network of Legal Experts in the Non-discrimination Field, an initiative of the European Commission, was established in 2004 within the framework of the Community Action Programme to Combat Discrimination (2001-2006). The aim was to provide the Commission with independent advice on all the grounds of discrimination covered by Directive 2000/43/EC and Directive 2000/78/EC. The network is established in the form of a service contract for a period of three years and has been renewed three times. Studies carried out through this network include a study on 'Discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression', which provides important insight into questions of gender identity and gender expression.

3.2.3. EU agencies

The EU Agency for Fundamental Rights (FRA) has an important role in collecting data on LGBTI experiences to assist the development of policy tailored to LGBTI needs.

The box below lists some of the reports on LGBTI concerns prepared by the FRA to date, and currently under preparation.

Reports on LGBTI concerns from the FRA

Studies carried out to date:

- Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis (June 2008)
- Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation (June 2009)
- Report on Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity (November 2010)
- Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States" (2011)

Studies in progress:

- FRA survey of the discrimination faced by lesbian, gay, bisexual and transgender (LGBT) people on a daily basis launched on 2 April 2012. Results to be published on 17 May 2013.¹²
- Study surveying LGBT people and authorities: qualitative component for public authority's research. Social fieldwork studies carried out in selected Member States. Results to be published in 2013.

¹² Available at: http://fra.europa.eu/fraWebsite/lgbt-rights/infocus12_1008_en.htm.

The FRA also plays an important role in training among EU and Member State officials. It organises roundtables and expert workshops to this effect, including for example a roundtable on rights of transgender people (22-23 September 2011) which brought together representatives of the EU institutions, international organisations, national governments, equality bodies and civil society organisations.

Whilst it has so far carried out few actions in this area, the European Institute for Gender Equality (EIGE) also has a responsibility to tackle discrimination based on gender, and should address issues effecting transsexual and intersex persons in the future.

3.2.4. Council of the European Union

The Council of the European Union has also taken an active stance on LGBTI issues which is reflected through a range of declarative documents as well as its adoption of legislative instruments.

Conclusions of the Council of the European Union

- Conclusions of the Council and of the Representatives of the Governments of the Member States of 15 November 2007, on improving the quality of teacher education (2007/C 300/07)
- Council Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (2009/C 119/02)

3.2.5. European Parliament

The European Parliament has been a pioneer in promoting LGBTI rights. In 1993, the European Parliament issued a resolution on 'Equal rights for homosexuals and lesbians in the European Community' after the Committee on Civil Liberty's Roth Report.¹³ The resolution called inter alia for decriminalisation of and equal age of consent for homosexuals acts, equal social benefits, anti-discrimination laws, access to marriage (or equivalent legal framework), and equal adoption rights.

The European Parliament also played a very important role during the negotiations for accession of new Member States, in particular through the 1998 'Resolution on equal rights for gays and lesbians in the EC', where it stated that 'it will not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men'.¹⁴

¹³ European Parliament Resolution of 08 February 1994 on equal rights for homosexuals and lesbians in the European Community (No A3-0028/94); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1994:061:0020:0054:EN:PDF>.

¹⁴ European Parliament Resolution of 17 September 1998 on equal rights for gays and lesbians in the EC (No B4-0824 and 0852/98); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:313:0123:0225:EN:PDF> or http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=980917&LANGUE=EN&TPV=DEF&SDOCTA=10&TXTLST=7&Type_Doc=RESOL&POS=1#EXPL_5_5_5.

The European Parliament has expressed a number of demands in various resolutions, as per the list in the box below.

Parliament resolutions with significance for protection of LGBTI rights

Freedom of assembly and expression

- Resolution of the European Parliament of 19 January 2011 on the violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania, OJ 2012 C 136 E.

Homophobic/transphobic violence and bias crime

- Resolution of the European Parliament of 18 January 2006 on homophobia in Europe, OJ C 74 E.
- Resolution of the European Parliament of 15 June 2006 on the increase in racist and homophobic violence in Europe OJ C 300 E
- Resolution of the European Parliament of 26 April 2007 on homophobia in Europe, OJ C 74 E.
- Resolution of the European Parliament of 24 May 2012 on the fight against homophobia in Europe (2012/2657(RSP)).

External relations

- Resolution of the European Parliament of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations, P7_TA(2011)0427
- Resolution of the European Parliament of 14 December 2011 on the upcoming EU-Russia Summit, P7_TA(2011)0575.
- Resolution of the European Parliament of 18 April 2012 on human rights in the world and the European Union's policy on the matter, including implications for the EU's strategic human rights policy, P7_TA(2012)0126.

Within the European Parliament, an Intergroup on LGBT Rights monitors the situation of LGBTI people in EU Member States and beyond and liaises with civil society groups. It is composed of 132 democratically elected members of the European Parliament.¹⁵

3.2.6. Court of Justice of the EU

A broad body of case-law, stemming from the Court of Justice of the European Union, has also developed over the years. In particular, European Court of Justice case law has developed to provide some protection by interpreting discrimination on the basis of 'sex' to also refer to persons who have undergone 'gender reassignment'.

¹⁵ Available at: <http://www.lgbt-ep.eu/>.

Selected case law of the CJEU relevant to LGBTI concerns

Access to employment

- Case C-13/94, *P v S and Cornwall County Council*, 1996 E.C.R. I-2143. Discrimination on grounds of sex applied to gender reassigned individuals.
- Case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.*, 1998 E.C.R. I-621. The court did not extend rights to the same-sex partner of a worker as the couple had no legal recognition of their relationship.
- Case C-117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, 2004 E.C.R. I-541. The granting of a right being preconditioned on the capacity to marry was considered as a breach of equal treatment. The legal recognition concerning gender reassignment resting upon the competencies of the Member States, the case was referred to national courts.
- Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, 2006 E.C.R. I-3585. Equal treatment for men and women required that an individual having undergone gender reassignment in accordance with national laws was entitled to retirement pension once the individual reached the required gender's age.
- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R I-1757. If a Member State has deemed registered civil partnerships on equal footing with marriage, then denying the surviving partner widower's benefits constitutes direct discrimination;
- Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011]. Where only civil registered partnership is available to same-sex partners, benefits under pension plans must be equal for same-sex registered partners and married partners.

Diverse families/freedom of movement

- Case C-122/99 *P, D & Kingdom of Sweden v. Council of the European Union*, 2001 E.C.R. I-4319. Freedom of movement not infringed where same-sex partners did not receive adjusted relocation allotment afforded to married couples though they had the highest form of same-sex partner recognition in their country of origin.
- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R I-1757 (see above).
- Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] (see above).

3.2.7. Member States

A number of EU Member States and Norway have prepared national action plans for addressing LGBTI concerns, as per the recommendation of the Council of Europe. The box below provides examples of national action plans developed to date.

National Action Plans for addressing LGBTI concerns

- **Belgium (Flanders):**
http://publicaties.vlaanderen.be/docfolder/21245/LGB_%20policy.pdf
- **Netherlands:**
http://www.dayagainsthomophobia.org/IMG/pdf/Simply_Gay_engelstalige_versie_Hnota.pdf
- **Portugal:**
<http://www.poatfse.qren.pt/upload/docs/legislacao/Nacional/Plano%20Nacional%20Igualdade%20IV%20plano%20RCM%20n%C2%BA%205-2011.pdf>
- **Spain (Catalonia) :**
http://www20.qencat.cat/portal/site/bsf/menuitem.7fca6ecb84d307b43f6c8910b0c0e1a0/?vgnextoid=80d2148edb854210VgnVCM1000008d0c1e0aRCRD&vgnnextchannel=80d2148edb854210VgnVCM1000008d0c1e0aRCRD&vgnnextfmt=default&newLang=ca_ES
- **UK (Scotland):** <http://www.scotland.gov.uk/Resource/Doc/243417/0067747.pdf>
- **UK (national):** <http://www.homeoffice.gov.uk/publications/equalities/lgbt-equality-publications/lgbt-action-plan?view=Binary>
- **Norway:**
http://www.regjeringen.no/upload/BLD/Rapporter/2010/cedaw_rapporten/Annex_19.pdf

3.3. International organisations

Whilst the EU has taken important steps over the last few decades towards promoting LGBTI rights, these need to be considered in the context of recent efforts from global and regional actors which have taken strides in this area.

3.3.1. United Nations

In 2011, the Human Rights Council issued a resolution expressing a “grave concern”,¹⁶ and commissioned the UN High Commissioner for Human Rights (UNCHR) to issue a report with specific regard to LGBTI individuals and the violations they face.

The ensuing UNCHR report, entitled ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’,¹⁷ concluded by highlighting the existing “gap” in the fight against anti-discrimination and other human rights violations concerning ‘sexual orientation’ or ‘gender identity’ at the international level. Whilst never referring to the LGBTI community as ‘minorities’ or ‘sexual minorities’, the Council’s resolution and High Commissioner’s conclusions and recommendation are important steps towards the recognition of the LGBTI community as minorities at risk.

3.3.2. Council of Europe

The Council of Europe has also taken an active stance on LGBTI issues which is reflected through recent publications and declarative documents. In 2009 it published a report Human Rights and Gender Identity report of 2009¹⁸ which explores trans human rights and provides recommendations. In 2011 it published two other extensive reports outlining the current situation of discrimination and human rights violations against LGBT people, as listed in the box below.

Recent reports of the Council of Europe

- Discrimination on grounds of sexual orientation and gender identity in Europe (2011)¹⁹
- Discrimination against lesbian and bisexual women and girls and transgender persons (2011)²⁰

In addition, the Committee of Ministers issued Recommendation CM/Rec(2010)5 to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, which represents a significant soft law commitment on rights of LGBT persons.

In 2010, the Parliamentary Assembly also issued Recommendation 1915 (2010) on Discrimination on the basis of sexual orientation and gender identity which includes recommendations to monitor Member State measures to combat discrimination based on

¹⁶ A/HRC/RES/17/19; available at: <http://arc-international.net/wp-content/uploads/2011/09/HRC-Res-17-19.pdf>

¹⁷ A/HRC/19/41; available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf

¹⁸ Thomas Hammarberg, ‘Human Rights and Gender Identity’, Issue Paper 2009 (2); available at <https://wcd.coe.int/ViewDoc.jsp?id=1476365>.

¹⁹ Available at: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf.

²⁰ Available at: http://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/gender-equality/CDEG_2011_18_LGBT_rev_en.pdf.

sexual orientation or gender identity, further mainstream LGBTI issues and address homophobic and transphobic bullying.

3.3.3. European Court of Human Rights

The European Court of Human Rights started recognising the violation of convention rights against LGBTI individuals as early as 1980. In thirty years, the Court's case law has seen a considerable evolution. The court first found unlawful the criminalisation of homosexual acts on grounds of violation of private life, which led it to address incidental issues on grounds of non-discrimination. This led the court to grant the possibility for transgender individuals to have their sex-change reflected in their official documents, which in turn allowed them to marry accordingly. Finally, the court recognised the LGBTI community as a whole when it found the ban of LGBTI marches contrary to the freedom of assembly and association.

Key cases of the European Court of Human Rights

Non-discrimination

- *Sutherland v. the United Kingdom* 2001 Where the differentiation drawn between ages of consent for heterosexual and homosexual acts was held discriminatory. In this instance, the court also found this discrimination problematic on grounds of sexual health and personal development.²¹
- *Lustig-Prean and Beckett v. the United Kingdom* 1999 Where the ban of homosexuals from the UK military was equated to discrimination on grounds of race or colour, with the court directly tackling the issue of employment.²²

Right to private life and non-discrimination with regard to transsexuals: right to marry (Article 12)

- *Case of Goodwin v. United Kingdom* 2002 Where transsexuals were found entitled to have their official documents modified in view of reflecting the changes they had undergone, which in turn entitled transsexuals to marry a person of the opposite sex in accordance with their article 12 right to marry.²³

Diverse families

- *Case of Karner v. Austria* 2003 Where the court found that the claimant was entitled to stay in the flat he and his life-long companion had shared until the latter's death. A contrary interpretation of national law was held discriminatory, with the court enunciating that: "differences based on sexual orientation require particularly serious reasons by way of justification".²⁴
- *Case of E.B. v. France* 2008 Where the court found that a decision to refuse adoption to a lesbian woman could not be based solely on her sexual orientation or such a decision would be discriminatory.²⁵

Freedom of assembly and association (Article 11)

- *Case of Baczkowski & Others v. Poland* 2007 Where the court found that the ban of a march, even though it had taken place, was in violation of the right to peaceful assembly and non-discrimination. The court added that States had a positive obligation to secure this right "to those with unpopular views or belonging to minorities, because they were more vulnerable to victimisation".²⁶
- *Case of Alekseyev v. Russia* 2010 The court reiterated its decision in *Baczkowski* with regard to the ban of the Moscow gay pride of 2006, 2007, and 2008.²⁷

In the following sections, a detailed analysis is carried out of the problems that LGBTI people face and how the EU has responded to resolve those problems.

²¹ Case of *Sutherland v. the United Kingdom* (Application no. 25186/94), European Court of Human Rights, 27 March 2001; available at : [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":\["697231"\],"itemid":\["001-59354"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{).

²² Case of *Lustig-Prean and Beckett v. the United Kingdom* (Applications nos. 31417/96 and 32377/96), European Court of Human Rights, 27 September 1999; available at : <http://www.bailii.org/eu/cases/ECHR/1999/71.html>.

²³ Case of *Christine Goodwin v. UK* (Application 28957/95), European Court of Human Rights, 11 July 2002; available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596>.

²⁴ Case of *Karner v. Austria* (Application 40016/98), European Court of Human Rights, 24 September 2003; available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263>.

²⁵ Case of *E.B. v. France* (Application 43546/02), European Court of Human Rights, 22 January 2008

²⁶ Case of *Baczkowski & Others v. Poland* (Application 1543/06), European Court of Human Rights, 3 May 2007; available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80464>.

²⁷ Case of *Alekseyev v. Russia* (Applications 4916/07 25924/08 14599/09), European Court of Human Rights, 21 October 2010; available at : <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257>.

4. EQUALITY AND ACCESS

KEY FINDINGS

- Discrimination against LGBTI persons continues to occur in all Member States to varying degrees.
- The adoption of the proposed anti-discrimination Directive to address the existing 'hierarchy of grounds' in EU law would significantly improve equal protection against discrimination on all grounds across the EU.

4.1. Horizontal issues

The EU has been active in promoting equality rights for LGBTI persons. As early as 1993, the European Parliament issued a resolution on 'Equal rights for homosexuals and lesbians in the European Community' after the Committee on Civil Liberty's Roth Report.²⁸ The resolution provided for inter alia de-criminalisation of and equal age of consent for homosexual acts, equal social benefits, anti-discrimination laws, access to marriage (or equivalent legal framework), and equal adoption rights.

Moreover, the EU has developed a body of equality Directives, including Framework Directive 2000/78/EC on Equal Treatment in Employment in 2000 which has given LGBTI persons legal rights against discrimination in the employment sector. However, outside the area of employment, including access to goods, education and health, there are few binding legal tools at EU level to tackle discrimination against LGBTI persons.

Enforcement of existing rights is also a problem. Apart from the requirement to set up equality bodies under the Gender Recast Directive 2006/54/EC, which should protect transsexuals having undergone gender reassignment from discrimination in employment, there is currently no EU requirement for designating equality bodies to deal with cases of discrimination based on gender identity in other areas or to tackle discrimination based on sexual orientation. The aim of equality bodies is to provide independent help to victims, including helping victims of discrimination access justice. This gap means that LGBTI victims of discrimination are in many cases not obtaining redress even when they do have the legal tools available.

The proposed anti-discrimination Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (anti-discrimination Horizontal Directive)²⁹ would extend the protection of LGBTI persons against discrimination to areas other than employment.

Article 3 of the proposed Directive prohibits discrimination based on religion or belief, disability, age or sexual orientation in both the public and private sector in:

- social protection, including social security and health care;
- social advantages;
- education;
- access to and supply of goods and services which are available to the public, including housing.

²⁸ European Parliament Resolution of 08 February 1994 on equal rights for homosexuals and lesbians in the European Community (No A3-0028/94); available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1994:061:0020:0054:EN:PDF>.

²⁹ COM/2008/0426 final.

Also important is Article 12 which provides for the designation of bodies to promote equal treatment and tackle discrimination based on religion or belief, disability, age or sexual orientation.

The Directive was presented by the Commission to the European Parliament on 2 July 2008 and discussed at the European Council on 2 October 2008³⁰. The European Economic and Social Committee issued an opinion on the proposed Directive on 14 January 2009 which welcomed the proposal on the whole, but expressed concerns that the Directive does not cover multiple discrimination, and that the scope of Article 3 is too limited. The European Parliament has approved the draft Directive and suggested amendments, including adding the ground of multiple discrimination; adding a duty to actively promote equality, and including employment within the scope of the equality body. However, the Directive is currently blocked at first reading in the Council.

The reasons for the blockage identified in the 2011 Council Progress Report are the lack of legal certainty of the text, the issue of subsidiarity and proportionality and the costs relating to provisions on disability and age, especially provisions concerning 'reasonable accommodation for persons with disabilities'.

The following sections address five different areas where LGBTI experience discrimination: employment, education, health, goods and services, and housing. Many gaps identified in tackling discrimination in the areas of education, health, and access to goods and services would be overcome by the proposed Directive and provide LGBTI persons with the tools to enforce these rights.

However the proposed Directive does not cover areas falling outside EU competence and would therefore not address issues such as the structures in place in schools and content of curricula. In the same way, matters relating to family, including civil status, adoption and reproductive rights would not be covered by the proposed Directive.

4.2. Employment

KEY FINDINGS

- LGBTI people face obstacles in accessing employment in all EU Member States and these are particularly severe for transgender people.
- Within employment, prevailing negative attitudes make it difficult for LGBTI people to disclose their sexual orientation.
- Non-discrimination legislation in employment is not always translated in practice and actions should focus on monitoring of existing tools.

4.2.1. Defining the problem

Data in this area is generally lacking, with more focus on issues of same-sex marriage, adoption rights and gay pride parades than employment – despite the fact that 'the labour

³⁰ 2893rd Council meeting on employment, social policy, health and consumer affairs, Luxembourg, 2 October 2008; available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/271&format=HTML&aged=0&lg=en&quiLanquage=en>.

market is the area in which gay men and lesbian women are most vulnerable to discrimination'.³¹

Evidence indicates that across the EU, LGBTI people are often discriminated against in the employment sector,³² despite such discrimination being prohibited under EU legislation³³ and in all Member States and Croatia.³⁴ Additionally, the Employment Directive at the European level contains an exemption allowing religious organisations to discriminate based on religious belief, which has been interpreted as an allowance to discriminate against LGBTI people.³⁵

The reality for LGBTI people is that EU and national legislation has not sufficiently filtered through to the workplace and that they continue to face discrimination in all areas of employment.

i. Access to employment

LGBTI people face obstacles in accessing employment in all EU Member States. Obstacles are particularly severe for transgender people.³⁶ In simple terms, LGBTI people find it more difficult to gain employment. As with every equality area this impacts not only the disadvantaged person but also their family, the economy and the State, with the best qualified person not necessarily being employed and the State bearing the burden of unemployment.

UK research found that transgender women were 17% less likely to be in employment compared to non-transgender women, whilst the rate of employment for transgender men was half that of non-transgender men.³⁷ A separate study also found that 37% of transgender respondents were on unemployment benefits.³⁸

The same study quoted Spanish research into unemployment amongst transgender people in 2009, as showing that 54% of the respondents were unemployed.³⁹

ii. Negative attitudes prevent openness

Within employment, prevailing negative attitudes make it difficult for LGBTI people to disclose, in any form, their sexual orientation. According to Stonewall, research has shown that a large percentage of LGB people across the EU do not feel safe enough to be open at work. For example, in a survey carried out in France in 2006, 42% of respondents said they were not "out" in their workplace. The effort it takes to hide one's identity and not be oneself, for the sake of job security, has the effect of undermining self-confidence and

³¹ Network of socio-economic experts in the non-discrimination field VT-2008-007, 'Part I - The Situation of LGBT Groups in the Labour Market in European Member States', Synthesis Report 2010, p. 17

³² European Union Agency for Fundamental Rights, 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States', 2009, p. 21.

³³ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.4: Employment, Council of Europe Publishing, June 2011, p.116.

³⁴ ILGA-Europe, 'Rainbow Index', May 2012; available at: http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe_map_and_index_may_2012.

³⁵ ILGA-Europe, 'Going Beyond the Law: promoting equality in employment', Chapter 1: The Legal Situation, Chapter 3: Lesbian, Gay, and Bisexual Experience of Legislation, 2007.

³⁶ Ibid. p. 7

³⁷ Whittle, S., Turner, L., Al-Alami, M., 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination', The Equalities Review (UK).

³⁸ Scottish Transgender Alliance, 'Transgender Experiences in Scotland - Research Summary', Equality Network, 2008, p. 14

³⁹ Ibid.

ultimately affecting work performance.⁴⁰ People rearrange their lives and hide everyday details that might imply same-sex relationships. Some simply conceal personal matters or disclose them only partially. Others invent stories to cover up the truth.

'I was very much in the closet, so much so I hated coming to work just from the point of view of not knowing what to say. When people asked about weekends you'd concoct a story and then get yourself in a real mess because you'd have to remember those stories.' Robbie, private sector⁴¹

iii. Discrimination and harassment in the work place

For people who are "out" in the workplace discrimination can take many forms. According to labour market research several reports found that being part of the LGBT community negatively influences promotion, working conditions, salaries and career opportunities. Comparable educational backgrounds, qualifications and performance do not mean equal evaluation and career opportunities for LGBT people.

Harassment in the form of jokes, bullying, sexual harassment and threats is faced by approximately a quarter of LGBT people all over Europe. Furthermore, only a small percentage of transgender people are able to keep their jobs when they undergo surgery in order to change their gender status.⁴² This discriminatory treatment and working in a homophobic atmosphere can lead to depression, stress-related illness, substance abuse and even suicide.⁴³ Evidence on bullying indicates that workers can also lose motivation affecting work performance and increasing absence levels. In extreme circumstances bullying has led to self-harm and even suicide. Bullying can also have a significant effect on the physical and mental health of the workforce as it can be a major cause of work-related stress.⁴⁴

A significant lack of data in this area makes estimates on the number of people affected difficult. Nevertheless, a UK survey of over 1,600 lesbian and gay people found that more than 50% stated they had experienced bullying in the workplace in the previous three years. Based on calculations on the EU workforce⁴⁵ and the size of the LGBTI community⁴⁶, it can be estimated that bullying alone, not including wider forms of discrimination, would have affected between 5 and 10 million LGBTI people in those same three years.

iv. Lack of action in the work place or systemic failings:

This ongoing discrimination, despite existing legislation, reflects the fact that change is highly reliant on changes in attitudes amongst staff, work and organisations themselves. Research indicates that there is insufficient action through training and awareness-raising

⁴⁰ 'Addressing Homophobia in the Workplace', An initiative of (PFLAG) Brisbane Inc. Project; available at <http://www.pflagbrisbane.org.au/wp-content/uploads/docs/homophobiaintheworkplace.pdf>.

⁴¹ Guasp, A. and Balfour, J., 'Peak Performance, Gay People and Productivity', Stonewall, 2008, p. 8; available at: http://www.stonewall.org.uk/documents/peak_performance.pdf.

⁴² European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States', Part II—The Social Situation, Part I, Section 4, 2009.

⁴³ 'Addressing Homophobia in the Workplace', An initiative of (PFLAG) Brisbane Inc. Project; available at: <http://www.pflagbrisbane.org.au/wp-content/uploads/docs/homophobiaintheworkplace.pdf>

⁴⁴ UNISON, Guidelines 'Tackling bullying at home'; available at: <http://www.unison.org.uk/acrobat/18989.pdf>.

⁴⁵ According to Eurostat, there were around 221 million people in employment across the EU in the first quarter of 2012: 'Eurostat Compact guides, Basic figures on the EU', Autumn 2012 edition; available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-GL-12-003/EN/KS-GL-12-003-EN.PDF.

⁴⁶ Figures across the EU and around the world vary often due to lack of confidence and fears of reporting. Thus for example telephone or house call surveys tend to produce lower results than more anonymous surveys. Nevertheless, surveys tend to indicate a LGBT population of between 5 and 10% of the total national population.

to prevent discriminatory action in the first place; and once discrimination has been identified, there are either insufficient mechanisms to respond to the situation or the action itself is insufficient.

For example, company policies often do not include protection from harassment based on sexual orientation or gender identity. LGBTI individuals do not know what procedures—if any—exist to gain redress for any harassment⁴⁷ and employers often do not extend employment related benefits to partners of the same sex, specifically when there is no partner recognition in the country in question.

"In 2007, 45% of EU respondents indicated that they believed there were no laws prohibiting sexual orientation discrimination when hiring employees."⁴⁸

In addition, in contrast to other vulnerable groups there are no specific labour market programmes in place, nor are LGBTI issues included in national action plans for social inclusion or employment strategies⁴⁹ whilst Labour unions often do not have information or training to handle the claims about the workplace concerning sexual orientation or gender identity.⁵⁰ Such a lack of resources leaves LGBTI individuals without recourse, reducing the impact of any existing legislation that protects from discrimination.

4.2.2. EU actions to date

The EU has taken a strong stance to tackle discrimination against LGBTI persons in the area of employment, through legislative actions and broad case law interpretations. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation provides protection from discrimination based on the grounds of religion or belief, disability, age or sexual orientation.

The Directive aims to combat discrimination on grounds inter alia of sexual orientation in areas relating to employment and occupation, including employment and self-employment, vocational training, working conditions (encompassing pay and dismissals), membership in professional organisations or unions. It applies to both private and public sector, paid and unpaid work.

The CJEU case of *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen VdB*⁵¹ clarifies that Article 3(1) of the 2000/78/EC Directive extends to employment and working conditions, including pay. Its scope does not however extend to payments of any kind made by State schemes, including state social security or social protection schemes (Article 3(3)).

The recast Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation extends protection from discrimination in employment to discrimination arising from the gender reassignment of a person.

⁴⁷ ILGA-Europe, 'Going Beyond the Law: promoting equality in employment', Chapter 1: The Legal Situation, Chapter 3: Lesbian, Gay, and Bisexual Experience of Legislation, 2007, p. 43.

⁴⁸ European Agency for Fundamental Rights, 'Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member states', 2011, p. 21.

⁴⁹ Network of socio-economic experts in the non-discrimination field VT-2008-007, 'Part I - The Situation of LGBT Groups in the Labour Market in European Member States', Synthesis Report 2010, p. 19.

⁵⁰ ILGA-Europe, 'Going Beyond the Law: promoting equality in employment', Chapter 5: The Responsibilities of Trade Unions, 2007.

⁵¹ Case C-267/06, paragraph 65 [2008] E.C.R I-1757.

This Directive consolidates previous EU legislation related to employment and sex discrimination. It seeks to ensure that men and women are treated equally especially in terms of access to employment, including promotion and vocational training, working conditions, remuneration, and occupational social security schemes. Recital 3 expressly refers to Case P v S & Cornwall⁵² in which the court held that provisions on equal treatment between men and women also applies to gender reassignment.

Initiatives and funding programmes to tackle harassment in the workplace include the EU funded forum for organisations promoting and implementing national diversity charters⁵³, which are voluntary diversity initiatives taken by companies. There are currently diversity charters in Austria, Brussels Capital Region, France, Germany, Italy, Poland, Spain, and Sweden.

4.3. Education

KEY FINDINGS

- LGBTI people are routinely subject to systematic heteronormativity and gender normativity in the education system.
- LGBTI students and others targeted for homophobic or transphobic bullying are the group most often harassed in the education system.
- Teachers and administrators across the EU lack the competence to deal with issues affecting LGBTI young people.
- EU law does not cover discrimination and harassment in education, and until the proposed anti-discrimination Directive is adopted, LGBTI persons will not have recourse in this area.

4.3.1. Defining the problem

LGBTI people, whether students or teachers, face discrimination, bullying and harassment in the educational setting. This can range from discriminatory learning materials and methods to outright harassment by other students and even teachers. For LGBTI students, effects of non-inclusive education include despondency, failure to engage in the learning process, and increased early school leaving rates. Ultimately they can lead to suicide.

The Council of Europe's Parliamentary Assembly highlighted "concerns over evidence that suicidality among young lesbian, gay, bisexual and transgender (LGBT) people is significantly higher than in the general young population." It noted that "this heightened risk was not a function of their sexual orientation or gender identity, but of the stigmatisation, marginalisation and discrimination which they experience because of their sexual orientation or gender identity. As such, this heightened risk has a significant human rights dimension."⁵⁴

These occurrences impact both the individual and society. The individual does not meet his or her full potential, therefore not contributing to society fully and, in the worst of cases, leaving school early and relying on public benefits. Moreover, when LGBTI students receive

⁵² Case C-13/94, P v S and Cornwall County Council [1996] ECR I-2143.

⁵³ Available at: http://ec.europa.eu/justice/discrimination/diversity/diversity-charters/index_en.htm

⁵⁴ Council of Europe Parliamentary Assembly, Social, Health and Family Affairs Committee, 'Child and teenage suicide in Europe: A serious public-health issue Report', Doc. 11547, 27 March 2008; See also a detailed list of studies at <http://people.ucalgary.ca/~ramsay/qay-lesbian-bisexual-suicide-studies-europe.htm> and <http://www.youth-suicide.com/qay-bisexual/news/europe.htm#632a>.

differential treatment in school, discrimination becomes entrenched in society beyond the education system.⁵⁵

A negative attitude towards homosexuality can very often be found in relation to teachers and schools, even in countries where the general attitude is more positive. A Finnish study revealed that most teachers hide their sexual orientation. Bullying in schools and, as a consequence, a hesitance on the part of both students and teachers to reveal any non-heterosexual identity is also reported for countries such as Germany, Greece, Ireland, Italy, Lithuania and Malta.⁵⁶

i. Heteronormativity and gender normativity in education

LGBTI people are routinely subject to systematic heteronormativity and gender normativity in the education system.⁵⁷ Heteronormativity and gender normativity refer to the pervasive assumption that everyone in the classroom has conforming sexual orientations and gender identities. All forms of non-inclusive education that inhibit access result in a violation of all citizens' right to education. School is the first place that social hierarchies are constructed, and any intolerance of nonconforming sexual orientations or gender identities sends a dangerous message to all students about the way to treat people who are different.

Curriculum and learning materials across Europe are often silent on LGBTI issues.⁵⁸ LGBTI topics are often not addressed, and most learning materials have a heterosexual perspective. For instance, history classes might deal with a historical figure that happened to be gay, but the person's sexuality or partnerships are never mentioned. This silence also exists in sex education classes, where sexual orientation and safe sex for same-sex activities is never mentioned.

There are also extreme cases where education materials contain misinformation regarding sexual orientation and gender identity. According to the Council of Europe, "in a significant number of member states [of the Council of Europe], including Belgium, Bulgaria, Croatia, Denmark, Hungary, Ireland, Italy, Lithuania, Malta, Poland, Slovakia, Slovenia, NGOs report that schools do not provide any information about homosexuality or if so only biased, incorrect information. Such schoolbooks and teaching materials tend to present incorrect information not reflecting the WHO de-classification of homosexuality."⁵⁹ Efforts to revise materials to be inclusive are often met by fierce opposition in some Member States including from churches, political parties and NGOs.

In Latvia, representatives from churches, political parties, and NGOs called for the removal of a textbook asserting that homosexuality is not a disease, pushing at the very least the inclusion of the alternative viewpoint.⁶⁰ Similarly, in France 80 Members of Parliament and 113 Senators sent a letter to the Ministry of Education opposing the inclusion of materials relating to sexual identity in biology textbooks.⁶¹

⁵⁵ Takács, J. 'Social exclusion of young lesbian, gay, bisexual and transgender (LGBT) people in Europe', Section 2.2, ILGA-Europe and IGLYO, 2006.

⁵⁶ Network of socio-economic experts in the non-discrimination field VT-2008-007, 'Part I - The Situation of LGBT Groups in the Labour Market in European Member States', Synthesis Report 2010, p. 15.

⁵⁷ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.3: Education, June 2011, p. 111; IGLYO, 'Guidelines for LGBTQ Inclusive Education', 2007; ILGA-Europe and IGLYO, 'Social exclusion of young lesbian, gay, bisexual, and transgender (LGBT) people in Europe', Section 4.3: School Environment, April 2007; European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—The Social Situation, Part I, Section 5, 2009

⁵⁸ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.3: Education, June 2011, p 112.

⁵⁹ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', 2nd edition, 2011, p. 112; available at: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf

Absence of information at all stages of the curriculum helps maintain the invisibility of LGBT persons and it helps to maintain the absence of discussing sexual orientation and gender identity issues.⁶²

ii. Harassment in schools

Evidence shows that LGBTI students and others targeted for homophobic or transphobic bullying are the group most often harassed in the education system.⁶³ In the 2009 Stonewall report "Homophobic Bullying in Britain's Schools" some 90% of secondary school teachers said that pupils in their schools are bullied, harassed or called names for being or for being perceived to be homosexual. While for the most part it is other students who bully LGBTI students, there are also incidences of teachers and administrators directly and indirectly discriminating against LGBTI students.

Authors of a report conducted in the UK regarding education and LGBT persons recorded:

- that trans gender persons 'felt isolated and needed to stay "in the closet";
- that they received harassment from teachers and other students;
- that they had been prohibited from using or expelled for using the 'wrong' toilet facilities; and
- that their institution did not have a trans acceptance policy.⁶⁴

Such discrimination includes being refused admission to a school, receiving marks that are not objective, or not being offered opportunities within the school setting because of sexual orientation or gender identity. In extreme cases, teachers act as a bully in front of the classroom, ostracising an individual because of real or perceived sexual orientation or gender identity.

A survey of 1,110 individuals carried out in 2010 in Ireland found that 20 % of students who had been victims of homophobic bullying had missed school on a regular basis because they felt threatened or afraid, while a number of participants said their decision to leave school was directly related to the treatment they received as a result of their LGBT identity.⁶⁵

Additionally, LGBTI students are often prohibited from forming extracurricular student groups or clubs that focus on sexual orientation or gender identity. Such groups provide students with a social space to express their identity that they might otherwise have to keep hidden.

Harassment in the education setting affects more than just LGBTI students. Students who are perceived to have nonconforming sexual orientations or gender identities—even at an age where such concepts are not fully formed in the individual—are often targeted for homophobic and transphobic bullying. Similarly, children of same-sex couples are often subject to bullying due to their nonconventional family structure.

⁶⁰ The government did not remove the accurate textbook, ILGA-Europe Annual Review, Latvia, p. 96.

⁶¹ Ibid., France, p. 72.

⁶² Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', 2nd edition, 2011, p. 114.

⁶³ UNESCO, 'Review of Homophobic Bullying in Educational Institutions', 2012.

⁶⁴ Keogh, P., Reid, D. and Weatherburn, P., 'Lambeth LGBT Matters: The Needs and Experiences of Lesbians, Gay Men, Bisexual and Trans Men and Women in Lambeth', Lambeth: Sigma Research, 2009.

⁶⁵ Parliament report, DG for Internal Polices, 'Reducing Early School Leaving in the EU', 2011, p. 48, (House of the Oireachtas Joint Committee on Education and Skills, 'Staying in Education: A New Way Forward, School and Out of School Factors Protecting Against Early School Leaving', 2010).

iii. Teacher competence and non-inclusive policies

Teachers and administrators across the EU lack the competence to deal with issues affecting LGBTI young people.⁶⁶ As heads of the classroom, teachers often do not have the capacity to teach according to inclusive curricula, and more importantly, they do not possess the capacity or confidence to manage the classroom so that all students are safe, regardless of sexual orientation or gender identity.

While this is true when it comes to the content being taught, the lack of competence is more striking when teachers cannot handle a situation of homophobic or transphobic bullying in schools. Teachers often tell an LGBTI student to change their behaviour to avoid bullying, recreating the bullying dynamic in the teacher-student relationship. Without competent teachers, LGBTI students are often isolated in the classroom, without the option to go to the authority in the classroom for information or safety concerns.

School policies often fail to address the issues affecting LGBTI young people through internal policy development. Particularly, when schools do have anti-bullying policies, those policies do not address issues linked to sexual orientation and/or gender identity. This omission leaves teachers and administrators without direction on how to approach situations affecting LGBTI students, and leaves students no recourse to advocate for themselves.

4.3.2. EU actions to date

So far no legal protection is in place at EU level to protect LGBTI persons from discrimination and harassment (including bullying) in education. Until the proposed anti-discrimination Directive is adopted, LGBTI persons will continue to lack legal recourse in this area, based on EU law.

The question of structure of schools and curricula falls within the competence of EU Member States, as affirmed in Article 145 of the TFEU. However, the TFEU provides that the EU should encourage cooperation between Member States in this area.

The EU has nonetheless recognised the need to address the issue of discrimination in this area. The European Commission Inclusion Strategy of the Youth in Action programme (2007-2013) recognises the problems faced by LGBTI students in schools and highlights that people affected by discrimination based on their sexual orientation are at a disadvantage compared to their peers. The ensuing Decision No 1719/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing the 'Youth in Action' programme for the period 2007 to 2013 includes a reference to the need to fight against exclusion and discrimination based on sexual orientation (Article 2.3).

Moreover, the Conclusions of the Council and of the Representatives of the Governments of the Member States of 15 November 2007, on improving the quality of teacher education (2007/C 300/07) highlight the role of teachers in ensuring personal fulfillment and well-being of pupils, and refers to the need to ensure a safe and attractive school environment which is based on mutual respect and cooperation.

Council Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (2009/C 119/02) also refer to the need to promote inclusive

⁶⁶ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.3: Education, June 2011, p. 112.

education which should promote respect for fundamental rights and combat all forms of discrimination.

4.4. Health

KEY FINDINGS

- Research and data on sexual orientation and gender identity in healthcare in the EU is lacking.
- Pathologisation of LGBTI people, inappropriate behaviour by medical staff and confidentiality concerns reduce the likelihood that LGBTI persons will make use of health services or receive appropriate and effective health care when they do seek it.
- Whilst horizontal initiatives by the EU reflect a tendency towards protecting vulnerable groups and tackling discrimination in health care, no specific measures have been adopted at EU level to protect LGBTI persons from discrimination in this area.

4.4.1. Defining the problem

There is a striking lack of data on sexual orientation and gender identity in healthcare in the EU, and little research has been devoted to the particular situation of LGBTI people's health.⁶⁷ Indeed, the European Commission, through DG SANCO, has recently focussed on health disparities within the EU but has not disaggregated this data based on sexual orientation or gender identity, demonstrating a failing to treat these factors as health indicators in research.⁶⁸

Without a discrete focus on sexual orientation and gender identity, the issues affecting LGBTI people are not clearly understood, contributing to inaction in policy development and lack of coordinated action. Moreover, sexual orientation is often only discussed in the healthcare sector when referring to sexually transmitted diseases and infections, specifically HIV, rather than regarding the ways that sexual orientation and gender identity relate to overall health and wellbeing.

However, the limited evidence does point to some clear problems for LGBTI people regarding healthcare. The issues associated with discrimination in access, lack of competency, and trans-specific issues are discussed below.

i. Stigmatisation and inappropriate behaviour

The approach taken by medical authorities at the international and national level effectively stigmatises LGBTI people and perpetuates discriminatory and harmful behaviour by practitioners.

It wasn't until 1990 that the World Health Organization removed homosexuality as a medical classification in the *International Classification of Disease*⁶⁹, and both professional and public perception have been slow to catch up in many EU Member States.

⁶⁷ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—The Social Situation', Part I, Section 6, 2009, p. 79.

⁶⁸ Mladovsky, Philipa, 'Health in the European Union: Trends and Analysis', European Commission, 2009.

⁶⁹ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.2: Health, p 23.

Nevertheless, the WHO continues to consider transsexualism as a "mental and behavioural disorder".⁷⁰ This, however, no longer reflects modern interpretations of transsexualism with the UK and Sweden having changed their approach and with French health services no longer treating it as a mental health order. Recognising the fact that health care continues to be needed for most transsexuals, UK health authorities describe it as "a condition for which medical treatment is appropriate in some cases", whilst France continues to formally classify it as a disorder to ensure health services are provided. Most recently the American Psychiatric Association has stated it will remove transsexualism as a disorder from its fifth edition of its Diagnostic and Statistical Manual of mental disorders .

This classification impacts the behaviour of medical staff who refer to homosexuality as a disease based on far out-dated information and medical texts. In some Member States, medical practitioners refuse service to LGBTI people on the basis of sexual orientation or gender identity. There are reports of physicians and nurses refusing to touch a lesbian or gay patient, waiting for a member of the opposite sex to perform routine procedures. For example, research in the UK found that 21% of transgender respondents' GPs either did not want to help, or in 6% of cases actually refused to help.⁷¹

Furthermore, much medical care in the EU is based on an assumption of heterosexuality or gender normativity of patients.⁷² Physicians often treat patients according to these assumptions, which leads to LGBTI individuals withholding important information from their healthcare provider. Patients might fail to disclose information about sexual activity and risk, or not feel comfortable listing their same-sex partner as their next of kin. This can seriously compromise the quality of the health service provided.

Confidentiality is also a constant concern for LGBTI individuals when seeking medical advice or treatment. Those who go to a medical professional can fear that their sexual orientation or gender identity will be disclosed to other medical professionals, employers, colleagues, or family members.⁷³

ii. Discrimination against LGBTI persons

Men who have sex with men are prohibited from donating blood in a large majority of EU Member States. Proponents of the blood ban justify the practice due to the historically higher incidence of infection among men who have sex with men. However, given that all blood donations are screened, that there have been significant improvements in the screening process and evidence that disparities in infection of e.g. HIV between heterosexual and homosexual sex are not great (29% compared to 39%⁷⁴), there are strong arguments that the ban is not justified or that objective criteria should be applied to all groups which have higher infection rates e.g. young men.⁷⁵ In addition, the justification that the prohibition only bans those who have engaged in a certain practice, not those of a specific sexual orientation, unfairly restricts only those who disclose their same-sex activity, most

⁷⁰ World Health Organization, 'International Statistical Classification of Diseases and Related Health Problems, Tenth Revision, Version for 2010', Classification F64.

⁷¹ The Equalities Review, 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination', 2007; available at: <http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf>.

⁷² Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.2: Health, June 2011, p. 103; European Union Agency for Fundamental Rights 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—The Social Situation', Part I, Section 6, 2009.

⁷³ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 6.2: Health, June 2011, p. 107.

⁷⁴ European Centre for Disease Prevention and Control/WHO Regional Office for Europe, 'HIV/AIDS surveillance in Europe', European Centre for Disease Prevention and Control, Stockholm, 2008.

⁷⁵ See: European Parliament, Intergroup on LGBT Rights, Press Release, 'European Commission: Banning gay men from donating blood is against EU law', 8 September 2011; available at: <http://www.lgbt-ep.eu/press-releases/european-commission-banning-gay-men-donating-blood-against-eu-law/>, last accessed 2 September 2012.

often gay men, and does not reflect other practices which increase risk levels or practices which remove or reduce risk.

Some Member States, such as Italy and Austria, do not allow assisted reproduction for either lesbian women or those not married, even where this is possible for heterosexual women.⁷⁶ This contrasts with other Member States such as the UK which do allow assisted reproduction.⁷⁷

In Austria, the same-sex partnership law explicitly bans lesbians from receiving fertility treatment.⁷⁸ In the accession country of Croatia, the Minister of Health has repeatedly stated that he is opposed to assisted reproduction for same-sex couples.⁷⁹

When an LGBTI person is hospitalised, authorities at the hospital often refuse to recognise the partner of the person being treated—both when there is a legal relationship and when no legal recognition is available. When there is a legal partnership that is less than marriage, LGBTI individuals often enter the system as ‘single.’ A partner can be refused visitation, causing extreme stress to both individuals during a time of medical crisis. Moreover, hospital officials can ignore the wishes of the healthy partner in making medical decisions for a person who is unable to make decisions, where a married opposite-sex couple would be awarded that benefit.⁸⁰

iii. Impacts of stigmatisation discrimination on access to health care and health of LGBTI persons

Pathologisation of LGBTI people, inappropriate behaviour by medical staff and confidentiality concerns all reduce the likelihood that they will make use of health services, reduce the likelihood that they will disclose fully characteristics or behaviour that may have an impact on diagnosis and treatment and reduce the likelihood of them receiving appropriate and effective health care when they do seek it.

Reports from NGOs as identified by the Council of Europe⁸¹, find a significant level of mistrust between LGBT patients and their health care providers. In particular, lesbians and bisexual women are less likely to seek preventative medical check-ups, specifically from gynaecologists. This reluctance can stem from previous bad experiences with these specialised doctors, or from the stress of having to conceal same-sex sexual activity from a homophobic doctor. The absence of yearly check-ups leads to a greater incidence of failing to discover cancer and other terminal conditions within a treatment timeframe.

Difficulties in accessing healthcare are reflected in findings that LGBTI persons “have a higher incidence of poor health than heterosexual persons”.⁸² Belgium research, for example, has shown that LGB persons are twice as likely to have a chronic disease compared to the “average citizen”.

⁷⁶ Council of Europe Publishing, ‘Discrimination on grounds of sexual orientation and gender identity in Europe’, Section 5.4: Parenting and Children, June 2011, p. 98.

⁷⁷ European Union Agency for Fundamental Rights, ‘Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part I—Legal Analysis’, Section 8.2, 2008.

⁷⁸ ILGA-Europe, Annual Review of the Human Rights Situation of LGBTI People in Europe 2011., p. 39

⁷⁹ Ibid. p. 56.

⁸⁰ European Union Agency for Fundamental Rights, ‘Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—The Social Situation’, Chapter 6, 2008, p. 78.

⁸¹ Council of Europe Publishing, ‘Discrimination on grounds of sexual orientation and gender identity in Europe’, Section 6.2: Health, June 2011, p. 107.

⁸² Council of Europe Publishing, ‘Discrimination on grounds of sexual orientation and gender identity in Europe’, Section 6.2: Health, June 2011, p. 106.

LGBTI people are also at a greater risk of mental health problems compared to the general population.⁸³ A main source of this increased risk is minority stress, which refers to the process of dealing with a societal context hostile to one's sexual orientation or gender identity as the leading factor in mental health disparities between the LGBTI people and others.⁸⁴ These problems relating to mental health include an increased risk of depression, substance abuse, and self-harm, including suicide. Young LGBTI people in particular experience suicidal thoughts and suicidal ideation at a much higher rate than other young people. Lesbians are also at a greater risk of obesity and weight-related problems in response to psychological stressors than other women.

iv. Trans-specific health concerns

Trans individuals can have specific needs that are not being met by the governments of Member States, including access to hormone treatment and gender reassignment surgery, when appropriate. While trans-specific issues will be discussed generally below, the access to health services relating to transitioning are an important issue across the EU.

A German trans person residing and working in Belgium went to a hospital in Belgium asking for an injection of his regular testosterone shot. He was denied this service and told that he would need a certificate from a German doctor proving that this injection was necessary.⁸⁵

While access to the medical transition process within a country of residence is a problem in and of itself, Member States also do not facilitate cross-border solutions for trans people who need to seek medical services in another Member State. While costs are often cited as the justification for denying the appropriate cross-border solution, such costs do not comprise a significant burden on any Member State.⁸⁶ Additionally, accessing prescription medications when in another Member State has proven problematic for trans people, compromising their medical and social situation, as a result of direct discrimination by service providers or lack of knowledge of analogous treatment options.⁸⁷

DHEA-S gel pills and Estrogen gel prescribed in Belgium are not available in Dutch pharmacies. Androcur (estrogen) products prescribed in Spain were not available in Sweden. Sustanon, a testosterone product, has suddenly ceased to be produced in Belgium and in the United Kingdom, even though trans men (female-to-male trans persons) very much depend on this product. There is no other 3-month testosterone depot product produced or available in Europe. As a result, many trans persons need to get these products in other countries where there are still supplies (e.g. Netherlands and Spain).⁸⁸

Moreover, all of the competence issues identified above for LGBTI people are often more severe for trans people, as medical professionals lack understanding and knowledge to deal with the medical and social issues of transitioning. Additionally, the pathologisation of trans identities (discussed in Chapter 4 below) leads to increased incidences of general discrimination in accessing healthcare.

⁸³ ILGA-Europe and IGLYO, 'Social exclusion of young lesbian, gay, bisexual, and transgender (LGBT) people in Europe', Section 4.2: Mental Health, April 2007.

⁸⁴ Meyer, I. H., 'Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence', 129 *Psychological Bulletin*, 2003, p. 674–697.

⁸⁵ Ibid.

⁸⁶ i.e.: Cross Border Position Paper

⁸⁷ Transgender Europe and ILGA-Europe, 'Public consultation on measures for improving the recognition of prescriptions issues in another Member State', January 2012.

⁸⁸ Ibid.

4.4.2. EU actions to date

Article 9 of the TFEU provides that the EU should, in defining and implementing its policies and activities, take into account inter alia requirements linked to the protection of human health.

Despite this, there has so far been no legislation specific to LGBTI persons adopted at EU level thus far and there is minimal focus specifically on LGBTI issues within EU health initiatives, though some do create opportunities for work to improve the situation of LGBTI people in the health care setting. Whilst it is recognised that there are significant and wide ranging health issues that require prioritisation, the apparent absence of any work policy framework appears disproportionate to the extent of problems faced by LGBTI people in this sector.

The 2009 Commission Communication 'Solidarity in health: reducing health inequalities in the EU'⁸⁹ recognises that vulnerable groups face various obstacles when accessing healthcare, resulting in health inequalities that are avoidable. Whilst LGBTI persons are not explicitly mentioned, they are not excluded either and should be considered as a vulnerable group.

The Council conclusions on 'The European Pact for Mental Health and Well-being: results and future action' of 6 June 2011 also made an important recommendation to 'strengthen mental health promotion of children and young people by supporting [...] holistic school approaches to reduce bullying'. It also recommends the need to address mental health problems of vulnerable groups. However, it does not specifically refer to LGBTI issues.

To address the issue of pathologisation of trans identities, in 2011, the European Parliament issued a resolution on sexual orientation and gender identity at the UN Human rights Council (28.09.2011) calling on the WHO to withdraw gender identity disorders from the list of mental and behavioural disorders, and ensure a non-pathologising reclassification in negotiations on 11th version of the International Classification of Diseases (ICD-11). The Resolution of the European Parliament of 18 April 2012 on human rights in the world and the European Union's policy on the matter, including implications for the EU's strategic human rights policy⁹⁰ also called on the Commission to ask at WHO negotiations for the removal of gender identity from the list of mental disorders. The WHO is currently considering the revision of this classification in its 11th international classification of diseases (expected to be finalised in 2015).

However, the reality is that LGBTI issues are rarely dealt with at the EU level and there is no systematic mechanism for examining LGBTI health issues. As in the area of education, until the proposed anti-discrimination horizontal Directive is adopted, LGBTI persons will also continue to lack EU level legal protection in this area.

4.5. Goods and services and housing

KEY FINDINGS

- LGBTI persons experience discrimination in accessing goods and services and access to housing.

⁸⁹ COM (2009) 567 final.

⁹⁰ European Parliament Resolution of 18 April 2012 on human rights in the world and the European Union's policy on the matter (No P7_TA(2012)0126).

- Even though Directive 2004/113/EC protects persons having undergone gender reassignment, knowledge of these rights is limited among practitioners and transgender persons.

4.5.1. Defining the problem

LGBTI people can be refused service at hotels, restaurants, or stores based solely on their sexual orientation. Though protection based on gender identity has been extended by the CJEU, this protection is not realised in many Member States. For instance, a couple was ejected from a bar in Spain based only on the fact that they were gay.⁹¹

Landlords and other housing providers can refuse rental on the basis of sexual orientation or gender identity without any other reason. No protections exist for LGBTI people at the EU level regarding equal access to housing.

When protections do exist at the national level, landlords and other housing providers are often unaware that it is discrimination to refuse access to housing based on sexual orientation or gender identity.

4.5.2. EU actions to date

In the area of access to goods and services, Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services provides legal protection for persons who have undergone gender reassignment. This is in accordance with the ruling in *P v S and Cornwall County Council*, 1996 E.C.R. I-2143, where the CJEU ruled that the scope of the Equal Treatment Directive should not be narrowly construed.

However, until the proposed anti-discrimination Directive is adopted, there will continue to be no protection for LGBTI persons in access to goods and services, nor for LGBTI persons in the field of housing.

⁹¹ ILGA Europe, Annual Review of the Human Rights Situation of LGBTI People in Europe 2011, p. 154

5. TRANS AND INTERSEX ISSUES

KEY FINDINGS

- The requirements for the recognition of gender reassignment vary across Member States, and include forced sterilisation and divorce.
- Trans individuals must receive a psychiatric diagnosis of 'gender identity disorder' prior to receiving access to medical or legal transition which carries a stigma and often leads to unnecessary and harmful treatment.
- Very little information is available on the impact of forced sex assignment at birth of intersex persons.

5.1.1. Defining the problem

While trans and intersex issues are mentioned throughout this document, this particular section will mention the salient issues that only affect trans or intersex people in the EU. Currently, gender identity is not a clear ground for protection from discrimination, yet the EU has extended protection through case law and recent legislative recitals.⁹²

However, coverage is not clearly understood by the EU or when Member States are applying EU law.⁹³ Often, legal frameworks only refer to transsexuals—those individuals who wish to transition from one sex to the other—while the group of people covered by the term 'gender identity' are much more diverse. With the lack of clarity regarding legal protection, issues affecting trans and intersex people are a combination of institutionalised discrimination as well as competence issues and awareness raising in society.⁹⁴

i. Pathologisation: trans identities labelled as mental disorder

In almost all European Union Member States, trans individuals must receive a psychiatric diagnosis of 'gender identity disorder' prior to receiving access to any sort of medical or legal transition.⁹⁵ Depending on the country, trans individuals need a diagnosis to access hormones, breast augmentation, or gender reassignment surgery, but also before legally changing one's gender, identity documents, and other official forms that indicate gender. With or without the diagnosis gender identity disorder, trans people are often refused prescriptions or medical service by general practitioners based on discriminatory stances on gender reassignment therapies.⁹⁶

This requirement carries a heavy stigma, and often leads to non-personalised 'treatment' that is unnecessary and harmful to a particular individual. In many countries, the physicians attending trans people do not have the competence to deal with the transition process, and might apply a 'one size fits all' model for patients that ignore individual need or desire. While this is indeed a complicated medical situation for an individual, trans people are often seen as suffering from a disease rather than living with a condition that

⁹² Case C-13/94, P. v. S and Cornwall County [1996] ECR I-2143; Qualification Directive; Procedures Directive.

⁹³ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the grounds of sexual orientation in the EU Member States', Part I - Legal Analysis, p. 20.

⁹⁴ See generally: European Union, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity, and gender expression', 2012.

⁹⁵ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 1.2: Criminalisation and medical classifications, June 2011, p. 23.

⁹⁶ Whittle, Turner, Combs & Rhodes, 'Transgender EuroStudy', 2008.

might require medical intervention.⁹⁷ It also leads many trans individuals to remove themselves from the medical establishment completely, abstaining not only from medical options to facilitate living in their own gender, but also neglecting routine medical care.

ii. Legal recognition

The requirements for legal recognition of gender identity vary across the EU, creating bureaucratic and social difficulties for trans people to receive recognition of their appropriate gender on civil status documents.⁹⁸ For example, Member States might require completion of gender reassignment surgery, proof of hormone therapy, or sometimes just the diagnosis of gender identity disorder before recognising appropriate gender at law. Legal recognition of appropriate gender identity gives an individual access to changing their name and modifying a range of documents that display gender, including passports, driving licenses, and university degrees. No country provides a simple and comprehensive procedure for changing gender on civil documents, and individuals often have to go through lengthy and complicated processes to have documents indicate their proper gender, often sacrificing fundamental rights.

In Malta, a trans woman went through all of the legal and medical requirements to have her gender recognised by law, including mandatory divorce. When she attempted to marry a man, the Maltese government did not allow the union, stating that she was not a true woman, but her civil documents had been changed so that she could avoid embarrassment.⁹⁹

Many countries require forced sterilisation of trans individuals before they are granted legal recognition of their appropriate gender.¹⁰⁰ This requirement is not medically necessary, and violates the dignity of those who want to transition and retain the ability to have children. The sterilisation requirement further stigmatises trans people, entrenching the idea that trans people do not have the right to reproduce and should not be treated on an equal basis with the rest of society.

Many EU Member States require that trans people divorce their spouse before beginning legal or medical transition, such as in the Czech Republic where a law was just approved that continued to require mandatory divorce.¹⁰¹ This requirement stands even when both spouses wish to remain married, as well as in countries where marriage between two people of the same sex is legal. Due to the complexity and variety of transitioning, law and society are often not able to handle the implications of transitioning, but instead insist that a marriage is ended, forcing two people to give up previously held rights.

Trans and intersex persons also face the issue of privacy in the process of changing civil documents. Some Member States require a public announcement to run in the newspaper prior to a name change, which makes the transition very public and can place an individual at risk of violence.¹⁰² In the extreme case of Malta, an individual needs a court order before being granted a name change. Though this requirement might be applied regardless of the

⁹⁷ A useful, though not completely applicable comparison is a pregnant person. Though a woman might require medical services during pregnancy and when giving birth, she is not labeled as having a disease.

⁹⁸ See: ILGA-Europe 2011 Annual Review for information on country-specific requirements for change in civil documents; Thomas Hammarberg, 'Human Rights and Gender Identity', Issue Paper 2009 (2); Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 5.2: Recognition of transgender persons' new gender and name, June 2011, p. 84.

⁹⁹ Case of Joanne CASSAR v. Malta (Application no. 36982/11), European Court of Human Rights, 1 June 2011.

¹⁰⁰ See: ILGA-Europe 2011 Annual Review for information on specific countries requiring sterilization.

¹⁰¹ See: ILGA-Europe 2011 Annual Review for information on specific countries requiring divorce.

¹⁰² Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 1.2: Criminalisation and medical classifications, June 2011, p. 23.

reason for the name change, the very public notice of transitioning exposes trans people to harassment and violence.

The cumbersome and lengthy process for legal recognition affects trans people in many areas of life. When identity documents do not match a person's gender, access to education, employment, and public services are often compromised.¹⁰³ Moreover, trans people might not be able to travel outside of the country with valid documents. Trans people can be subjected to degrading treatment when their identity documents do not match their gender.

iii. Intersex issues

Intersex refers to those people whose biological makeup is not exclusively male or female, a situation in which individuals exist outside of medical and legal systems that refer to binary sex and gender. Many intersex people undergo forced sex assignment at birth, complicating the physical and mental wellbeing for the rest of their lives.¹⁰⁴ Intersex cases are vastly under-reported, so there is a great dearth of information on the topic.¹⁰⁵ Though sex assignment at birth usually carries no therapeutic benefit, doctors often heavily influence the decision to put a very young child through the procedure for social reasons. The initial sex assignment is often not discussed with the child until much later in life, when complications begin to affect the wellbeing of the individual. Moreover, intersex people are pathologised as suffering from sex development disorders for their entire lives.¹⁰⁶

Since legal frameworks throughout the EU do not accommodate individuals whose biological sex cannot be categorised, intersex people must distinguish themselves as 'other,' and often are marginalised when attempting to access services that depend on sex.¹⁰⁷ Similarly, intersex people might choose to change sex later in life, and they then face the same barriers and challenges as trans people, though their situation is distinguished as intersex people seek to transition because of a decision made about their bodily integrity at birth. The state's failure to facilitate that process does not take into consideration the complicated medical and social situation of the condition of intersex people.

"Not one EU Member State has a system in place that would allow citizens to change the sex indicated on their civil status documents to an alternative classification outside the male/female binary sex model."¹⁰⁸

¹⁰³ Thomas Hammarberg, 'Human Rights and Gender Identity', Issue Paper 2009 (2); available at <https://wcd.coe.int/ViewDoc.jsp?id=1476365>.

¹⁰⁴ See: Organization Intersex International Australia, available at: <http://oiaustralia.com> (last accessed 09/09/2012); European Union, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity, and gender expression', Parts I and VII, 2012.

¹⁰⁵ Studies in Germany have shown that around 150 people are born each year who can be identified as intersex. Bundestag, publication no. 16/4786, p. 3.

¹⁰⁶ European Union, 'Trans and intersex people: Discrimination on the grounds of sex, gender identity, and gender expression', Section 3.3, 2012.

¹⁰⁷ German Ethics Council, Press Release 01/2-12, 'Intersex people should be recognised/recognized, supported and protected from discrimination', Berlin, 23 February 2012.

¹⁰⁸ Agius S. & Tobler Ch., 'European Commission report. Trans and Intersex People: Discrimination on the grounds of sex, gender identity and gender expression', 2011, p. 83.

5.1.2. EU actions to date

In the Framework of the EU Strategy for equality between women and men 2010-2015¹⁰⁹, the European Commission decided to examine specific issues pertaining to sex discrimination in relation to gender identity. In this context the European Commission published a report in June 2012 entitled 'Discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression', which examines the questions of gender identity and gender expression.

Current EU non-discrimination law does not contain an explicit prohibition of discrimination on the grounds of gender identity and gender expression. Art. 19 TFEU relating to non-discrimination entitles the EU to take action to combat "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" but does not mention trans issues. Nor is there a clear prohibition of discrimination against trans people in the EU Charter of Fundamental Rights.

CJEU court interpretations of EU equality Directives have extended the protection to trans persons having undergone gender reassignment in the areas of employment and access to goods and services. However, EU law does not explicitly cover the right to equal treatment of trans people who have not undergone and do not intend to undergo gender reassignment surgery.

i. CJEU interpretation

The Court held in three cases, namely *P v S and Cornwall County Council*¹¹⁰, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*¹¹¹ and *Sarah Margaret Richards v Secretary of State for Work and Pensions*¹¹², that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment may amount to sex discrimination.

In *P v S and Cornwall County Council*, the CJEU found that dismissal of a transsexual person because of gender reassignment constitutes discrimination on grounds of sex. In *K.B. v National Health Service Pensions Agency and Secretary of State for Health*¹¹³, the CJEU stated that the decision to restrict certain benefits to married couples while excluding all persons who live together without being married cannot be regarded *per se* as discriminatory on grounds of sex. However, it stated that legislation which, in breach of the ECHR, prevents a couple from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other, must be regarded as being, in principle, incompatible with the requirements of Article 141 EC (now Article 157 TFEU). In *Sarah Margaret Richards v Secretary of State for Work and Pensions*¹¹⁴, the court found that equal treatment for men and women required that an individual having undergone gender reassignment in accordance with national laws was entitled to retirement pension once the individual reached the required gender's age.

ii. Application in EU Directives

¹⁰⁹ Case of *H. v. Finland* (Application No. 37359/09), European Court of Human Rights, 1 April 2010

¹⁰⁹ COM (2010) 491 final.

¹¹⁰ Case C-13/94, *P. v. S and Cornwall County Council* Case C-13/94, *P. v. S and Cornwall County Council* P. v. S and Cornwall County Council [1996] ECR I-2143.

¹¹¹ Case C-117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] E.C.R. I-541.

¹¹² Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] E.C.R. I-3585.

¹¹³ Case C-117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] E.C.R. I-541.

¹¹⁴ Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] E.C.R. I-3585.

The Goods and Services Directive (Directive 2004/113) was adopted in 2004. The Directive establishes a prohibition of discrimination based on sex in the access to and supply of goods and services available to the public and offered outside the area of private life. It prohibits direct and indirect, as well as incitement to, discrimination and specifically targets insurances and the calculation of premiums and benefits. The Directive also provides for the designation of Bodies for the Promotion of Equal Treatment in each Member State.

During negotiations, the Council of European Union took into account the aforementioned CJEU jurisprudence and stated that discrimination arising from gender reassignment is protected under the scope of the EU Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Two years later, in the area of employment, the recast Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation was adopted.

Recital 3 of the preamble states that: 'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.'

It is the first EU Directive referring to persons intending to undergo or having undergone gender reassignment.¹¹⁵ However, the recitals in preambles of EU directives do not require a transposition into Member State law and Member States are therefore only expected to interpret the meaning of sex in domestic law to cover gender reassignment.

A report by EQUINET from 2010 shows that '[t]here is some variation in the scope of protection afforded to transsexual people depending on which Member State they happen to live in: for example, in Austria, discrimination arising from gender reassignment covers discrimination on grounds of gender reassignment and gender identity; in Cyprus discrimination on grounds of 'sexual identification' is deemed to fall within sex discrimination.'¹¹⁶ It is difficult to assess how the term 'gender reassignment' is interpreted in Member States as few cases have been considered by courts and equality bodies and the legal interpretation of the term is therefore still academic.

As for intersex people, EU gender equality legislation is silent on this issue and the definition of the ground of sex is still based on the male/female binary sex model¹¹⁷. Moreover, no case of discrimination against intersex people has been brought before the CJEU to challenge the current understanding of the ground of sex.

The European Commission report 'Discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression' underlines the lack of knowledge and research in this area, by stating that 'the invisibility of intersex people in European and national legislation speaks volumes about the lack of knowledge about intersex people and

¹¹⁶ European Network of Equality Bodies, 'Dynamic Interpretation: European Anti-Discrimination Law in Practice V', Brussels: EQUINET, 2010, p. 30.

¹¹⁷ Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, [2008] E.C.R I-1757 paragraph 65; Council of Europe Publication, 'COMPASS - A manual on human rights education with young people', May 2002, available at: www.eycb.coe.int/compass/en/chapter_0/impressum.html.

¹¹⁷ European Commission, 'Thematic report on discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression', 2011, p. 85.

their invisibility in society as well as their lack of protection against human rights violations.¹¹⁸

6. DIVERSE FAMILIES AND FREEDOM OF MOVEMENT

KEY FINDINGS

- LGBTI persons have a patchwork of laws across the EU to regulate the recognition of relationships with someone of the same sex.
- Legal uncertainty arises as regarding mutual recognition of civil status and second parent adoption when same-sex couples exercise their right to freedom of movement. This has an impact on benefits that flow from legal recognition, including tax and employment benefits and insurance.
- In accordance with the Directive on Family Reunification, Member States retain discretion to extend the principles of the Directive to non-married or registered partners, which leads to indirect discrimination against same sex couples.

6.1. Defining the problem

LGBTI persons have a patchwork of laws across the EU to regulate the recognition of relationships with someone of the same sex. Member States have different forms of recognition, ranging from same-sex marriage to civil partnerships that are the same as marriage in all but name, to a variety of forms of recognition that carry some, but not all rights.¹¹⁹

In six Member States—Belgium, Denmark, the Netherlands, Portugal, Spain, Sweden—two people of the same sex can marry. Civil partnerships are recognised in 14 EU countries (Austria, Belgium, the Czech Republic, Denmark, Germany, Finland, France, Hungary, Ireland Luxembourg, Netherlands, Slovenia, Sweden and the UK). However, some Member States do not give any legal recognition to people of the same sex who wish to register their partnership with the state.

i. Freedom of movement and mutual recognition

Many issues arise when partners who have formalised their relationship in one country cross borders within the EU. It is clear that according to the Freedom of Movement Directive, if one member of a couple moves to another EU Member State, that country must give residence privileges to the recognised partner.¹²⁰

However, the law is unclear on how the destination country recognises the relationship. While some countries grant full recognition based on the civil status in the country of celebration of the relationship, many downgrade the relationship to an inferior civil status. In the extreme case, a country will grant residence to a partner but refuse to recognise any civil status between the two people. Also, the partner who receives residence might not

¹¹⁸ European Commission, 'Thematic report on discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression', 2011, p. 83.

¹¹⁹ See: ILGA-Europe, Annual Review of the Human Rights Situation of LGBTI People in Europe 2011 (for a complete index of the partnership laws in EU Member States).

¹²⁰ Freedom of Movement Directive; European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part I—Legal Analysis', Section 2, 2009, p. 60.

receive employment status in the destination country, or have to go through an unnecessarily cumbersome bureaucratic process.¹²¹

The same issues arise when families with children relocate to EU Member States without recognition of second parent adoption. While a durable relationship might exist between all family members in the country of origin, the destination country might not recognise parental rights of the non-biological parent. The second parent can be refused access to the child at day care, school, or hospitals.¹²²

ii. Violation of the principles of equality

The benefits that flow from a recognised civil partnership between two people are numerous, and correspondingly the issues that result in lack of recognition are equally extensive. When same-sex couples receive a lesser form of legal recognition, or no recognition at all, the principle of equality is violated as similarly situated people—that is, two people who have professed a desire to be recognised by law and society as a couple, regardless of the sexual orientation or gender of the individuals involved—are treated differently based only on their sexual orientation. This differential treatment arises in several areas of life.

The differential treatment affects same-sex couples regarding financial benefits. Same-sex couples do not receive the same benefits in the tax codes in all EU Member States as their similarly situated opposite-sex couples who have legal recognition. Similarly, those in forms of partnership less than marriage often do not receive the same inheritance benefits, as is the case in France.¹²³ Bills to equalise the tax code have recently been defeated, as is the case in Poland.¹²⁴

Often, if same-sex couples do not have equal legal recognition or lack recognition completely, individuals cannot include their partner under private or public insurance schemes. Such discrimination can be very costly for a couple, and can lead individuals to make choices that ensure appropriate insurance coverage for both people, such as remaining in a job despite a desire to change, where an opposite-sex couple could guarantee insurance for a legal partner under any circumstance.

Similarly, partners who do not have formal recognition miss out on receiving employment benefits that would otherwise flow to a married partner, specifically pension benefits. While the CJEU has ruled that all benefits apply when a country provides legal recognition that is the same as marriage in all but name,¹²⁵ in countries where no legal recognition exists same-sex partners are disadvantaged without any recourse to law.

iii. Lack of recognition of parent-child relationships

Laws in the EU are disjointed in the area of adoption. While many families are composed of one child who is biologically related to one member of the couple, or legally related to one parent through adoption, Member States regulate second parent adoption very differently. Some countries allow a partner of the same sex to adopt the child of a partner, while other Member States allow no legal relationship.

¹²¹ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation in the European Union Member States: Part I—Legal Analysis', Chapter 2: Freedom of Movement, 2008.

¹²² European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part I—Legal Analysis', Section 4: Family Reunification, 2008, p. 99.

¹²³ ILGA-Europe, 'Annual Review of the Human Rights Situation of LGBTI People in Europe 2011', France, p. 72.

¹²⁴ Ibid. p. 130

¹²⁵ Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen [2008] E.C.R I-1757

The same situation occurs when families grow. In many Member States, one parent will not have any legal relationship to their child, giving private and public authorities the justification to deny all rights to non-legal parent. This failure to recognise the familial relationship between parents and children causes multiple problems, including when the non-legal parent needs to make decisions relating to the education or health of the child.

iv. Third country reunification

Though the EU has a Directive on Family Reunification,¹²⁶ the Member States retain discretion to extend the principles of the Directive to non-married or registered partners. Therefore, same-sex couples are indirectly discriminated against if they do not have the option to enter into a legal partnership that will be recognised by the EU country where they are seeking reunification.¹²⁷ Similarly, the indirect discrimination applies to the children of someone living in the EU who might be barred from a legal relationship with those children in the country of origin, therefore rendering the Family Reunification inapplicable. There is also much legal uncertainty regarding partners who are married, for instance in South Africa, but reunify in a European country that does not recognise same-sex marriage. In that case, the couple would face the possibility of a downgrading of rights, similar to the issues outlined above regarding the Freedom of Movement Directive.

6.2. EU actions

i. Freedom of movement and mutual recognition

In 2004 the aforementioned Freedom of Movement Directive¹²⁸ aiming at consolidating free movement instruments and provisions in the EU was adopted by the Commission in April 2004. It repealed and replaced ten other European legal instruments, in what proved to be an important step towards reducing bureaucracy for citizens of the Union, and their family members, wishing to move and reside in the EU.

The Directive provides for the free movement and residence of EU citizens in EU member States for periods of up to three months. This right is extended to accompanying non-EU citizens' family members. Longer residency is allowed to EU citizens and accompanying family members but conditioned to e.g. employment or vocational training in the host country, possessing sufficient resources and sickness insurance.

After five uninterrupted years in the host country, the citizen and his accompanying family are granted permanent residency. In addition, the Directive provides for equal treatment of residents with regard to the host-country nationals. Those provisions may only be restricted on grounds of public policy, public security and public health and decisions taken on those grounds lead to expulsion of the residents.

The Directive recognises a same-sex partner as an accompanying family member if the Union citizen and his/her partner have a registered civil partnership and the host country recognises civil partnership in its law. The same is true for direct descendants under the age of 21 and those of a partner.

¹²⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ('The Family Reunification Directive').

¹²⁷ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part I—Legal Analysis', Section 4, 2008, p. 99; ILGA-Europe's contribution to the Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC).

¹²⁸ Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Despite the adoption of this Directive, European citizens are still confronted with many obstacles in the exercise of their freedom of movement. The recognition of civil partnership and marriage of LGBT people across Member States is particularly sensitive: same-sex partners can only use their right when the partnership or marriage is recognised in both countries. The situation is further complicated when children are involved, as often only one of the parents is recognised as a parent by the law.

In 2011, the Commission published a Green Paper to open a debate on the free movement of public documents and in particular on the recognition of the effects of civil status records in the EU¹²⁹. EU citizens still encounter many obstacles to the exercise of their right to freedom of movement and, more generally, the right to be treated like a national in the Member State of residence in relation to their civil status. For example, they are often required to provide civil records, such as a marriage certificate, to benefit from a right or to comply with an obligation.

These documents generally require administrative formalities, such as a proof of authenticity or a certified translation, in order to be used outside the Member State in which they were issued. Moreover, a document recording one of the main events of a person's civil status, such as birth or marriage, does not necessarily have an effect in another Member State, as is the case for civil partnership and marriage of LGBT people.

The Commission has scheduled proposals for 2013 on the following issues:

- Free movement of documents by eliminating legalisation formalities between Member States
- Recognition of the effects of certain civil status records (i.e. in relation to filiation, adoption, names), so that legal status granted in one Member State can be recognised and have the same legal consequences in another.¹³⁰

The Commission is also negotiating two proposals for regulations relating to property regimes: The 'matrimonial property regimes'¹³¹ to implement rules for married couples and the 'patrimonial property regime'¹³² to implement rules for registered partnerships. This will enhance legal certainty for registered partnerships with an international dimension, by submitting the joint property to the law of the country where the partnership was registered.

ii. Principles of equality

Anti-discrimination laws in the area of employment concerning LGBTI people has had an impact not only on the individual concerned but also on their families.

The CJEU has asserted the principle of equality for same sex couples relying on employment anti-discrimination legislation. In Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen¹³³, the Court held that a where Member State has deemed registered civil partnerships on equal footing with marriage, denying the surviving partner widower's benefits constitutes direct discrimination.

¹²⁹ Green Paper on Less bureaucracy for citizens: Promoting free movement of public documents and recognition of the effects of civil documents, COM(2010) 747 final

¹³⁰ Green Paper on Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final.

¹³¹ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final

¹³² Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final

¹³³ Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen [2008] E.C.R I-1757.

In Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, the Court held that where only civil registered partnership is available to same-sex partners, benefits under pension plans must be equal for same-sex registered partners and married partners.

iii. Lack of recognition of parent-child relationships

The European Union does not have the competence over the recognition of parent-child relationship and any right thereto, including the right for adoption. This situation causes discrimination issues when same-sex partners cannot both be recognised as parents (e.g. problems with inheritance and donations). This problem is further exacerbated by problems raised above concerning rights to freedom of movement and residency.

The ECHR has addressed the right to adoption with regard to LGBTI individuals and held that a decision to refuse adoption to a lesbian woman could not be based solely on her sexual orientation or such a decision would be discriminatory.¹³⁴

iv. Third country reunification

The Family Reunification Directive¹³⁵ applies to non-EU citizens and provides them with the possibility to reunite with their families already legally residing in the territory of the Member States.

The Directive provides for reunification of the individual asking for reunification with a spouse and minor children of the couple. It also leaves Member States free to grant family reunification to direct parents (father and mother), unmarried children of the couple who have come of age, and unmarried partners (long-term relationship bound by a civil partnership) of the individual asking for reunification.

Whilst the Directive is a useful harmonisation tool, it has received criticism for setting a rather low level of harmonisation. The Commission itself recognised in a 2008 report¹³⁶ that the Directive has its shortcomings and leaves too much discretion to Member States, some of which have set up restrictive rules over the last years. In particular, Article 4(3) of the Family Reunification Directive on the recognition of unmarried and registered partners for the purpose of family reunification is an optional clause.

¹³⁴ Case of *E.B. v. France* (Application 43546/02), European Court of Human Rights, 22 January 2008.

¹³⁵ Directive 2003/86/EC of 22 September 2003 of the Council on the right to family reunification OJ L 251, 3.10.2003, p. 12 – 18

¹³⁶ Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification COM(2008) 610 final. A "Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)" [COM(2011) 735 final], was issued by the Commission in 2011 in order to address those shortcomings.

7. FREEDOM OF ASSEMBLY AND EXPRESSION

KEY FINDINGS

- LGBTI persons are not always able to assert their fundamental rights to freedom of assembly and freedom of expression throughout the EU.
- Obstacles to asserting these rights range from bans to pride events to a lack of adequate police forces to protect LGBTI people in such events.

7.1. Defining the problem

LGBTI people are not able to realise their fundamental rights to freedom of assembly and freedom of expression throughout the EU.¹³⁷ LGBTI advocates often try to hold events to raise awareness in their particular society that affect LGBTI people. These events are usually labelled as 'pride' events, and they take the form of a parade, march or festival—such events often serve as a litmus test for the overall social attitude toward LGBTI people. However, in many parts of Europe, public authorities do not allow the events to go forward.

Since 2004, six Member States have had outright bans on any pride events.¹³⁸ In addition, authorities in many EU Member States use arbitrary and disproportionate restrictions to deny LGBTI groups their freedom of assembly. Such restrictions include denying permits or rentals, or diverting parade routes along procedures that do not apply to other groups holding events.

The landmark case *Bączkowski and Others v. Poland*, concerned a request from the authorities to present a traffic plan to the organisers of the 2005 pride parade in Warsaw, resulting in an impingement on the right to freedom of assembly, as ascertained by the European Court of Human Rights.¹³⁹

Moreover, many Member States do not provide adequate police forces to protect LGBTI people in their events, and there have been many incidences of violence surrounding pride efforts.¹⁴⁰ While authorities often cite the presence of counter-demonstrators as the reason pride events are restricted, the European Court of Human Rights has ruled that states have a positive obligation to protect those enjoying the freedom of assembly.¹⁴¹

¹³⁷ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 4: Participation: freedoms of assembly, expression, and association, June 2011, p. 71.

¹³⁸ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—The Social Situation', 2009, p. 50-51.

¹³⁹ Council of Europe Publishing, 'Discrimination on grounds of sexual orientation and gender identity in Europe', Section 4: Participation: freedoms of assembly, expression, and association, June 2011, p. 75.

¹⁴⁰ See generally: ILGA Europe, 'Annual Review of the Human Rights Situation of LGBTI People in Europe 2011'.

¹⁴¹ Case of *Alekseyev v. Russia* (Applications Nos. 4916/07, 25924/08 and 14599/09), European Court of Human Rights, 21 October 2010.

7.2. EU actions to date

The European Parliament has condemned breaches of the principle of freedom of assembly, notably through its Resolution of 26 April 2007 on homophobia in Europe¹⁴², which reminded Member States of the freedom of assembly and discriminatory nature of the ban of gay pride marches.

More recently, the European Parliament issued a Resolution of 19 January 2011 on the violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania¹⁴³, in which it condemned Lithuania's failure to remove the illegality of public promotion of homosexual acts, as well as anti-homosexual stands.

¹⁴² European Parliament Resolution of 26 April 2007 on homophobia in Europe (No P6_TA-PROV(2007)0167).

¹⁴³ European Parliament resolution of 19 January 2011 on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania (No P7_TA(2011)0019).

8. HATE SPEECH, HATE CRIME AND VIOLENCE

KEY FINDINGS

- LGBTI persons are targets of bias crime, and legal frameworks and police competence to deal with such crimes are often inadequate.
- There is also a problem of underreporting and a lack of disaggregated data which makes it difficult to tailor policy efforts to LGBTI crime victims.
- The adoption of the Victim's Rights Package, which will provide important rights for LGBTI persons, identifies sexual orientation and gender identity as a factor which may indicate a victim's vulnerability. There is, however, no clear legislative framework at EU level to address violence against LGBTI in criminal law.

8.1. Defining the problem

Violent crime against LGBTI people has long been a problem across the EU.¹⁴⁴ The main reason for this violence relates to the rejection by perpetrators of what they see as transgression of traditional gender roles. Unfortunately, there is a dearth of data relating to violence against LGBTI people. The lack of data is in part caused by the lack of bias crime legislation and the failure of police to respond appropriately.

In 2009, only nine Member States had bias crime legislation that treats violence motivated by bias toward a victim's perceived sexual orientation or gender identity an offence.¹⁴⁵ Even when bias crime legislation does exist, police often lack the competence and training to respond appropriately.

The lack of training and competence results in inaction on the part of police. Additionally, police will dismiss complaints, as they believe that such violence is an appropriate reaction to nonconforming displays of gender or sexual orientation. In extreme cases, police will harass the victim during the reporting of the crime, putting the LGBTI person at further risk.¹⁴⁶

79% of respondents surveyed in 2009 claimed to having experienced some form of harassment in public, ranging from transphobic comments to physical or sexual abuse. The most common forms of harassment included: unsolicited comments (44%), verbal abuse (27%), experience of threatening behaviour (15%) and physical abuse (7%).¹⁴⁷

¹⁴⁴ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', Part I, Section 2: Hate Crime and Hate Speech, 2009, p. 37.

¹⁴⁵ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', Part I, Section 2: Hate Crime and Hate Speech, 2009, p. 37.

¹⁴⁶ See: e.g. ENAR (2006) 'Shadow Report: Bulgaria 2006', available at: http://cms.horus.be/files/99935/MediaArchive/national/Bulgaria_2006.pdf (14 .07.2008); Kotter, L.: 'Sexual Orientation Discrimination in Estonia' in 'Sexual Orientation; Discrimination in Lithuania, Latvia and Estonia'. Open Society Institute and Kimeta Society, 2002; European Union Agency for Fundamental Right, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', Part I, Section 2: Hate Crime and Hate Speech, 2009, p. 44.

¹⁴⁷ Whittle S., Combs R., 'Transphobic Hate Crimes in the European Union. Study', London: Press for Change, 2009, p. 1.

There is a fear on the part of the victim to report violence to authorities. Such fear can stem from threats of reprisals from the original perpetrators, as well as fear of violence from the police. Other victims report that they experience bias-driven crime so often that they don't see the point in reporting.¹⁴⁸

According to a survey carried out by the London Metropolitan Police Service in the UK in 2008, 83% of homophobic and transphobic incidents mentioned by the women surveyed went unreported to the police. 41% of the women who reported incidents to the police felt that police officers did not make it comfortable. In 42% of the cases no action was taken by the police.¹⁴⁹

Even if information on sexual orientation and gender identity is collected at the time of reporting, such information is rarely disaggregated in crime statistics.¹⁵⁰ Therefore, authorities do not facilitate an understanding of bias motivated crime by providing disaggregation based on sexual orientation or gender identity, type of crime, or type of prosecution. Without disaggregated data, lawmakers cannot tailor policy efforts to address the issues relating to LGBTI bias crime.

The only territory in Europe with legislation protecting trans and intersex people against bias-motivated violence is Scotland.¹⁵¹

8.2. EU actions to date

The EU has recognised the problem of violence against LGBTI persons in declarative documents and through EU programmes aimed at tackling hate violence, including through the Commission Communication of 1 March 2006 on a 'Roadmap for equality between women and men'¹⁵² which refers to the 'eradication of all forms of gender based violence as one of its six priority areas, and several European Parliament resolutions¹⁵³. However, the extent to which there will be a focus on LGBTI issues, as opposed to violence against women, is questionable.

In the European Parliament 2012 annual report on equality between women and men in the EU, the Parliament urged the Commission to 'include homophobic and transphobic violence and harassment in its action programmes against gender-based violence'¹⁵⁴.

In 2013, the Fundamental Rights plans to develop two deliverables for practitioners and authorities working in the area of violence, including a 'European Handbook for Victims of Violence', and a 'European Handbook for the Police'.

¹⁴⁸ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', Part I, Section 2: Hate Crime and Hate Speech, 2009, p. 43.

¹⁴⁹ Paterson S., Kielinger V. & Fletcher H., 'Women's Experiences of Homophobia and Transphobia: Survey Report', London: Metropolitan Police Service, 2008.

¹⁵⁰ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', Part I, Section 2: Hate Crime and Hate Speech, 2009, p. 37.

¹⁵¹ Offences (Aggravation by Prejudice) (Scotland) Act 2009, Article 2.

¹⁵² COM(2006) 92 final.

¹⁵³ Resolution of 15 June 2006 on the increase in racist and homophobic violence in Europe (OJ C 300 E) strongly condemned all racist and hate attacks and asked for the restarting of the discussion on the proposed Framework Decision and for extending its scope.

¹⁵⁴ European Parliament Resolution of 13 March 2012 on equality between women and men in the European Union - 2011 (2011/2244(INI)); available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0069&language=EN&ring=A7-2012-0041>.

i. Victims' rights

The Council Directive establishing minimum standards on the rights, support and protection of victims of crime¹⁵⁵ (the Victims Rights Directive) was adopted on 4 October 2012 and provides important rights for vulnerable victims including LGBTI persons.

The Directive is based on Article 82 TFEU and identifies sexual orientation, gender identity and gender expression as factors which may indicate a victim's vulnerability to further victimisation or intimidation and thus require additional protection measures. It is the first time EU law mentions gender expression.

EU action should be centered on monitoring the application of the victim's rights directive once this has been adopted, to ensure that LGBTI are protected within this legal framework.

ii. Hate speech and hate crime

Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law refers to the protection of groups defined by reference to race, colour, religion, descent or national or ethnic origin. Member States were required to take measures to comply with the provisions of the Directive by 28 November 2010. The Council will review the Framework Decision before 28 November 2013, based on a Commission implementation report.

The Framework Decision does not, however, refer to sexual orientation or gender identity/expression. There have been calls in EU studies to consider adopting similar legislation to cover homophobic and transphobic hate speech and hate crime so that LGBT persons can be protected in all Member States.¹⁵⁶

On 2 April 2012, the FRA launched an EU-wide online survey covering all 27 EU Member States and Croatia, which asked questions about whether LGBTI persons have experienced discrimination, violence, verbal abuse or hate speech on the grounds of their sexual orientation or gender identity. It also asked participants to identify the context in which such incidents took place, and their nature. This study will be an important step in obtaining comparable data about the extent and nature of discrimination, violence and hate speech experienced by LGBT persons across the EU.

¹⁵⁵ COM (2011) 275 final.

¹⁵⁶ European Union Agency for Fundamental Rights, 'Hate speech and Hate Crimes against LGBT Persons. Factsheet', 2009; available at: http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-hate-speech-crime_EN.pdf.

9. FLEEING HOMOPHOBIA AND TRANSPHOBIA

KEY FINDINGS

- LGBT asylum seekers face problems in asylum procedures, including in establishing the credibility of their claim and lack of cultural sensitivity and competence from asylum officials.
- They also experience discrimination in reception and detention centres.
- The EU Qualification Directive, and its recast provide that gender related aspects and sexual orientation are factors to be considered in assessing an asylum seeker's claim.
- The proposed Asylum Procedures Directive provides a framework for support to LGBT asylum seekers including ensuring respect to human dignity and integrity. The proposed recast of the Receptions Condition Directive 2003/9/EC refers to gender based violence and vulnerable groups, but does not make an explicit reference to LGBTI persons.

9.1. Defining the problem

i. Asylum procedures

Whilst the borders of the 27 EU Member States still provide a safe-haven compared to many parts of the world where LGBTI people are persecuted for their sexual orientation or gender identity, the asylum procedures in the EU are fraught with difficulty for LGBTI applicants.¹⁵⁷ Each national system has its own intricacies for asylum proceedings, though several themes arise no matter where an LGBTI applicant is seeking refuge.

When applicants are fleeing extreme cases of homophobia, they have a deep fear to admit their sexual orientation or gender identity to any authority figure.

Fernanda Milan, a Guatemalan trans woman and activist, was in January 2012 denied her initial claim for asylum in Denmark submitted in 2009. On 8 August 2012 the Danish authorities issued a notification of deportation.

The Danish asylum authorities do not recognise gender identity as a reason of persecution. In Fernanda's case, several governmental and non-governmental organisations acknowledge the existence of high levels of transphobic violence in Guatemala. It is therefore likely that a deportation of Fernanda Milan will put her in a very dangerous situation."¹⁵⁸

¹⁵⁷ European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', Part I, Section 10: Asylum, 2009, p. 96.

¹⁵⁸ ILGA Europe news bulletin, 'Asylum seeking trans woman faces deportation despite evidence of Transphobic violence in her home country', 20 August 2012; available at: http://www.ilga-europe.org/home/guide/country_by_country/denmark/fernanda_milan.

LGBTI asylum seekers in the EU face problems in establishing the credibility of their claims.¹⁵⁹ A central aspect of any asylum proceeding is establishing the credibility of the applicants. This judicial process involves producing evidence that demonstrates an applicant's membership in a particular social group for which they were undergoing persecution. Therefore, LGBTI people must establish their sexual orientation or gender identity.

As many applicants for asylum in the EU come from a country where displaying nonconventional sexual orientation or gender identity is extremely dangerous, there is often very little evidence to demonstrate their LGBTI status. Additionally, applicants have often married and had children in their own countries due to the inability to remove themselves from social conventions. Asylum proceedings in the EU have taken such evidence as proof against a credible case, disregarding the social conditions in the country that might force gay and lesbian people to marry despite their sexual orientation.

In the extreme case, governments have attempted to use methods to evaluate asylum claims that qualify as dehumanising and degrading treatment, such as the phallometric testing the Czech Republic where authorities measured blood flow to the penis while being shown 'straight' porn.¹⁶⁰

Types of criteria existing in Member States to prove the existence of a well-founded fear of persecution on grounds of sexual orientation:

- homosexuality being illegal in the asylum-seeker's country;
- homosexuality being illegal and carrying a serious punishment;
- applicants to prove that they have been open about their sexual orientation or gender identity;
- applicants having to prove their sexual orientation, by often degrading means, e.g. Czech Republic ('phallometric testing' mentioned already);
- applicants undergoing psychiatric tests; or
- applicants undertaking humiliating and intensive questioning where they have alleged sexual abuse.¹⁶¹

One reason for the difficulty in establishing credibility is that judges and asylum offices lack in-depth knowledge relating to the country of origin, particularly the cultural attitudes toward LGBTI people.¹⁶² Authorities often depend on their own understandings and stereotypes of sexual orientation and gender identity, leading to inappropriate dismissal of asylum claims.

The same lack of understanding has led many authorities to send applicants back to the country of origin, citing that the LGBTI individual can remain discreet. This 'discretion requirement' places the applicant at risk of persecution upon return to the country of origin and ignores the right of LGBTI people to live freely and openly.¹⁶³

Finally, LGBTI applicants are often reluctant to disclose their sexual orientation or gender identity when they arrive in the EU, despite their desire to claim asylum. This often arises

¹⁵⁹ Jansen S., Spijkerboe T., 'Fleeing Homophobia', COC Nederland, Vrije Universiteit Amsterdam, September 2011, p. 47.

¹⁶⁰ European Union Agency for Fundamental Rights, Press Release, 'Practice of 'phallometric testing' for gay asylum seekers', 9 December 2010.

¹⁶¹ European Union Agency for Fundamental Rights, 'Homophobia, transphobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', 2011, p. 34.

¹⁶² Jansen S., Spijkerboe T., 'Fleeing Homophobia', COC Nederland, Vrije Universiteit Amsterdam, September 2011, p. 47.

¹⁶³ UNHCR, 'Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia,' Research Paper No. 181, 2009, p. 13.

due to a fear of authorities based on past experiences. In addition, LGBTI persons frequently experience violence and abuse in reception and detention centres in Europe, from other asylum applicants and officials.

This failure to disclose the reason for asylum upon arrival causes procedural problems in the application process, but stems from an individual's deeply held fear of harassment based on sexual orientation or gender identity.¹⁶⁴ However, the asylum procedures fail to take such deeply embedded fear into account, and dismiss the claim based on procedural grounds.

9.2. EU actions to date

i. Asylum procedures

The EU Qualification Directive, which sets criteria for who can be considered a refugee and be granted asylum in Member States, provides that an individual may be eligible to seek asylum where they are being persecuted because of their membership of a 'social group'.

The recast of the Qualification Directive¹⁶⁵ introduced by the European Commission in October 2009, includes the ground of gender identity. Article 10 of this directive provides that 'gender related aspects should be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'.

The 21 October 2009 European Commission proposal to recast the Asylum Procedures Directive provides modifications to strengthen the position of LGBT asylum seekers. These include providing expert advice to asylum officials on sexual orientation and gender identity; protecting claimants' privacy' guaranteeing that physical examinations fully respect human dignity and integrity; ensuring that applications by LGBT asylum-seekers are not fast-tracked for removal to their country of origin.

The mainstreaming of LGBT issues in the Asylum Procedures Directive¹⁶⁶ will provide important safeguards to LGBT persons when adopted. However, it does not take into consideration the special needs of many LGBT asylum seekers who face a number of cultural and linguistic obstacles during the asylum procedure, and who may have been victims of serious forms of psychological, physical or sexual violence. The proposal is being negotiated in the European Parliament and in the Council. To assist the negotiations, the Commission presented a modified proposal for the Directive in June 2011.¹⁶⁷

The modified proposal includes amendments to the definition in Article 2 of 'applicants in need of special procedural guarantees'. It includes sexual orientation and gender identity cases where applicants may need special procedural guarantees given that in these cases, inter alia, the examination of the application and especially the personal interview has to ensure that the applicant is able to present his/her case.

¹⁶⁴ Jansen S., Spijkerboe T., 'Fleeing Homophobia', COC Nederland, Vrije Universiteit Amsterdam, September 2011, p. 65.

¹⁶⁵ COM(2009) 551 final; 2009/0164 (COD).

¹⁶⁶ Directive 2005/85/EC of 1 December 2006 on minimum standards on procedures in Member States for granting and withdrawing refugee status ('The Asylum Procedures Directive').

¹⁶⁷ ILGA, Policy paper, 'The recast of the EU legislation on asylum', January 2011. Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast). COM(2011) 319 final ANNEX

The European Asylum Support Office (EASO) was established in 2011 and through Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office. It is an independent body based in Malta and became operational in mid-2011. It will be competent for common training curricula and producing country of origin information.

ii. Reception conditions

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter Reception Conditions Directive (2003/9/EC) provides in its Article 14(2)(b) that 'Member States shall pay particular attention to the prevention of assault within the premises and accommodation centres'¹⁶⁸.

In accordance with the Policy Plan on Asylum¹⁶⁹, on 9 December 2008 the Commission presented a proposal amending the Receptions Directive following an evaluation of the application of the Directive and after consultation with Member States and other stakeholders including UNHCR.

The recast proposal of this Directive is more explicit with regard to gender and gender based violence:

- Article 18(3) 'Member States shall take into consideration gender and age specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres'.
- Article 18(4) 'Member States shall take appropriate measures to prevent assault and gender based violence including sexual assault, within the premises and accommodation centres'.
- Article 17(1) 'Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'.

Whilst LGBTI persons are not excluded from these provisions, they are not specifically included even though they are often vulnerable groups. The European Parliament adopted its position on 7 May 2009 on the proposed Directive¹⁷⁰ and the proposal has been discussed in Council. On June 2011, the Commission presented a modified proposal for the Recast Directive. No position has been reached as of yet in Council.

iii. External action

The EU has also played an active role in promoting LGBTI rights abroad. In 2010, the Council of the European Union published a Toolkit to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People¹⁷¹. The toolkit aims to provide EU staff with an operational set of tools to be used in its external action in order to promote and protect the human rights enjoyed by LGBT people.

The European Parliament has taken a strong stance to promote the respect of LGBTI rights outside the EU. Recent resolutions to this effect include the 'Resolution of the European Parliament of 14 December 2011 on the upcoming EU-Russia Summit'¹⁷², which

¹⁶⁸ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

¹⁶⁹ COM(2008) 360.

¹⁷⁰ OJ C 212 E, 5.8.2010, p. 348.

¹⁷¹ 17 June 2010, 11179/10.

¹⁷² Resolution of the European Parliament of 14 December 2011 on the upcoming EU-Russia Summit (No P7_TA(2011)0575).

condemned proposals to criminalise public information about sexual orientation and gender identity in various Russian regions and at federal level. Resolution of the European Parliament of 18 April 2012 on human rights in the world and the European Union's policy on the matter, including implications for the EU's strategic human rights policy¹⁷³ also called on Member States to grant refugee status to those defining themselves as LGBTI individuals.

¹⁷³ Resolution of the European Parliament of 18 April 2012 on human rights in the world and the European Union's policy on the matter (No P7_TA(2012)0126).

10. CONCLUSIONS

10.1. Equality and access

1. Discrimination against LGBTI persons continues to occur in all Member States to varying degrees.
2. The Commission has proposed an EU Directive on anti-discrimination which will significantly improve protection against discrimination across the EU.¹⁷⁴
3. Discrimination is often rooted in social norms and attitudes and reflected in individual acts and systemic approaches taken by authorities and organisations.
4. Awareness among LGBTI persons and practitioners of rights and redress is limited.
5. A significant lack of data on the situation of LGBTI persons which hampers effective policy making and the addressing of discrimination and wider problems.
6. The EU has the legal basis to tackle discrimination in a number of areas including education, health, and goods and services. The proposed anti-discrimination Directive covers such areas but adoption and transposition is not expected to occur for some years. The EU's competence to act in those fields is limited to supporting Member State Action.
7. Discrimination in Employment: EU legislation is still not sufficiently translated into non-discrimination practice in the work place. LGBTI people are more likely to be unemployed, to have lower wages and have more difficulties in getting promotion than heterosexual people. They are also more likely to face discrimination, bullying and violence and experience greater health problems.
8. Discrimination in education: Protection in educational establishments remains variable. Lack of recognition of LGBTI issues, a lack of understanding and training of teachers and of effective protective policies in schools, results in LGBTI youth and teachers experiencing high levels of discrimination and bullying. This leads to high drop out rates and health impacts such as self harming and suicide.
9. Discrimination in health: LGBTI persons face an array of problems depending on which Member State they are in. Overall they suffer stigmatisation and discrimination in accessing healthcare and are at greater risk of suffering from mental health and other health problems due to a failure to access care.
10. No policy framework is in place at the EU level for addressing LGBTI health issues.
11. Discrimination in accessing goods and services and housing. Lack of knowledge of the application of the Gender Goods and Services Directive to persons having undergone gender reassignment has limited its positive impact.

The level of discrimination faced by LGBTI persons indicates a strong need to increase efforts to prevent and respond to discrimination against such persons in all areas.

More research and data, more actions to change attitudes and improve knowledge and clear guidelines on implementation of legislation can all play an important role in reducing discrimination and the harm it causes.

¹⁷⁴ European Union Agency for Fundamental Rights, 'Homophobia, transphobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', 2011, p. 26.

10.2. Trans and intersex issues

12. Transgender individuals face a wide range of stigmatisation. They tend to experience higher levels of discrimination and face specific problems all of which require specific focus and a targeted EU response.
13. They continue to be categorised as having a disease or disorder in the vast majority of Member States and at the international level.
14. They face a range of obstacles in obtaining legal recognition of their identity including forced sterilisation and divorce.
15. Very little information exists on impacts and scale of the problem of forced sex assignment at birth of intersex persons.
16. There is a lack of uniformity in the approach to discrimination based on gender identity, despite CJEU caselaw and there are no clear policy or objectives on the matter.
17. EU law currently provides no protection against discrimination for transsexuals who have not undergone gender reassignment procedures. Whilst the proposed anti-discrimination Directive continues to be blocked, these groups will only have the protection of ad hoc national action.
18. Even though gender equality Directives cover gender reassignment, knowledge about this is limited among practitioners and transgender persons which leads to a lack of protection and lack of legal clarity of rights available.

10.3. Diverse families and freedom of movement

19. LGBTI persons experience difficulties in having partnerships or second parent adoption recognition when exercising their right to free movement.
20. Differential treatment between same-sex couples and married couples is also a challenge for LGB persons and can affect benefits such as tax benefits or access to insurance.
21. In accordance with the Directive on Family Reunification, Member States retain discretion to extend the principles of the Directive to non-married or registered partners, which leads to indirect discrimination against same sex couples.

10.4. Freedom of assembly and expression

22. In some Member States, the fundamental rights of LGBT persons to freedom of assembly and freedom of expression are impeded.
23. Obstacles to asserting these rights have ranged from bans to pride events to a lack of adequate police forces to protect LGBTI people in such events.
24. The European Parliament has taken a strong stance against such limits to fundamental rights through resolutions, including a recent resolution condemning homophobic stands in Lithuania.

The European Union should continue to provide strong leadership to protect these fundamental freedoms and should consider all options as it has done for breaches of other EU fundamental principles such as independence of the central bank and of the judiciary.

10.5. Hate speech, hate crime and violence

25. LGBTI persons are frequently targets of bias crime and the legal frameworks and police competence to deal with such crimes are often inadequate.
26. Underreporting of crime exists, stemming from the fear of reprisals from the victim, and bias crime is rarely disaggregated in statistics, which makes it difficult to tailor policy efforts to LGBTI crime victims.
27. Whilst LGBTI victim's rights are addressed to some extent under the Victims of Crime Directive, there is no clear legislative framework at EU level to address violence against LGBTI in criminal law.

The EU needs a more targeted focus on preventing bias crime against LGBTI persons and on responding effectively and in an individualised manner to their needs where they are victimised.

10.6. Fleeing homophobia and transphobia

28. LGBT asylum seekers face problems in asylum procedures, including in establishing the credibility of their claims and lack of cultural sensitivity and competence from asylum officials. They also experience discrimination in reception and detention centres.
29. The EU Qualification Directive, and its recast, is a positive step since gender related aspects and sexual orientation should now be considered in assessing claims.
30. The proposed Asylum Procedures Directive provides a framework for support to LGBT asylum seekers including ensuring respect to human dignity and integrity. The proposed recast of the Receptions Condition Directive 2003/9/EC refers to gender based violence and vulnerable groups, but does not make an explicit reference to LGBTI persons.

11. RECOMMENDATIONS FOR A ROADMAP

11.1. Recommendation for a roadmap on equality for LGBTI people

KEY FINDINGS

- There is strong evidence to suggest that an EU roadmap on LGBTI rights and equality would provide significant added value by:
 - Improving co-ordination
 - Improving mainstreaming
 - Improving communication of EU policies and actions in the field
 - Establishing long term objectives and actions to establish a strong evidence base and to change social attitudes

In evaluating the necessity for a roadmap on equality for LGBTI people, three factors are considered: the specific nature of LGBTI issues which makes successful action particularly difficult, how the EU is already acting to respond to the array of problems LGBTI people face, and whether the EU's response could be enhanced or be more effective through the establishment of a roadmap. This evaluation should take into account the basic benefits of roadmaps, namely to facilitate the development of policy, ensure effective co-ordination of those policies and actions, and ensure leadership, transparency, accountability and effective follow-up.

Below is described the main difficulties in achieving successful action on LGBTI issues and how a roadmap overcomes such difficulties.

i. Broad nature of discrimination and equality

It is often difficult in policy areas which are very broad in scope and which cut across a range of departmental responsibilities to co-ordinate action and to achieve a comprehensive response. This is the case for equality and anti-discrimination issues. Discrimination can occur at any time, can be committed by individuals or can result from the organisation of enterprises, authorities or processes. It can occur in all competence areas of the EU but will often not be identified as an objective for action in those policy areas. This is why mainstreaming equality can be so difficult and is perhaps why strategies have already been seen as necessary for non-discrimination, equality between men and women, Roma integration, racism and persons with disabilities¹⁷⁵.

In areas where there is limited competence to act, a lack of knowledge of LGBTI issues, or simply a range of other priorities, EU action focused on LGBTI needs is minimal. Areas such as education and health are characteristic of this situation in that there is limited recognition of LGBTI issues within strategic or policy positions despite the significant impact that discrimination in health and education can have on LGBTI people. As such, policy development and research tends to be limited in these sectors.

¹⁷⁵ Non-discrimination and equal opportunities for all - A framework strategy, COM(2005) 224 final; A Roadmap for equality between women and men 2006-2010, COM/2006/0092 final; Strategy for equality between women and men - 2010-2015; Action Plan Against Racism - COM(1998) 183, 25.3.1998; Equal opportunities for people with disabilities - a European Action Plan - COM(2003) 650, 30.10.2003 and the European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final.

In such areas, a roadmap will facilitate mainstreaming, will help identify the most important priorities and ensure these are incorporated into broader priorities of a particular area. It will also assist with the co-ordination of policies between different sectors. This is commonly required for equality issues where one department may be responsible for the overall agenda but is reliant on specific DGs to carry out detailed action.

In addition, it can often be difficult for LGBTI people or the wider community to find out where and how the EU is acting in this area. In effect they must work through each policy area individually to piece together a single picture. Likewise, it is difficult for the EU to communicate to its citizens its policies and priorities and how it has acted. A roadmap can serve as an important tool for communication and understanding.

ii. Sensitivity of some LGBTI issues

The development of policy in the LGBTI area is further complicated due to its often sensitive nature in Member States and in society. Whilst views are uniformly against all forms of gender discrimination or racism for example, such uniformity does not exist in the LGBTI field.

The achievement of full equality for such persons cuts across deep seated, philosophical and religious convictions about the notion of gender, the make-up of families and the institution of marriage, to name but a few of the most sensitive areas. This can make progress slow, can require the resolution of complex legal problems or the restructuring of administrative systems such as those relating to civil status and identity. It can result in staunch opposition to action and blockages due to widely divergent views.

Thus in areas such as rights of the family, reunification, or civil status, the question of LGBTI rights and equality can be highly sensitive and in some cases raise complex legal issues. In such areas, even where there is a clear legal basis, any EU action requires careful consideration and a strong evidence base, to avoid becoming blocked in the adoption process.

A long term or staged approach may be necessary especially when some issues such as gender identity are still relatively new. A roadmap can facilitate the determination of long term objectives and ensure sufficient research is carried out to identify what action to take. This will assist the EU in providing strong leadership in its role as protector of fundamental rights whilst achieving a balance with other fundamental rights and meeting core EU principles such as subsidiarity and proportionality.

iii. Real change on LGBTI issues requires prolonged and concerted action

To resolve the vast majority of problems faced by LGBTI people, individuals, society, organisations and authorities must stop regarding their differences as factors which require differential treatment. Whilst this seems self evident, such shifts in attitude cannot be achieved through one-off, short term action, nor through legislation alone. As discussed above, in some areas a change of views of some groups may simply not be possible.

In sectors where relevant EU legislation is in place, such as employment, the primary problem is the lack of effective implementation of rules and the translation of law into practice. Indeed, as the Commission has recognised in the gender equality strategy:

"it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups. Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities. The EU's experience in the field of gender equality strongly suggests that protection of individual rights must be backed

up by accompanying measures in order to bring about lasting change and to promote genuine equal opportunities for all.”¹⁷⁶

For these areas, a roadmap will facilitate the development of a coherent and long term plan of action. In areas where strategies already exist, it has resulted in the development of indicators to assess whether objectives are being met, and monitoring of the achievement of objectives. Given continuing problems in spite of legislation, there are strong arguments that real change will only be achieved through similar activities.

Furthermore, in all areas EU action through funding programmes can pay for on-the-ground projects, provide direct assistance and develop important tools such as training and guidelines to help prevent discrimination and to respond to it where it does occur. This funding can be a powerful tool in securing change. Yet there is little or no co-ordination between the array of funding programmes on how they might contribute to combating specific LGBTI problems and there is often little to indicate to the LGBTI community that a funding programme might be relevant to their project. A roadmap can facilitate greater co-ordination in this area and forward planning of multi-annual frameworks and annual work programmes. It can help raise the awareness of officials responsible for equality matters of possible programmes and when their specific input is required. It can also help officials of those programmes to be aware of LGBTI issues when preparing future programmes.

In conclusion, the problems faced by LGBTI people cut across numerous sectors making the development of a coherent policy and co-ordinating the relevant actors particularly difficult. The extent of EU competence to act varies and real change can often only be achieved through prolonged action focusing in particular on a shift in cultural attitudes. This necessitates the co-ordinated use of legislation, recommendations, guidelines and other practical measures to fully implement objectives.

11.2. Recommendation for general content of a roadmap and implementation

Whilst a number of specific recommendations are made below on actions that would be useful to include in a roadmap, it is not possible within the remit of this study to carry out a comprehensive assessment of appropriate actions in each sector. However, to facilitate the development of a roadmap, some of the key issues or mechanisms that should be contained in a roadmap are discussed.

i. Development of strategic priorities and core themes

Given the range of difficulties in implementing policy in this field, it is recommended that a roadmap on LGBTI issues takes a strategic approach by identifying core themes or priorities and determining appropriate actions within those areas. The specific sectors discussed in this study and which are taken from existing approaches of the Council of Europe and the Fundamental Rights Agency could provide a starting point.

ii. Research and data collection

It is evident that there is a significant lack of data and research on the problems facing LGBTI people, the scale of those problems, the impacts of the problems and the ways in which those problems are being addressed. Such information is crucial to developing appropriate policy and prioritising action.

¹⁷⁶ COM(2005) 224 final, p6.

A roadmap should clearly identify priority areas for research and establish actions for how that research should be implemented and when. The roadmap would most usefully do this through a rolling programme of priorities, which could be incorporated within annual and multi-annual funding programmes, through tendering procedures of the European Commission and European Parliament and through inclusion in the Fundamental Rights Agency's programme of work as well as through the work of other EU agencies and legal networks.

iii. Co-ordinated and targeted use of funding programmes and effective follow up

Practical measures are fundamental to securing change in this area. The EU can and does make a significant contribution to local, national and international activities. However, organisations are not always aware of the possibility of using funding programmes. There could also be greater co-ordination in the development of priorities for those programmes with respect to cross cutting issues such as equality and with respect to specific issues such as the situation of LGBTI people. This would help ensure that the most important LGBTI issues are reflected within the most appropriate programmes and that LGBTI issues do not consistently lose out to "higher" priorities.

A roadmap could be used to establish the process by which such programmes might be co-ordinated. The timing of this process would need to match the pre-existing schedule for negotiating work and funding programmes.

iv. Recommendations, guidelines and manuals

These forms of action can be particularly important for the development of best practice and its dissemination. They can also result in much greater uniformity in action which helps reduce the potentially negative impacts for LGBTI people of moving across borders. In addition, recommendations provide an important opportunity for setting out policy objectives and providing EU leadership.

A roadmap could identify specific issues where recommendations, guidelines and manuals would be of greatest benefit, and the timing for the adoption of such instruments. A roadmap could also identify the necessary steps to adopting such tools, such as public consultations, establishment of specialist expert groups etc.

v. Use of peer review, Open Method of Coordination (OMC), improvement of networks and other forms of co-operation between Member States and stakeholders

In a number of areas the EU has limited competence to act. At the same time, successful implementation of EU legislation requires the application of a range of mechanisms. Exchange of best practice, development of EU wide agreements and an increase in awareness of different approaches can all result from the use of a range of methods such as peer review, or Open Method of Coordination.

A roadmap could envisage the establishment of LGBTI focused methods of co-ordination and where appropriate could identify specific sectors where such co-ordination would be used.

vi. Targeted training and capacity-building actions

Achieving any significant reduction in discrimination against LGBTI people requires a change in attitudes. An important mechanism for achieving this change is through the training of those people coming into contact with LGBTI people largely in a professional capacity, such as specialised equality bodies, judges, lawyers, NGOs, health care

professionals, teachers and others in educational establishments. In addition, the provision of training in the workplace as part of wider gender equality training can be an important means to change.

A roadmap could establish specific training targets or a programme of actions to identify best practice in training methodology, help develop training materials etc. A sectoral, role practitioner-based or cross-cutting approach could be taken.

vii. Awareness-raising and dissemination of information

Diverse policies and laws exist. LGBTI people can be discriminated against in a wide range of ways and in some cases, there is a relatively new understanding of situations such as gender identity. All these factors make it difficult for individuals and organisations to know and understand about the vast range of LGBTI issues and rights. Awareness raising of these issues can be an important means of achieving change, yet awareness raising can be notoriously difficult to implement successfully.

A roadmap could foresee a programme of activities, both new and supporting or supplementing existing ones, to increase awareness of LGBTI rights and issues amongst the general population and the LGBTI community itself. New and innovative approaches should be considered and developed, along with a variable approach focusing action not just at the international level but also at the local level and within organisations where it can often have the most impact. Awareness raising activities could also foresee opening dialogue between groups having opposing views such as between religious groups and LGBTI organisations, with a view to finding ways to balance fundamental rights and encourage tolerance within that framework.

viii. Legislation, preparatory acts and follow up

At times legislative action can be the most appropriate and necessary step to establish basic rights. However, action in the LGBTI arena can be controversial and can therefore require a much greater evidence base and development of policy in order to ensure successful proposals and eventual adoption of EU legislation. In addition, it is not uncommon for there to be a lack of follow up or insufficient or unco-ordinated follow up to legislation. This greatly weakens the impact of EU legislation, increases the likelihood the Member States will not correctly implement measures the first time round, and lengthens the period it takes for LGBTI people to have access to their rights.

A roadmap could be used to identify areas where legislative action might be appropriate or needed and to instigate the process by which sufficient evidence will be available to determine the most effective course of action.

Where legislation is already in place or is planned, a roadmap can be used to develop a programme of follow up measures. These should be split between immediate follow up action on adoption of legislation. Immediate action might include the development of guidelines or recommendations on implementation and on the interpretation of provisions of the legislation. It may include additional funding to identify and develop best practice. It could also include specific capacity building exercises carried out by the European Commission in Member States. Action following the implementation deadline should also be taken, as is usually the case, to assess implementation by Member States. However, this should be followed up by an assessment of areas where particular problems are identified. This would facilitate the development of additional measures, beyond enforcement, to support correct implementation and to determine where new legislative action should take place. This process will effectively complete the policy making cycle.

ix. Development of “success” criteria/ indicators and monitoring of progress

Development and implementation of roadmaps and strategies are most successful when accompanied by an effective oversight and monitoring framework. Without these, roadmaps often do not achieve their objectives and are eventually simply left aside.

It is therefore recommended that a roadmap on LGBTI issues should be accompanied by the setting up of a high level group (whether through the extension of the remit of an existing group or through the setting up of a new one) to oversee the implementation of the roadmap. Sub-groups specialising in thematic areas are also likely to be necessary. This could be established to facilitate the identification of priorities and agree on timings. It could also be used for monitoring progress in the achievement of objectives and for developing new actions.

The determination of priorities and monitoring can only be effectively achieved when clear targets and indicators are established. These indicators provide a benchmark by which it can be determined in an objective manner whether the rights of LGBTI people are being met and whether discrimination is being acted against.

This requirement is already well recognised and processes are in place to develop indicators in most areas such as through the Gender Equality Index being developed by the European Institute for Gender Equality or the indicators on disability discrimination as developed by the Academic Network of Experts on Disability. Similarly, ILGA-Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, has developed a Rainbow Europe index which rates each European country’s laws and administrative practices according to 42 categories and ranks them on a scale between 30 (highest score: respect of human rights and full legal equality of LGBT people) and -12 (lowest score: gross violations of human rights and discrimination of LGBT people).

A roadmap should thus envisage the development of EU wide accepted indicators in the LGBTI field.

To ensure effective monitoring and following up, a biennial report on the situation of LGBTI persons should be presented by the European Commission detailing progress towards equality and the protection of LGBTI people and the main challenges and priorities for the future.

Beyond these broad recommendations for the content of an LGBTI roadmap, the following sections focus on specific findings and recommendations in each relevant thematic area.

11.3. Recommendations on equality and access

11.3.1. Horizontal issues

1. One key reason for the blockage of the proposed anti-discrimination Directive relates to a lack of legal certainty concerning the scope of some provisions and associated costs, though such concerns appear largely focused on disability issues. A clear process should be instigated to verify potential costs and benefits and to identify a range of options which may make implementation proportionate and feasible. These could include a sectoral or thematic approach, variable implementation deadlines, certain limitations in the most problematic areas

accompanied by a review clause to ensure such matters are re-examined within a certain period of time.

2. The EU should encourage a consistent approach to discrimination against transgender persons by ensuring that transgender discrimination is referred to in EU anti-discrimination measures. In particular, "gender identity" should be expressly included among the prohibited grounds of discrimination in any future equality legislation including any recasts.
3. The Treaty on the Functioning of the European Union places an obligation on the EU to actively mainstream equality in its work and activities (TFEU Art 10). The Commission should take steps similar to those identified in its Communication on Actions to implement the Strategy for Equality between Women and Men 2010-2015¹⁷⁷ to ensure that equality for LGBTI persons is taken into account in policy areas in accordance with the mainstreaming obligations under Article 10 of the TFEU.

11.3.2. Employment

Discrimination in the workplace

4. As with other areas such as discrimination against persons with disabilities, it is recommended that the Commission establish clear indicators on the type of actions necessary to prevent discrimination. Such actions should be focused both on preventative measures to avoid discrimination in the first place and measures to ensure effective response to discrimination where it does occur. Such indicators could be developed for example through specific funding to the European network of legal experts in the non-discrimination field. This approach has been taken with respect to indicators on disability discrimination which are being developed by the Academic Network of European Disability experts.
5. The Commission should establish a concerted and prolonged programme of activities to support Member States actions in changing discriminatory attitudes against LGBTI persons in the workplace and to respond to discrimination. This programme could be established through the next multi-annual framework and could be achieved through a combination tenders and calls for proposals. Projects could cover, inter alia, main drivers of discriminatory attitudes and best practices to change such attitudes. On this basis the programme could establish EU wide guidelines on how to prevent discrimination through training and awareness and how to respond to such discrimination when it does occur. Any programme should consider approaches to increase employer involvement in the development of solutions. The European Parliament should consider how to co-ordinate its funding streams with any established programme to facilitate implementation of that programme.
6. Monitoring of the implementation of the Equality Directives by the Commission should include a specific LGBTI focus and should be carried out on a regular and continuous basis.

Monitoring already occurs to some extent, through for example the European Network of Legal Experts in the field of Gender Equality. However, such monitoring tends not to examine specific LGBTI issues since the focus is on discrimination against women. The Network could either be asked to specifically consider LGBTI issues in general monitoring or through specific projects. Equally, the European

¹⁷⁷ Commission Staff Working Document, Actions to implement the Strategy for Equality between Women and Men 2010-2015, SEC(2010) 1079/2

Institute for Gender Equality plays an important data gathering role. Its remit could specifically be extended to focus on LGBTI issues. In the alternative, such monitoring issues could be carried out by the European Network of Legal Experts in the Non-Discrimination Field. They already carry out this work to some extent, but LGBTI issues are not dealt with on a systemic or focused basis.

7. Data on the prevalence of discrimination should be collected to facilitate evidence-based policy making. In particular studies could examine legal implementation, practical measures and how implementation occurs in reality. This could be determined through specific surveys of LGBTI people.

Applying transgender rights

8. The Commission and Member States should ensure that equality bodies are aware of their responsibilities towards transgender persons. This could be achieved through bilateral meetings with those bodies or through EU wide meetings and conferences. The Commission could also encourage Member States to liaise with equality bodies on this issue as well as establishing position papers.
9. Commission implementation reports should examine how the rights of transsexuals and intersex persons are protected under Directive 2006/54/EC, including whether equality bodies cover such persons.

11.3.3. Education

Greater inclusion for LGBTI persons in education

10. While national curricula and textbooks remain under the sole responsibility of Member States, DG Education and Culture (DG EAC) can nonetheless propose peer-learning between Member States on addressing LGBTI issues through sex and relationship education on the one hand and civic and human rights education on the other hand. It can also promote existing good practice tools and facilitate sharing of materials among schools and Member States. In addition, it can encourage Member States to share their good practices on combating gender stereotypes within schools.

Addressing discrimination in education (including bullying)

11. The Commission could encourage Member States through the Open Method of Coordination (OMC)¹⁷⁸ (development of common principles, exchange of good practices, joint initiatives etc) to facilitate LGBTI anti-discrimination policy development in the field of education. For example, the peer learning themes/clusters and groups could focus on concrete issues such as early school leaving and bullying of LGBTI students including through mediation and restorative justice, emphasising anti-bullying policy development and teacher training programmes which extend the notion of teaching effectively in culturally diverse settings to LGBTI issues. They could also develop best practice approaches in implementing school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Themes and targets for addressing the needs of LGBTI students could be identified for two years, with comprehensive reform plans delivered to the Commission within this period.

12. The European Commission could fund LGBTI specific projects through its Lifelong

¹⁷⁸ The OMC provides a framework for cooperation between the Member States. Under this intergovernmental method, the Member States are evaluated by one another (peer pressure), with the Commission's role being limited to surveillance. It is based principally on jointly identifying and defining objectives to be achieved (adopted by the Council); jointly established measuring instruments (statistics, indicators, guidelines); benchmarking, i.e. comparison of the Member States' performance and exchange of best practices (monitored by the Commission).

Learning Programme (LLP). Under the 2007-2013 Lifelong Learning Programme, the programme has funded study visits and networking activities for students, teachers and other actors in education and training, including a European Workshop for Adult Learners on Anti-discrimination and Diversity (8 December 2009)¹⁷⁹.

13. Teaching tools that promote human rights and respect of sexual orientation and gender identity could be disseminated at both national level and European level. The Council of Europe's COMPASS manual and its upcoming revision with a focus on gender are examples of comprehensive materials to promote inclusive education.
14. Guidelines should be developed at EU level on preventing and responding to discrimination against LGBTI people in education and to improving inclusion of such people. For example, the International LGBTQ Youth and Student Organisation (IGLYO) and the Organising Bureau of European School Students Unions (OBESSU) have developed Guidelines for LGBTQ Inclusive Education, highlighting ten areas for improvement, which includes curriculum development, anti-bullying policies, and access to information and support¹⁸⁰.

11.3.4. Health

Mental health and stigmatisation of LGBTI people in healthcare

15. An EU roadmap should include a clear objective to establish a policy framework to address LGBTI issues in health and the Commission should undertake a process to adopt such a framework as soon as possible.
16. LGBTI health issues or at least vulnerabilities could be recognised within wider strategic health policy papers particularly around access to health care, equity and the EU's voice in global health. The inclusion of LGBTI issues should be examined within any new strategic approach following the Commission's white paper Together for Health: A Strategic Approach for the EU 2008-2013.
17. EU health policies on LGBTI persons should address the need to change attitudes and remove existing stigmatising attitudes as well as promote further research on specific LGBTI health issues. This could be achieved in particular through support to Member States in the training of health care professionals and medical staff in acceptance and sensitivity towards LGBTI persons and through the development of best practice.
18. In this respect, it is recommended that the EU examine ways to provide leadership on the issues of designation of gender identity issues and disorders. The EU should consider how to use its partnership role with the WHO to advise and influence the on-going revision (expected to be finalised in 2015) of the WHO's 11th international classification of diseases. The EU should at least raise awareness amongst practitioners and relevant parties that the revision process is open to comments from all persons including individuals, NGOs and States. The EU should also emphasise that any future change in classification should not affect treatment currently afforded to transgender persons.

¹⁷⁹ Available at: http://www.lgbt-education.info/en/news/local_news/news?id=410).

¹⁸⁰ IGLYO and OBESSU, 'Guidelines for LGBTQ Inclusive Education', 2007.

19. The EU should support, in particular through appropriate funding programmes, the development of facilities or services specifically addressing health-related needs of LGBTI persons in order to provide support and information¹⁸¹.

Privacy and confidentiality

20. The Commission should assess compliance of the Data Protection Directive (95/46/EC), with respect to the circulation of personal health data by any individual or institution (schools, employers, healthcare professionals etc) without informed consent.
21. Given that medical ethics impose a duty of confidentiality and the case-law of the European Court of Human Rights (*Z v. Finland*, 25 February 1997, no 22009/93) which stated that a breach of confidentiality has an impact on confidence in the health system and seeking of assistance, the EU should encourage Member States to share good practices aiming at ensuring confidentiality in the field of healthcare including to avoid or prevent forced unconsensual outings.

11.3.5. Goods and services and housing

22. Implementation reports for the Gender Goods and Services Directive should have a specific focus on the application of the rights to trans persons.

11.4. Trans and intersex issues

23. It is recommended that an EU roadmap includes the objective of establishing a clear EU policy position that gender identity is recognised within the notion of gender discrimination. In implementing this policy, 'gender identity', 'gender expression' and protection concerning discrimination against intersex people should be made explicit in relevant new or amending EU legislation.
24. Clear objectives and targets should be established to specifically reduce discrimination against trans and intersex people. These objectives should take into account broader actions aimed at all LGBTI persons to ensure coherence between policies.
25. Actions, such as studies and direct funding of projects, should carry out more detailed research on problems faced by transgender people, their impacts, and best practice, in particular with respect to procedures for gender reassignment and recognition of gender change.
26. Actions should also be carried out to increase awareness of transgender issues and responsibilities toward transgender persons, in particular amongst health professionals and equality bodies.
27. Transgender persons could also be supported in gaining information and exercising their rights. This can be achieved through a range of means including the development of guidelines.

¹⁸¹ Council of Europe, 'Study on Discrimination against lesbian and bisexual women and girls and transgender persons – 2011', p. 54; available at: http://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/gender-equality/CDEG_2011_18_LGBT_rev_en.pdf.

28. Transsexuals and intersex persons' rights should be mainstreamed in targeted areas and in EU policy focused on gender, following similar approaches to those adopted in the Gender Equality Strategy.

11.5. Diverse families and freedom of movement

Civil status

29. The Commission's proposal for the recognition of the effects of civil status records planned for 2013 should ensure that same-sex couples are not discriminated in the recognition of the effects linked to these documents.

Family Reunification

30. The Commission should assess and publish information on the extent to which Article 4(3) of the Family Reunification Directive has been applied by Member States and the impact this has had on family reunification.
31. Further evidence should be gathered to understand how LGBTI persons are prevented from joining their families to determine what future EU action should be taken. This could be carried out by the Commission directly, through the funding of further projects, actions via EU Agencies such as the FRA or EU legal networks.
32. The Commission should promote wider recognition of same-sex partnerships in the application of Article 4(3) of the Family Reunification Directive, and identify best practices.

11.6. Freedom of assembly and expression

33. The EU should maintain a unified position against violations of freedom of assembly and expression for LGBTI persons and should consider all options as it has done for breaches of other EU fundamental principles such as independence of the central bank and of the judiciary.

11.7. Hate speech, hate crime and violence

Monitoring of implementation of Victim's Rights Directive

34. The Victim's Rights Directive was adopted on 4 October 2012 and will need to be transposed by October 2015. Any assistance provided to Member States in the implementation by the Commission, for example through the development of best practices, guidelines and implementation seminars, should include a focus on LGBTI issues. The Commission should also mainstream LGBTI issues in implementation reports.

Hate speech/hate crime legislation

35. The European Commission, as part of its assessment of the implementation of the Framework Decision 2008/913/JHA on hate speech and hate crime should also examine gaps in the legal protection of LGBTI victims of bias crime.
36. Any review of the existing Framework Decision, whether by the Council or the Commission, should take into account the need to extend the scope of the legislation to cover bias crimes on the grounds of sexual orientation and gender identity/expression.

37. In the case the Framework Decision will not be reviewed or amended, the feasibility of separate legislation to protect against other forms of bias crime not covered by the Framework Decision should be examined by the Commission.

Police training

38. Police and other executive personnel should be educated and trained to support and respond to persons concerned in an accepting and sensitive way to build up a trustful setting that enables LGBTI victims to confide in them¹⁸². The European Police College (CEPOL), which is a network of national training institutes for police officers, proposes common training curricula for police forces in Europe. The Commission should support the adoption by CEPOL of a common curriculum on discriminatory violence, and integrate LGBT issues into this curriculum.
39. The role of the FRA in training and promoting good practices in the area of crime victims, police and judicial cooperation and mainstreaming of human rights should be reinforced. This is already apparent in the FRA annual programme for 2013, and the FRA should maintain this focus in future annual work programmes.
40. In 2013 the FRA will publish results of the LGBTI survey and linked research on views and perceptions of authorities including law enforcement of homophobia and transphobia. These results should be disseminated to a wide public.
41. In 2013, the FRA will develop two handbooks for practitioners and authorities working in the area of violence against women; these will consist of a 'European Handbook for Victims of Violence', and a 'European Handbook for the Police'. The FRA should ensure that these results are disseminated as widely as possible, including through the FRANET network.

Data collection and research

42. Member States should be encouraged to ensure that relevant quantitative data in the form of regular surveys and official data recorded by authorities are gathered and analysed. This will help monitor the extent and nature of discrimination on the grounds of sexual orientation or gender identity, and criminal victimisation¹⁸³. European data developed on the basis of shared indicators could be collected by the Fundamental Rights Agency, building on the FRA 2012 LGBT survey.
43. Inter-service dialogue and action plans on hate-motivated violence should be promoted and should involve the police, local authorities, schools, university, health authorities and the LGBT community. Such action plans should also focus on long-term and sustainable measures¹⁸⁴.

11.8. Fleeing homophobia and transphobia

Amendments to proposed directives

44. In the on-going negotiations on the recast of the Asylums Procedures Directive (2005/85/EC) it should be made explicit that asylum seekers persecuted on the basis of their sexual orientation or gender identity can be asylum seekers in need of special procedural guarantees. The identification process of such special needs

¹⁸² European Union Agency for Fundamental Rights, 'Homophobia, transphobia and Discrimination on the Grounds of Sexual Orientation and Gender Identity in the European Union Member States: Part II—the Social Situation', 2011, p. 14.

¹⁸³ Ibid.

¹⁸⁴ Fundamental Rights Agency, 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States', 2011.

should be correctly defined and include the obligation for asylum authorities to take into consideration information on such needs when it becomes apparent at a later stage of the procedure. Training of the relevant personnel should be made adequate on such issues.

45. In the negotiations of the recast of the Reception Conditions Directive (2003/9/EC), the Council and European Parliament should pay particular attention that the identification process of asylum seekers with special reception needs are adequately defined. Protection from all forms of bias violence, including homophobic and transphobic violence, should be made an obligation.
46. In future amendments of asylum law instruments, the Commission should consider the feasibility of making obligatory an extended definition of family members of the asylum seekers which includes all unmarried and registered partners as well as their children.
47. Where instruments have an option to include unmarried and registered partners in the definition of family member, Member States should be encouraged to adopt that definition. This could be carried out by the Commission and the European Parliament through for example research, guidelines, recommendations and resolutions.

Monitoring of Directives

48. By 21 June 2015, the Commission shall report to the European Parliament and the Council on the application of the recast Qualifications Directive and shall propose any amendments that are necessary. In the preparation of this report, the Commission should take into account how gender related aspects are given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group (in accordance with Article 10).
49. The Commission should monitor the adoption of the Asylum Procedures Directive and the Reception Conditions Directives and take into account their application with regard to LGBTI asylum seekers. Commission implementation reports should include a focus on LGBTI issues.

Role of the European Asylum Support Office

50. The European Asylum Support Office, in its development of material to assist Member States, should facilitate the understanding and proper handling of cases raising issues of sexual orientation and gender identity.¹⁸⁵ It should ensure that country of origin reports contains information on treatment of sexual orientation and gender identity.
51. The EASO should also mainstream LGBTI asylum related issues in their work on training modules, specifically in the modules developed in the frame of the European Asylum Curriculum (EAC). The EAC is a co-operation between the Swedish, Dutch, Czech and Spanish Immigration Services with the Odysseus Academic Network to create a European Asylum Curriculum (EAC) for common vocational training of employees of the Immigration Services in the EU. Their annual programme contains modules on procedures, interview techniques (including interviewing vulnerable persons), and evidence assessment. The EAC should ensure that annual programmes mainstream LGBTI issues in these modules.

¹⁸⁵ Ibid.

52. The EASO should define the way NGO information can feed into their methodology for the elaboration of country or thematic reports. It should also mainstream the issue of LGBTI related persecutions in all its country reports.

12. PROPOSED ROADMAP MEASURES AND TIMELINE

While the section above identifies the content of a possible roadmap in a narrative approach, this section synthesizes the above 52 recommendations in the same thematic approach and identifies outcomes, actors, and timeframes for achieving the recommendations. It also synthesizes the horizontal recommendations discussed at the start of chapter 11.

The table uses an annual timeframe for the proposed recommendations to address the issues and challenges faced by LGBTI people in the EU. Where relevant or possible, the timeframes are linked to already established EU agendas and schedules.

2.1 Horizontal

No	Recommendation
1.	<p>An EU Roadmap on LGBTI rights and equality should be adopted by the European Commission</p> <p>The Roadmap should be aimed at improving co-ordination, mainstreaming, communication on policies, transparency, and establishing long term objectives and actions.</p> <p>Strong evidence on the need for a roadmap and the likelihood that without such a roadmap, action on LGBTI rights in a range of areas will be slow or ineffective suggest that the process to develop a roadmap should begin as soon as possible.</p>
2.	<p>An EU roadmap should include the following broad actions or themes</p> <ul style="list-style-type: none"> a) Core themes or priorities should identified and appropriate actions within those areas determined b) identify priority areas for research and establish actions for how and when research should be implemented c) Establish a process to improve co-ordination of LGBTI priorities in EU funding programmes d) identify specific issues where recommendations, guidelines and manuals would be of greatest benefit; identify necessary steps to adopting such tools, such as public consultations, establishment of specialist expert groups e) Actions where EU has limited competence should be achieved through use of peer review, Open Method of Co-ordination (OMC), improvement of networks and other forms of co-operation between Member States and stakeholders f) establish specific training targets or a programme of actions to identify best practice in training methodology, help develop training materials etc. A sectoral, role/ practitioner based or cross cutting approach could be taken. g) establish a programme of activities, both new and supporting or supplementing existing ones, to increase awareness of LGBTI rights and issues amongst the general population and the LGBTI community itself. h) identify areas where legislative action might be appropriate or needed and to instigate the process by which sufficient evidence will be available to determine the most effective course of action i) develop a programme of follow up measures to existing legislation to assist in implementation, monitor implementation and improve approaches and to identify gaps in legislation which require resolution j) setting up of a high level group (whether through the extension of the remit of an existing group or through the setting up of a new one) to oversee the implementation of the roadmap.

k) development of EU wide accepted indicators in the LGBTI field to determine in an objective manner whether the rights of LGBTI people are being met and whether discrimination is being acted against
 a biennial report on the situation of LGBTI persons should be presented by the European Commission detailing progress towards equality and the protection of LGBTI people and the main challenges and priorities for the future.

2.2 Equality and Access

Horizontal Issues				
No	Recommendation	Output/theme/ mechanism	Who	When
1.	Instigate process to verify potential costs and benefits and to identify a range of options which may make implementation proportionate and feasible.	These could include a sectoral or thematic approach, variable implementation deadlines, certain limitations in the most problematic areas accompanied by a review clause to ensure such matters are re-examined within a certain period of time.	Commission/ European Parliament	2013
2.	Encourage a consistent approach to discrimination against transgender persons	Ensure that transgender discrimination is referred to in EU anti-discrimination measures in line with jurisprudence from the CJEU.	Commission/ European Parliament	Ongoing
3.	Ensure that equality for LGBTI persons is taken into account in policy areas in accordance with mainstreaming obligations.	Carry out similar actions to those in the Communication on Actions to implement the Strategy for Equality between Women and Men 2010-2015 ¹⁸⁶	Commission	Ongoing
Employment				
No	Recommendation	Output/theme/ mechanism	Who	When
4.	Establish clear indicators on the type of actions necessary to prevent discrimination	Developed for example through specific funding to the European network of legal experts in the non-discrimination field.	Commission	2013 - 2014 In line with annual work programme of legal network
5.	Establish a concerted and prolonged programme of activities to support Member States actions in changing discriminatory attitudes against LGBTI persons	Could be established through the next multi-annual framework and could be achieved through a combination tenders and calls for proposals. Could establish EU wide guidelines on how to prevent and respond to discrimination including through training and awareness.	Commission	2013 and 2014-2020 In line with annual and multi-annual programmes
6.	Monitoring of Equality Directives should have a specific LGBTI focus and should be carried out on regular and continuous basis	Some monitoring already carried out by legal networks. They could have a more LGBTI focus however.	Commission	2013, ongoing
7.	Data on the prevalence of discrimination should be collected to facilitate evidence based policy making		Commission, FRA, EIGE, European Networks	2013 and 2014-2020 In line with annual and multi-annual

¹⁸⁶ Commission Staff Working Document, Actions to implement the Strategy for Equality between Women and Men 2010-2015, SEC(2010) 1079/2

				programmes
8.	Equality bodies are informed of their responsibilities towards transgender persons	bilateral meetings with equality bodies, EU wide meetings and conferences, encourage Member States to liaise with equality bodies and civil society organisations.		2013 Relatively straightforward to implement
9.	implementation reports should examine how the rights of transsexuals and intersex persons are protected under Directive 2006/54/EC, including whether equality bodies cover such persons	Implementation reports	Commission	Ongoing , in line with report scheduling
Education				
10.	Address LGBTI issues through sex and relationship education and civic and human rights education.	Use of peer-learning between Member States Peer learning can promote good practice, for example on combating gender stereotypes within schools, and facilitate sharing of materials among schools and Member States.	DG Education and Culture (DG EAC)	Commencing in 2013, ongoing
11.	Facilitate LGBTI anti-discrimination policy development	Encourage Member States to use Open Method of Coordination (OMC) Focus on early school leaving and bullying of LGBTI students, anti-bullying policy development and teacher training programmes. 2 year themes and targets to be established with comprehensive reform plans delivered to the Commission.	Commission	Commencing in 2013, ongoing
12.	Specific funding for LGBTI specific projects through the Lifelong Learning Programme (LLP).	Ensure that the thematic issues receive funding through LLP; also that the next funding envelop that replaces LLP includes LGBTI specific projects.	Commission	2013 (annual work programme) 2014-2019 ? (life long learning programme ends 2013)
13.	Dissemination of teaching tools that promote human rights and respect of sexual orientation and gender identity.			Ongoing
14.	Develop guidelines on preventing and responding to discrimination against LGBTI people and to improving inclusion of such people.	See e.g. Guidelines for LGBTQ Inclusive Education. While many national contexts contain good practices, EU-wide guidelines can take time to develop. Discrimination in education has a significant impact on LGBTI youth, as well as peers, and should be addressed as a priority.		Ongoing
Health				
15.	Establish a clear objectives to develop a policy framework to address LGBTI issues in health	Clear process to be established to adopt the policy framework Without a clear policy framework, it is difficult to progress effectively in this area. This should be regarded as a precursor action and therefore a priority.	Commission	Ongoing

16.	Recognition of LGBTI health issues in wider strategic health policy papers.	The inclusion of LGBTI issues should be examined within any new strategic approach following the Commission's white paper Together for Health: A Strategic Approach for the EU 2008-2013. Specific focus needed on access to health care, equity and the EU's voice in global health. Similarly, the next strategy should include LGBTI-specific issues.	Commission	Ongoing Together for Health Strategy runs until 2013
17.	EU health policies to focus on cultural changes to remove stigmatisation	Support to be provided to Member States in the training of health care professionals and medical staff in acceptance and sensitivity towards LGBTI persons and through the development of best practice.	Commission	Ongoing Dependant on when policies are updated.
18.	EU to press for changes to designation of gender identity issues as disorders.	Possible use of partnership role with the WHO to advise and influence the on-going revision the WHO's 11 th international classification of diseases. Carry out awareness raising of the issues and encourage participation in the WHO consultation process.	Commission, European Parliament, Member States, NGOs and individuals	2013-2015 (final version of ICD 11 to be released 2015)
19.	Support development of facilities or services specifically addressing health-related needs of LGBTI persons in order to provide support and information	Funding programmes can play an important role in supporting services or relevant projects.	Commission, European Parliament,	2013 and 2014-2020 In line with annual and multi-annual funding programmes
20.	Assess Member State compliance with the data protection directive with respect to the circulation of personal health data by any individual or institution without informed consent.	Implementation report	Commission	2013-2014
21.	Share good practices on confidentiality in healthcare including to avoid or prevent forced unconsensual outings		Member States	Ongoing
Goods, Services and Housing				
22.	Implementation reports for Gender Goods and Services Directive should have a specific focus on the application of the rights to trans persons		Commission	Ongoing

2.3 Trans and intersex issues

No	Recommendation	Output/theme/ mechanism	Who	When
23.	Establish a clear EU policy position that gender identity is recognised within the notion of gender discrimination.	gender identity', 'gender expression' and protection against discrimination against intersex people should be made explicit in relevant new or amending EU legislation.	Commission, Parliament	Ongoing
24.	Clear objectives and targets should be established to specifically reduce discrimination against trans and intersex people.	Objectives should take into account broader actions aimed at all LGBTI persons to ensure coherence between policies.	Commission	2013
25.	Detailed research on problems faced by transgender people, their impacts, and best practice to be carried out, in particular with respect to procedures for gender reassignment and recognition of gender change.	e.g. through funding of projects and research	Commission, European Parliament, FRA, EIGE, and EU networks	2013 and 2014-2020 In line with annual and multi-annual funding programmes
26.	Awareness raising of transgender issues and responsibilities toward transgender persons in particular amongst health professionals and equality bodies to be carried out.	Actions need to be carried out an EU, national, regional and local level. This could be through conferences, publications, online campaigns, roadshows, funding of documentaries etc.	Commission, European Parliament, Member States	Ongoing
27.	Empowerment of transgender persons in exercising their rights.	This can be achieved through a range of means including research, development of guidelines, EU recommendations and communications and the establishment of facilities or services specialising in transgender issues		Ongoing
28.	Transsexuals and intersex persons' rights should be mainstreamed in targeted areas	Similar approaches to those used in the Gender Equality Strategy should be adopted.		Ongoing

2.4 Diverse families – freedom of movement and recognition

No	Recommendation	Output/theme/ mechanism	Who	When
29.	The Commission's proposal for the recognition of the effects of civil status records should ensure that same-sex couples are not discriminated in the recognition of the effects linked to these documents.	Legislative proposal	Commission	2013
30.	Information should be published on the extent to which Article 4(3) of the Family Reunification Directive has been applied by MS.	Commission reports	Commission	Ongoing, dependent on report scheduling
31.	Further evidence should be gathered to understand how LGBTI persons are prevented from joining their families.	Commission report, EU funded projects or studies	Commission, FRA, EU legal networks	2013-2014
32.	Wider recognition of same-sex partnerships should be promoted in the application of Article 4(3) of the Family Reunification Directive	Commission guidelines to Member States, implementation seminars	Commission	Ongoing

2.5 Freedom of assembly and expression

No	Recommendation	Output/theme/ mechanism	Who	When
33.	The EU should maintain a unified position against violations of freedom of assembly and expression for LGBTI persons.	European Parliament Resolutions; Council Recommendations;	European Parliament, Commission	Ongoing

2.6 Hate speech, hate crime and violence

No	Recommendation	Output/theme/ mechanism	Who	When
34.	Implementation assistance on the 2012 Victims of crime Directive should include a focus on LGBTI rights	Assistance could be achieved through the development of best practice, guidelines, implementation seminars, surveys and research	Commission, European Parliament	2013-2015 (based on transposition date of 2015)
35.	Gaps in the legal protection of LGBTI victims of bias crime should be examined	Analysis should take place in conjunction with the assessment of the implementation of the 2008 Hate speech and hate crime Framework Decision	Commission	2013 (COM Implementation report due 2013)
36.	Any review of the hate speech and hate crime Framework decision should examine the need to extend the scope to LGBTI bias crime		Commission, Council, European Parliament	2013 (COM Implementation report due 2013)
37.	Feasibility of separate legislation to protect against bias crime beyond race hate should be considered if no review of the Framework decision takes place			Dependent on recommendation 36
38.	Police and other executive personal should be educated and trained to support LGBTI persons	The Commission should support the adoption by CEPOL of a common curriculum on discriminatory violence, and integrate LGBT issues into this curriculum	Commission	To be determined in discussion with CEPOL Governing board (work programme decisions made on annual basis, multi-annual programme. expires 2014)
39.	FRA role in training and promoting good practices in the area of crime victims, police and judicial cooperation should be reinforced.	Maintain LGBTI focus in future work programmes	FRA	2014 - ongoing
40.	FRA should disseminate results of the 2012 LGBTI survey on views and perceptions of authorities		FRA	2013
41.	FRA studies collecting data on LGBTI persons, as well as FRA handbooks aimed at public authorities should be disseminated to a wide public	Dissemination of the 2013 'European Handbook for Victims of Violence', and a 'European Handbook for the Police'.	FRA	2013
42.	Member States should be encouraged to gather relevant quantitative data.	European data could be collected by the FRA, based on shared indicators. Significant lack of data in the field limits effective action. This	FRA	2014 (2013 work programme already

		should be considered a precursor action.		published)
43.	Promote interservice dialogue and action plans on hate motivated violence.		Commission, European Parliament, Member States	Ongoing

2.7 Fleeing homophobia and transphobia

No	Recommendation	Output/theme/ mechanism	Who	When
44.	Asylum's Procedure Directive should identify LGBTI people as in need of special procedural guarantees and the process should be correctly defined	Inclusion of relevant in the Recast Directive.	Council, European Parliament	Ongoing
45.	The Reception Conditions Directive should define the identification process of asylum seekers with special reception needs and should protect against all forms of bias violence.	Inclusion of relevant in the Reception Conditions Directive.	Council, European Parliament	Ongoing
46.	Examine the feasibility of including unmarried and registered partners and their children in asylum legislation.	Future amending legislation.	Commission	2013
47.	Member States should be encouraged to adopt definition of family member which includes unmarried and registered partners and their children.	research, guidelines, recommendations and resolutions	Commission, European Parliament	Priority, ongoing
48.	gender related aspects for determining membership of a social group should be examined re the Qualifications Directive	Commission implementation report	Commission	2014-2015
49.	LGBTI specific focus in monitoring of Asylum Procedures and Reception Conditions Directives needed.	Commission monitoring (conformity checking studies), implementation reports.	Commission	Dependent on adopted text
50.	The EASO should facilitate the understanding of LGBTI cases	Ensure that Country of Origin reports contain information on LGBTI issues.	EASO	In line with next annual work programme
51.	The EASO should mainstream LGBTI asylum related issues in their training modules.	Through modules developed in the frame of the European Asylum Curriculum (EAC).	EASO	Ongoing (In line with next annual training programme)
52.	The EASO should define the way NGO information can feed into their methodology for the elaboration of country or thematic reports.		EASO	Ongoing

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