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EU ANTI-DISCRIMINATION AND FREEDOM OF MOVEMENT POLICIES RELATING TO LGBTIQ+ RIGHTS

Key developments

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List of abbreviations

AG	Advocate General of the Court of Justice of the European Union
Charter	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
the Commission	European Commission
the Council	Council of the European Union
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECP	European Certificate of Parenthood
ECtHR	European Court of Human Rights
EQUINET	European Network of Equality Bodies
EU	European Union
FRA	European Union Agency for Fundamental Rights
IDAHOT	International Day Against Homophobia, Biphobia, Lesbophobia and Transphobia
LGBTIQ+	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual +
MS	Member State of the European Union

NGO	Non-governmental organisation
OJ	Official Journal of the European Union
PIL	Private international law
SOGI	Sexual orientation and gender identity
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRHC	Transition-Related Healthcare
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

In the midst of hate, I found there was, within me, an invincible love.

In the midst of tears, I found there was, within me, an invincible smile.

In the midst of chaos, I found there was, within me, an invincible calm.

I realized, through it all, that…

In the midst of winter, I found there was, within me, an invincible summer.

And that makes me happy. For it says that no matter how hard the world pushes against me, within me, there's something stronger – something better, pushing right back.

Introduction

"*United in diversity*" - the official motto of the European Union – was incorporated as one of the fundamental values of the European Union in 2009 by the Treaty of Lisbon where Article 1a states: "*The Union is founded on the values of respect for human dignity*, […] *equality* […] *and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".

Despite the importance of this principle, so far, the European Union has defended only partially the many differences that exist within it. In fact, although the principle of equality and the prohibition of discrimination are enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (the 'Charter') and in various Articles of the Treaty on European Union (the 'TEU'), discriminatory acts and policies continue to exist in the Union of 27, exacerbated by renewed political and xenophobic populism.

According to the Fundamental Right's Agency 2019 annual report[1]: "*discrimination and inequalities on different grounds remain realities in everyday life throughout the EU*". These findings also consistently show that people who experience discrimination seldom report it. The most common reason cited for not reporting is the belief that nothing would change as a result.

At continental level, the European Convention on Human Rights (the 'ECHR') extends the right to non-discrimination to all Articles of the Convention. The Court of Justice of the European Union (the 'ECJ') and the European Court of Human Rights (the 'ECtHR') have played a decisive and complementary judicial law-making role through the

[1] European Union Agency for Fundamental Rights., *Fundamental Rights Report 2019* (Publications Office 2019) 6 <https://data.europa.eu/doi/10.2811/303379> accessed 1 January 2023.

interpretation, definition and identification of fundamental rights in national (ECtHR) and European (ECJ) laws.

These jurisprudential developments continually re-defining the content and scope of anti-discrimination rights in national and EU laws and policies have increased considerably the protection of individuals against discriminatory acts in recent years and demonstrate both the topicality of the issue in European law and the need for a special interest in the latest and upcoming developments.

The aim of the proposed research work is to carry out a comparative analysis of the rights of LGBTIQ+ individuals in the European legal framework, following these objectives:

- analysing of the evolution of the general principle of equal treatment and the principle of non-discrimination (definitions, scope, interpretations and evolution) and the right to freedom of movement in European Union law (laws, policies and case law) and European international law (ECHR and case law of the ECtHR),
- analysing and comparing of the case law of the ECJ and the ECtHR Courts in order to highlight any innovative elements and/or differences in interpretation of the principles of equality and non-discrimination and the right to freedom of movement in the European Union,
- analysing the innovations brought forward by the 2022 European Commission's "Equality Package": the legislative proposals for a Regulation aimed at harmonising at EU level the rules of private international law relating to parenthood and the two directive proposals to strengthen equality bodies.

This research can be useful for European policy makers who want to implement anti-discrimination strategies, whether in the area of civil rights or complementary policy areas where protection from discrimination should be integrated (work, culture, migration, international trade agreements, etc.).

Methodology

The research was targeted at producing a thesis on the key developments on the LGBTIQ+ individuals' right to non-discrimination and freedom of movement under EU law and the ECHR with a particular focus on the increasing role of European judicial law-making. This thesis was researched and authored between November 2019 and January 2023.The methodology for this thesis involved a review of relevant literature and case law.

Firstly, a review of relevant literature was conducted, starting from the history to the existing equality, non-discrimination and freedom of movement CoE and EU legal framework, its recent developments (rulings and policies) and ongoing policy debates on possible future developments.

Secondly, a review of relevant case law was conducted, divided in two parts. First: a review of the landmark rulings preceding the start of this research project was conducted with the aim to spot and study recently developed legal concepts on the right to equality, non-discrimination and freedom of movement. Secondly: a list of pending cases and rulings from the ECtHR (1200+) and the ECJ (180+) were considered due to their subject-matter (non-discrimination and freedom of movement rights). The time-framework for the second step covered cases communicated, registered or delivered from the 1st of November 2019 to the 31st of January 2023. The inclusion criteria for this review were each cases' relevance to the scope of the research thesis, namely, rulings that either concerned directly LGBTIQ+ rights and/or that could impact them indirectly in the socio-economic sphere as well as their freedom of movement rights.

Secondly, a catalogue of cases and examples was drafted and a selection of key cases and rulings to be individually commented was carried out based on the above-mentioned criteria as well as their novelty, introduction of interesting legal concepts and impact on the development of anti-discrimination and freedom of movement law.

Thirdly, a review and analysis of the 2022 “Equality package” legislative proposals by the European Commission was conducted in line with the recommendations found in the relevant literature and the case-law reviewed.

Finally, the Conclusion summarises the findings of the research, persisting gaps to the rights to non-discrimination and freedom of movement and highlights recommendations targeted respectively at EU legislators and judges.

Given the relatively limited input of the existing fragmented legal framework, the case-law from the ECJ and the ECtHR and corresponding literature were the main sources of information for this thesis.

This thesis was drafted as a final step and includes a series of updated Articles published during the research period on the *Journal du Droit Européen* and the EU Law Analysis blog.

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The information and views set out in this thesis are those of the author and do not necessarily reflect the official opinion of the European Commission.

Glossary

"Language is a living thing and its usage changes over time"[2]

Inspired by the glossary used by ILGA Europe's Glossary and the European Commission's Trans and Intersex Equality Rights in Europe: A Comparative Analysis[3], the author wishes to acknowledge the deeply personal ways in which many individuals experience their sexuality, gender and bodies.

While specific terminology and definitions have been used as part of this thesis, the reader should appreciate that these terms may not align with the multiplicity of ways that certain individuals – cisgender or transgender, heterosexual or not – may understand and live their identity. The study's language may also not correspond with individual, or community, experiences of intersex variance. Although the author has, where possible, chosen terminology which is commonly used within human rights discourse, the report should not be understood as claiming to use definitive or authoritative language.

Here we provide some of the most commonly terms used throughout this report, most of which are taken directly from ILGA-Europe's most commonly used phrases and acronyms and are regularly updated, which can be found here: ILGA-Europe Glossary

Automatic co-parent recognition: covers when children born to same-sex couples are not facing any barriers in order to be recognised legally from birth to their parents.

Biphobia: the fear, unreasonable anger, intolerance or/and hatred toward bisexuality and bisexual people.

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[2] 'Our Glossary - ILGA-Europe' (4 February 2022) <https://www.ilga-europe.org/about-us/who-we-are/glossary/> accessed 4 January 2023.

[3] European Commission. Directorate General for Justice and Consumers., *Trans and Intersex Equality Rights in Europe: A Comparative Analysis.* (Publications Office 2018) <https://data.europa.eu/doi/10.2838/75428> accessed 1 January 2023.

Birth certificate: A document certifying the live birth of a child and typically also recording other information, such as the parenthood of the child, date and place of birth and other vital statistics relating to the child.

Bisexual: when a person is emotionally and/or sexually attracted to persons of more than one gender.

Case-law: Case-law refers to the decisions and interpretations made by judges while deciding on the legal issues before them which are considered as the common law or as an aid for interpretation of a law in subsequent cases with similar conditions. Case-law is used by advocates to support their views to favour their cause and establish certain principles in existing law. In a European context case-law includes:

Judgments of the Court of Justice of the European Union (see European Union) in response to referrals from the European Commission, national courts or individuals of the EU countries.

Judgments of the European Court of Human Rights in response to the member states of Council of Europe and individuals living in the member states.

Charter of Fundamental Rights of the European Union (The Charter): The European Union Charter of Fundamental Rights sets out in a single text the whole range of civil, cultural, political, economic and social rights of all persons resident in the EU. The Charter are based, in particular, on the fundamental rights and freedoms recognised by the European Convention on Human Rights (ECHR), the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions on the subject. The Lisbon Treaty which came into force in 2009 gave the Charter to have the same legal value as other EU treaties.

Civil union: see Registered partnership.

Cisgender: A term that refers to a person who does not identify as trans.

Cohabitation rights: two persons living together at the same physical address can, in some European countries (and regions), make a legal agreement on some practical matters

(which vary from country to country). The rights emanating out of cohabitation are limited.

Coming-out: the process of revealing the identification of a lesbian, gay, bisexual, trans or intersex person.

Court of Justice of the European Union (ECJ): Court of Justice of the European Union is located in Luxembourg. The Court is composed of one judge from each EU country, assisted by eleven advocates-general.

Cross-border family: a family with children in which one or more members are of different nationalities or live in a country other than their country of origin.

Depathologisation: The recognition that no sexual orientation, gender identity or gender expression is an illness. Depathologisation allows trans people to access trans specific healthcare without a mental health assessment or diagnosis.

Different-sex relationship: a relationship containing people of two different sexes. This term is preferred instead of opposite-sex, as 'opposite' is based on the incorrect assumption that there are only two possible sexes and that they are immutable.

Discrimination[4]: Discrimination defines a situation where an individual is disadvantaged in some way on the basis of 'one or multiple protected grounds'.

The **non-discrimination principle**[5] prohibits scenarios where persons or groups of people in an identical situation are treated differently, and where persons or groups of people in different situations are treated identically.

Direct discrimination[6] will have occurred when:

• an individual is treated less favourably;

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[4] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg)., *Handbook on European Non-Discrimination Law :2018 Edition* (Publications Office 2018) 42 <https://data.europa.eu/doi/10.2811/58933> accessed 25 December 2022.

[5] ibid.

[6] European Union Agency for Fundamental Rights. (n 1) 43.

• by comparison to how others, who are in a similar situation, have been or would be treated;

• and the reason for this is a particular characteristic they hold, which falls under a 'protected ground'.

The elements of **indirect discrimination**[7] are as follows:

• a neutral rule, criterion or practice;

• that affects a group defined by a 'protected ground' in a significantly more negative way;

• in comparison to others in a similar situation.

Domestic adoption: adoption of a child or adult habitually resident in one country by (a) prospective parent(s) habitually resident in that same country.

European Convention on Human Rights (ECHR): (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedoms in Europe. It was drafted in 1950 and the convention entered into force on 3 September 1953. Rulings at the European Court of Human Rights are based on the Convention.

European Court of Human Rights (ECtHR): composed of one judge from each of the 46 member states of the Council of Europe. It makes judgments in respect of possible violations of the European Convention on Human Rights. Where the Court finds that a particular member state has violated the Convention then the government is obliged to take corrective action. Judgments of the Court, which establish a general principle in respect of one country, should, in theory, be acted on by other countries, which similarly violates the Convention.

European Union (EU): The European Union is an economic and political union of 27 current Member States in Europe. The EU origins from the European Coal and Steel

[7] ibid 54.

Community formed in 1951 and the Treaty of Rome from 1957. Since then, it has grown in size through enlargement, and in power through the addition of policy areas.

Free movement, free movement right: right to move and reside freely within the territory of the Member States as provided for in Articles 21, 45, 49 and 56 TFEU, Directive 2004/38/EC and relevant case-law of the ECJ.

Gay: refers to a person who is sexually and/or emotionally attracted to people of the same gender. It traditionally refers to men, but other people who are attracted to the same gender or multiple genders may also define themselves as gay.

Gender: refers to a social construct which places cultural and social expectations on individuals based on their assigned sex.

Gender expression: refers to people's manifestation of their gender identity to others, by for instance, dress, speech and mannerisms. People's gender expression may or may not match their gender identity/identities, or the gender they were assigned at birth.

Gender identity: refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. Some people's gender identity falls outside the gender binary, and related norms.

Gender non-conforming: Refers to gender expressions other than male or female.

Gender reassignment: This is an outdated term to refer to the process of medical transition (See Transition).

Gender Reassignment Surgery (GRS): Medical term and outdated term for surgeries taking place in the frame of Transition-Related healthcare.

Hate crime: offences that are motivated by hate or by bias against a particular group of people. This could be based on gender, gender identity, sexual orientation, ethnicity, religion, age or disability. Also called bias crime.

Hate speech: refers to public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards minorities.

Heteronormativity: refers to the set of beliefs and practices that consider gender to be an absolute, unquestionable binary, and therefore describe and reinforce heterosexuality as a norm. It implies that people's gender, sex and sex characteristics are by nature and should always be aligned, and therefore heterosexuality is the only conceivable sexuality and the only way of being 'normal'.

Homophobia: fear, unreasonable anger, intolerance or/and hatred directed towards homosexuality.

Homosexual: People are classified as homosexual on the basis of their gender and the gender of their sexual partner(s). When the partner's gender is the same as the individual's, then the person is categorised as homosexual. It is recommended to use the terms lesbian and gay men instead of homosexual people. The terms lesbian and gay are being considered neutral and positive, and the focus is on the identity instead of being sexualised or pathologised.

Hormone Replacement Therapy (HRT): It refers to hormone therapy that can be taken as part of transition-related medical care or intersex-specific healthcare.

Intended parent(s): the person(s) who will eventually become the legal parent(s) of the child.

Intersex: intersex individuals are born with sex characteristics (sexual anatomy, reproductive organs, hormonal structure and/or levels and/or chromosomal patterns) that do not fit the typical definition of male or female. The term "intersex" is an umbrella term for the spectrum of variations of sex characteristics that naturally occur within the human species. The term intersex acknowledges the fact that physically, sex is a spectrum and that people with variations of sex characteristics other than male or female exist.

Legal gender recognition: A process whereby a trans and/or intersex person's gender is recognised in law, or the achievement of the process.

Lesbian: a woman who is sexually and/or emotionally attracted to women.

Limping parenthood: a situation in which a child has, from a legal viewpoint, different parents in different States as a result of the fact that two States answer the question "who is a parent of this child" in a different manner. It includes situations where the legal parenthood by one parent, as established in one State, is not recognised in another State.

LGBTIQ+: acronym for Lesbian, Gay, Bisexual, Trans, Intersex, Queer. The '+' represents minority gender identities and sexualities not explicitly included in the term LGBTIQ.

Marriage equality: where national marriage legislation also includes same-sex couples – e.g. gender-neutral reference to the spouses. Sometimes media outlets and decision makers incorrectly refer to the extension of existing marriage legislation to same-sex couples as 'gay marriage'. What they really mean is marriage equality; no country has created a marriage law specifically for same-sex couples.

National certificate of parenthood: a national authentic instrument on parenthood, for instance, a certificate of birth, a certificate of parenthood or a notarial act establishing or providing evidence of parenthood

Non-binary: Refers to gender identities other than male or female.

Out: being openly gay, lesbian, bisexual, trans or intersex

Pansexual: When a person is emotionally and/or sexually attracted to people regardless of their gender.

Private international law (PIL): a branch of law governing the rules to be applied in cases with an international dimension and dealing with the resolution of conflicts between the jurisdictions and applicable laws of different states.

Pride events: Pride events and marches are annual demonstrations against LGBTIphobia and in favour of LGBTI rights that take place around the world.

Queer: previously used as a derogatory term to refer to LGBTI individuals in the English language, queer has been reclaimed by people who identify beyond traditional gender categories and heteronormative social norms. However, depending on the context, some

people may still find it offensive. Also refers to queer theory, an academic field that challenges heteronormative social norms concerning gender and sexuality.

Rainbow family: a family with parents of the same sex bringing up a child, or an LGBTIQ-parented family

Recommendation: a non-binding act that can be adopted by the European Commission and that does not have legal consequences but provides guidance to Member States on a certain matter.

Registered partnership: a legal recognition of relationships; not always with the same rights and/or benefits as marriage – synonymous with a civil union or civil partnership.

Same-sex marriage: the term same-sex marriage does not exist in reality. There is no country which has a specific marriage law solely for same-sex couples. The right term is marriage equality, as the aim is to open marriage laws to same-sex couples to give them the same rights as different-sex couples. See marriage equality.

Same-sex relationships or couples: covers relationships or couples consisting of two people of the same sex.

Second parent adoption: where a same-sex partner is allowed to adopt their partner's biological child(ren).

Sex: The classification of a person as male or female. Sex is assigned at birth and written on a birth certificate, usually based on the appearance of their external anatomy and on a binary vision of sex which excludes intersex people. A person's sex, however, is actually a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.

Sex characteristics: A term that refers to a person's chromosomes, anatomy, hormonal structure and reproductive organs. OII Europe and its member organisations recommend protecting intersex individuals by including sex characteristics as a protected ground in anti-discrimination legislation. This is because many of the issues that intersex people face are not covered by existing laws that only refer to sexual orientation and gender identity.

This is seen as being a more inclusive term than 'intersex status' by many intersex activists, as it refers to a spectrum of possible characteristics instead of a single homogenous status or experience of being intersex.

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

Successive adoption: where a same-sex partner is allowed to adopt their partner's adopted child.

Surrogacy: an arrangement in which a woman carries and delivers a child for another couple or for another person.

Trans: Is an inclusive umbrella term referring to people whose gender identity and/or gender expression differ from the sex/gender they were assigned at birth.

It may include, but is not limited to: people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant, gender non-conforming, or with any other gender identity and/or expression which does not meet the societal and cultural expectations placed on gender identity.

Transgender: See Trans.

Transition: Refers to a series of steps people may take to live in the gender they identify with. A person's transition can be social and/or medical. Steps may include: coming out to family, friends and colleagues; dressing and acting according to one's gender; changing one's name and/or sex/gender on legal documents; medical treatments including hormone therapies and possibly one or more types of surgery.

Transition-Related Healthcare (TRHC): (previously referred to as gender reassignment surgery (GRS), gender-affirming surgery/healthcare (GAS or GAH)): Medical interventions, including hormone therapies, surgeries, and others, to bring the primary and secondary sex characteristics of a person's body into alignment with their internal self-perception.

Transphobia: Refers to negative cultural and personal beliefs, opinions, attitudes and behaviours based on prejudice, disgust, fear and/or hatred of trans people or against variations of gender identity and gender expression.

Victimisation: a specific term describing discrimination that a person suffers because they have made a complaint or been a witness in another person's complaint.

Chapter I : International and European Legal Framework

1.1 Overview of EU policies in selected areas of discrimination

1.1.1 The Council of Europe and the principle of non-discrimination

An international tool for the protection of human rights is the European Convention on Human Rights (the 'ECHR'), adopted in 1950 by the Council of Europe. Notably, while in EU law the principle of non-discrimination applies only within the Union's competences and in the implementation of EU law, Article 14 of the ECHR extends the principle of non-discrimination to all Articles of the Convention[8] and, for the States that are signatories to Protocol 12 of 2000, to all national acts but has so far been ratified only by 20 Members of Council of Europe among which10 Member States of the European Union.

Moreover, Article 14 of the ECHR provides protection against discrimination on an open-ended list of protected categories ("any ground such as") including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

'Other status' has been has been interpreted by the ECtHR to include characteristics which are "neither innate or inherent" such as health status and length of prison sentence[9].

Article 14 ECHR is however limited by its ancillary nature: it prohibits discrimination only in the enjoyment of the rights and freedoms set forth in the ECHR, thus

[8] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' 8 <https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf>; Giovanni Zaccaroni, *Equality and Non-Discrimination in the EU: The Foundations of the EU Legal Order* (Edward Elgar Publishing 2021) 51–52; Marco Balboni, 'An Introduction: The Principle of Non-Discrimination in the Framework of the European Convention on Human Rights', *The European Convention on Human Rights and the Principle of Non-Discrimination* (Editoriale Scientifica 2017) XIV.

[9] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 36; Sarah Ganty and Juan Carlos Benito Sanchez, 'Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU' [2021] S. Ganty and J.-C. Benito Sanchez, Expanding the List of Protected Grounds within Anti-Discrimination Law in the EU, Equinet 70.

complementing the other substantive provisions of the Convention and the Protocols[10]. Nevertheless, its applicability does not require the recognition by the ECtHR of a violation of the substantive provision, but merely for "the facts of the case to fall within the wider ambit of one or more of the Convention Articles"[11].

The ECHR also protects individuals from discrimination in several aspects of the 'socio-economic sphere'. For instance, Article 2 of Protocol No. 1 provides a right to education and, should a State apply different treatment in the implementation of its obligations under said Article, an issue may arise under Article 14 of the Convention. Although no Article specifically guarantees a right to employment, Article 8 has been interpreted as covering some aspects of it in several ECtHR rulings[12].

Furthermore, while the 'access to and supply of goods and services' is not explicitly protected by the ECHR, the ECtHR has interpreted Article 8 to include cases relating to "activities capable of having consequences for private life, including relations of an economic and social character"[13]. For instance - while deeming the case inadmissible – the ECtHR was asked in 2019 to interpret whether the refusal by a Christian-run bakery to make a cake with the words "Support Gay Marriage" led to the possible violation of Article 8 ECHR[14] (see Chapter 2.4.2).

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[10] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 14; Marzia Barbera, *Principio Di Eguaglianza e Divieti Di Discriminazione* (2019) 20.

[11] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 7–8; Carmelo Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale* (Editoriale scientifica 2015) 87–88; Balboni (n 8) XVI–XVIII; Zaccaroni (n 8) 51.

[12] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 120.

[13] ibid 135.

[14] *Lee v the United Kingdom* [2021] European Court of Human Rights (ECtHR) Application no. 18860/19.

1.1.2 The principles of equality and non-discrimination in the European Union's primary law

The creation of the European communities did not originally foresee the development of the principles of equality and non-discrimination: the original treaties of the European communities did not contain any reference to human rights or their protection[15]. Nevertheless, the Paris Treaty[16] signed the 18th of April 1951 already enshrined basic nuclear concepts relating to equality and non-discrimination[17]. Article 3 (b) of said Treaty ensured that "all comparably placed consumers in the common market have equal access to the sources of production" while Article 4 abolished and prohibited within the Community "measures or practices which discriminate between producers., between purchasers or between consumers, especially in prices and delivery terms or transport rate s and conditions, and measures or practices which interfere with the purchaser's free choice of supplier".

After a couple of years the Treaty of Rome, adopted in 1957, prohibited discrimination only on the grounds of nationality and sex[18] with the aim to promote and protect economic integration[19].

The following decades, after several ECJ rulings on cases alleging human rights breaches, the revision of the treaties explicitly included equality and respect for human rights among the Union's founding values and the first EU anti-discrimination laws started being discussed and adopted originally to prohibit discrimination based on sex in employment[20].

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[15] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 20.

[16] Treaty establishing the European Coal and Steel Community 1951.

[17] 'I principi di uguaglianza e non discriminazione, una prospettiva di diritto comparato' 2.

[18] Denis Martin, 'Article 19 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 425 <https://doi.org/10.1093/oso/9780198759393.003.92> accessed 25 December 2022.

[19] Barbera (n 10) 7.

[20] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 21.

With the entry into force of the Treaty of Maastricht[21] in 1993, the EU underwent "significant, institutional and substantive changes"[22], shifting from the construction of an economic community to the building of a more political Union. Furthermore, Article F of the Treaty provided that:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The Treaty of Maastricht also introduced the status of Union citizenship allowing the right to move and reside freely to the Member State of choice to develop into a 'fundamental and personal' right of Union citizens[23].

Following the entry into force of the Amsterdam Treaty in 1999, the EU gained the ability to take action to combat discrimination on a wider range of grounds[24] and adopted the equality directives further discussed *infra*.

In 2005, the ECJ recognized in the *Mangold*[25] ruling the existence of a general principle of equal treatment and instructed the national courts to ensure, within the limits of their jurisdiction, "the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law". Unfortunately, the scope of that judgment

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[21] Treaty on European Union 1993 (OJ C).

[22] Alina Tryfonidou and Robert Wintemute, 'Obstacles to the Free Movement of Rainbow Families in the EU' (2021) 25.

[23] Denis Martin, 'Article 18 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 417 <https://doi.org/10.1093/oso/9780198759393.003.91> accessed 25 December 2022; Katarina Hyltén-Cavallius, 'The Right to Move and Reside Freely: Article 21(1) TFEU and Directive 2004/38', *EU Citizenship at the Edges of Freedom of Movement* (1st edn, Hart Publishing 2020) 26 <http://www.bloomsburycollections.com/book/eu-citizenship-at-the-edges-of-freedom-of-movement/ch3-the-right-to-move-and-reside-freely-article-21-1-tfeu-and-directive-2004-38/> accessed 22 November 2020.

[24] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 21; Barbera (n 10) 29; Zaccaroni (n 8) 59–60.

[25] *Werner Mangold v Rüdiger Helm* [2005] ECJ Case C-144/04.

has been watered down[26] by successive decisions in which the Court has failed to mention or limited the scope of the principle of equal treatment.

However, with the entry into force of the Treaty of Lisbon with its revised Article 6(1) TEU the Charter was given the same legal status as the Treaties and, therefore, status of EU primary law[27].

As seen *supra,* Article 2 of the TEU provides that the Union is founded on the values of "respect for […] equality […] and respect for human rights, including the rights of persons belonging to minorities" and that these values are common to the Member States in a society "in which […] non-discrimination […] and equality between women and men prevail". Moreover, Article 3 counts among the objectives of the Union, that it shall "combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". While the objectives enshrined in said Articles do not create legal obligations for the Member States or recognize rights directly applicable to individuals, the ECJ has recognized that the pursuit of the objectives is indispensable for the achievement of the Union's tasks[28].

Finally, the TEU underlines in Article 9 that "in all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies […]".

On the functioning of the European Union, Article 10 of the TFEU states that: "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Article 18 of said Treaty prohibits discrimination on grounds of nationality and Article 19 grants the power to the Council and the European parliament to adopt acts

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[26] Barbera (n 10) 13; Marzia Barbera and Alberto Guariso, *La Tutela Antidiscriminatoria* (G Giappichelli Editore 2019) 36–37.

[27] Steve Peers, 'The EU Charter of Rights and the Right to Equality' (2011) 11 ERA Forum 571, 573 <http://link.springer.com/10.1007/s12027-010-0176-6> accessed 25 December 2022.

[28] Marcus Klamert, 'Article 3 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 32 <https://doi.org/10.1093/oso/9780198759393.003.6> accessed 25 December 2022.

aimed at combating a closed, exhaustive list of grounds of discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[29].

With regards to the Charter, Title III contains seven Articles on the right to equality: Articles 20 to 26, which we will briefly summarize below.

The ECJ regularly jointly references Articles 20 and 21 of the Charter as "as together enshrining the principle of equal treatment and non-discrimination"[30].

While Article 20 sets out a general principle of equal treatment with wide-ranging application, Article 21 lists an open list of grounds[31] protected by the "non-discrimination principle" therefore applying the general principle of equal treatment in specific situations[32]. Indeed, the ECJ has clarified in the *Wolfgang Glatzel v Freistaat Bayern* ruling that "the principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression"[33].

More specifically, Article 20 of the Charter corresponds to the "equality before the law" principle which is included in all European constitutions and has also been recognised by the Court of Justice as a basic principle of Community law[34]. According to the Fundamental Rights Agency, this principle "requires states and EU institutions to comply with the requirements of formal equality (treating like cases in a like manner) in

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[29] Martin (n 18) 429; Chiara Favilli, 'Article 19 [Combating Discrimination Based on Other Grounds] (Ex-Article 13 TEC)', *Treaty on the Functioning of the European Union-A Commentary: Volume I: Preamble, Articles 1-89* (Springer 2021) 471.

[30] Steve Peers and others (eds), 'Article 21', *The EU Charter of Fundamental Rights : A Commentary* (2nd edn, Hart Publishing 2021) 631 <http://www.bloomsburycollections.com/book/the-eu-charter-of-fundamental-rights-a-commentary-1/article-21-hanna-eklund-university-of-copenhagen-and-claire-kilpatrick-eui/> accessed 26 November 2021.

[31] Ganty and Sanchez (n 9) 71.

[32] J Croon-Gestefeld and others, 'A. Field of Application of Article 20' 600.

[33] *Wolfgang Glatzel v Freistaat Bayern* [2014] ECJ Case C-356/12 [43].

[34] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 35; Croon-Gestefeld and others (n 32) 597.

framing and implementing EU law" whereas Article 21 "embeds non-discrimination into the framework of substantive norms" [35].

Furthermore, Article 20, by proclaiming 'everyone' to be equal before the law, potentially applies to "any situation where the law differentiates between categories in its application" whereas, Article 21 appears to be – with some exceptions - more specifically focused upon "important personal characteristics that often give rise to inequalities across different aspects of social life, such as employment, education, housing, healthcare or access to services"[36]. Indeed, the non-discrimination principle prohibits situations where people in an identical situation are treated differently, and where persons in different situations are treated identically[37]. Furthermore, it does not prohibit all differences in treatment, but only those differences based on or more protected grounds[38].

Articles 20 and 21 (notwithstanding the broad field of application of the first) are limited by Article 51 on the field of application of the Charter: differences of treatment without a link to EU law will fall outside their scope[39].

Another possible limitation to the scope of both principles has been repeatedly highlighted by the ECJ since its 1977 *Bela-Mühle Bergmann* ruling[40]: a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment concerned.

In 2018 in *Egenberger* the Court recognized to the Charter's non-discrimination guarantees a horizontal direct effect[41] by stating that: "the prohibition of all discrimination

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[35] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 35.

[36] Croon-Gestefeld and others (n 32) 597 to 600.

[37] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 42.

[38] ibid 160.

[39] Croon-Gestefeld and others (n 32) 598; European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 36; Ganty and Sanchez (n 9) 71.

[40] *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO KG* [1977] ECJ Case 114-76 [7].

[41] Peers and others, 'Article 21' (n 30) 630; Barbera (n 10) 13.

[…] is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law". Furthermore, as regards its mandatory effect "Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals"[42].

The five Articles following Articles 20 and 21 contain more specific provisions relating to equality.

Article 22 introduces the obligation to respect cultural, religious and linguistic diversity. Article 23 concerns gender equality in all areas, including employment, work and pay. Article 24 focuses on the rights of the child including the right to protection and care as is necessary for their well-being. Article 25 states that the EU recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. Finally, in Article 26, the EU recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community.

1.1.3 Context and background to European anti-discrimination law

The European Union, despite the high level of protection conferred in theory by its principles, the Charter (art. 20 and 21), the European Treaties (Art. 2, 3, 9 of the Treaty on European Union and Art. 10, 18, 19 and 157 of the Treaty on the Functioning of the European Union) against discrimination, lacks a "general basic law"[43] that promotes the principles of equal treatment and non-discrimination. There are currently three

[42] *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* [2018] ECJ Case C-414/16 [76–77].

[43] G Bisogni, G Bronzini and V Piccone, *La Carta dei diritti dell'Unione europea. Casi e materiali* (Chimienti 2009) 258.

directives[44], which, on the basis of Article 19 of the TFEU, protect only a number of limited aspects of discrimination, leaving aside protection in many areas of European law.

European non-discrimination law prohibits direct and indirect discrimination (see Glossary) but only for certain categories of individuals (on grounds of race, religion, disability, age, sexual orientation, sex) and in certain fields within EU competences. With regards to the scope, prohibition of discrimination under the EU non-discrimination law is highly fragmented (*see infra*) but could in theory cover the following areas: employment, education, social protection, and access to and supply of goods and services.

Furthermore, the protection provided against gender identity discrimination (and potentially against discrimination on the basis of sex characteristics) is derived from instruments protecting against gender-based discrimination (EU Gender equality laws). Notably, art 21(1) of the Charter could hopefully one day be interpreted by the Court of Justice to include sex-characteristics within "discrimination based on any ground such as sex […] or sexual orientation" as laid out by the Maltese law and the Yogyakarta Principles plus 10[45].

With regards EU secondary legislation, the table below summarises the gaps of protection in the current anti-discrimination legal framework at European level:

Grounds / **Field**	**Race**	**Religion**	**Disability**	**Age**	**Sexual orientation**	**Sex**
Employment & vocational training	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
Education	**Yes**	**No**	**No**	**No**	**No**	**No**

[44] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation 2000; 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 2004.

[45] International Commission of Jurists (ICJ), 'The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' <https://www.refworld.org/docid/5c5d4e2e4.html>.

Goods and services	**Yes**	**No**	**No**	**No**	**No**	**Yes**
Social protection	**Yes**	**No**	**No**	**No**	**No**	**Yes**

The table is copied and edited from the European Commission, staff working document accompanying the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Impact assessment {COM(2008) 426 final}, p.4.

A proposal for a directive protecting individuals against discrimination on grounds of religion or belief, disability, age or sexual orientation both the public and private sector in the areas of education, social protection, access to and supply of goods and services was presented by the European Commission in 2008[46]. However, given the lack of political will on the part of the Member States, this legal proposal remains in deadlock more than a decade after its presentation by the European Commission.

Nevertheless, in November 2019, the European Commission presented the first ever LGBTIQ equality strategy (2020-2025)[47] and, in December 2022, three proposals aimed at the recognition of parenthood between Member States and strengthening equality bodies.

Additional steps in the recognition of LGBTIQ+ rights could be included in several existing legal instruments depending on whether the discrimination they face would be considered on grounds of sexual orientation or sex. Among the measures proposed or hinted at by the Commission's strategy:

- the adoption of the 2008 "Equal treatment directive" proposal could cover many fields - other than employment and vocational training - impacting the socio-economic position of LGBTIQ+ persons;
- a possible revision of the "Equality Framework" Directive[48];

[46] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} 2008.

[47] European Commission, Union of Equality: LGBTIQ Equality Strategy 2020-2025 2020.

[48] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44).

- a possible revision of the "Gender Equality Directive"[49] to include "sex characteristics" as a ground of discrimination would be crucial to the explicit protection of LGBTIQ+ persons. Currently, Recital 3 to above directive already affirms "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."

Unfortunately, some of the most urgent issues faced by transgender and intersex individuals (IGMs) fall outside the scope of EU competences recognized by the Treaties.

Furthermore, extensions to the existing EU gender equality legal framework anchor transgender and intersex equality within the binary concept of sex, likely excluding non-binary persons[50]. Furthermore, existing provisions on gender identity have covered only individuals who intend to undergo or have undergone gender transition-related surgery(ies)[51].

The rights of LGBTIQ+ people are also addressed in several laws within the Common European Asylum System and in the "Victims' Rights" Directive[52].

1.1.4 EU laws and policies relating to the right to equality in the 'socio-economic sphere'

Education

Under EU law, Article 14 of the Charter guarantees the right to education and to access continuing and vocational training. With regards to secondary law, the right to education

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

[50] European Commission. Directorate General for Justice and Consumers. (n 3) 47.

[51] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (Publications Office of the European Union 2022) 46.

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

draws from economic integration and developed first to protect children of workers[53], then European Union citizens and, finally, third country nationals wishing to move and reside in a Member State for educational purposes[54]. Although the European Union has limited competences in the field of education, the Court of Justice gradually developed a series of individual educational rights, which have been partially consolidated by subsequent treaty amendments and secondary legislation[55].

A recent survey by the FRA[56] found that 51% of LGBTIQ+ respondents aged 15 to 17 said that someone from school, college or university perpetrated the most recent incident of harassment they experienced.

Finally, most issues faced by transgender, non-binary and intersex people in education and schooling fall outside the scope of EU sex equality law, which currently extends to neither the protected grounds of 'sex' nor 'sex characteristics'[57] yet, they likely face harassment and abuse due to being considered as deviating from the established binary norms[58].

Employment

The "Equality Framework" Directive[59] prohibits discrimination in employment and occupation on the ground of sexual orientation, amongst other grounds, and covers access

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[53] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 129.

[54] Steve Peers and others (eds), 'Article 14', *The EU Charter of Fundamental Rights : A Commentary* (2nd edn, Hart Publishing 2021) 430 <http://www.bloomsburycollections.com/book/the-eu-charter-of-fundamental-rights-a-commentary-1/article-14-the-author-is-currently-senior-political-adviser-at-the-european-union-delegation-to-the-united-states-the-opinions-expressed-in-this-chapt/> accessed 26 November 2021.

[55] ibid.

[56] European Union Agency for Fundamental Rights., *A Long Way to Go for LGBTI Equality* (Publications Office 2020) 42 <https://data.europa.eu/doi/10.2811/7746> accessed 1 January 2023.

[57] European Commission. Directorate General for Justice and Consumers. (n 3) 94.

[58] ibid 89.

[59] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44).

to employment, employment and working conditions, including dismissals and pay, access to vocational guidance and training, and worker and employer organisations.

The "Gender Equality" Directive[60] enshrines the right not to be discriminated against, nor subject to harassment in access to employment, working conditions and occupational social security schemes on the basis of sex. Recital 3 of the directive – drafted following the *P v S and Cornwall County Council* ruling[61] - explicitly protects against discrimination arising from the transition-related surgery(ies) of a person; however, because that obligation derives from the preamble of the directive, Member States are not required to transpose it into national law but must nevertheless interpret the obligations deriving by the directive accordingly.

Furthermore, this legal framework does not yet explicitly mention sex characteristics as a prohibited ground for discrimination.

LGBTIQ+ people in Europe face various forms of discrimination in employment. As reported by ILGA[62]: "they may be directly discriminated against during recruitment procedures or when it comes to promotions. They may experience harassment in the form of 'jokes' or LGBTI-phobic comments or threats to 'out' them. Trans and intersex people may experience gender or sex discrimination related to the use of gender segregated facilities such as toilets or changing rooms or gender specific uniforms. LGBTI persons might simply not feel comfortable coming out to work colleagues and live in fear of exposure, discrimination or harassment".

With regards to transgender individuals, identity documents not showing their new name and gender may hinder their access to the labour market and choosing a profession[63].

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[60] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (n 49).

[61] *P v S and Cornwall County Council* [1996] ECJ Case C-13/94.

[62] ILGA EUROPE, 'Employment' <https://www.ilga-europe.org/what-we-do/our-advocacy-work/employment> accessed 21 April 2022.

[63] European Commission. Directorate General for Justice and Consumers. (n 3) 99.

Research indicates the many of intersex people do not believe their employers are aware of intersex, or their intersex variation, yet believe their variation has impacted their work experiences on numerous levels: impacts participants had experienced included obstacles to gaining or maintaining work, particular workplace discrimination issues, the complications of wellbeing issues, and reported effects on some participants' comfort in engaging in particular working arrangements or industries[64].

Access to supply of goods and services, including housing

According to the FRA, "access to goods and services" can be considered as "any context where a good or a service is normally provided in return for remuneration, so long as this does not take place in an entirely personal context, and with the exclusion of public or private education" and may cover scenarios as varied as entering and "receiving service in bars, restaurants and shops, purchasing insurance, as well as the acts of 'private' sellers such as dog breeders"[65].

The "Gender Equal Access to Goods and Services" Directive[66] implements the principle of equal treatment between men and women in the access to, and supply of, goods and services.

While the directive does not expressly protect against discrimination arising from a person's gender identity- as instead found in the Gender Equality Directive - there is evidence it does implicitly provide this protection due to the *P v S and Cornwall County*

[64] Tiffany Jones and others, *Intersex: Stories and Statistics from Australia* (Open Book Publishers 2016) 4.

[65] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 133–134.

[66] 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 (n 44).

Council ruling[67]. This interpretation was also recently confirmed by the European Commission[68].

Access to healthcare and social security

The directive on equal treatment for men and women in matters of social security[69] provides for equal treatment on the basis of sex within 'statutory social security schemes' whereas 'occupational social security' is covered by the Gender Equality Directive[70].

As noted by the European network of legal experts in gender equality and non-discrimination, this directive is "founded on and firmly grounded in a binary perception of sex […] raising the question of how far the directive is capable of protecting people who are not recognised as [male/female] or who identify as non-binary"[71]. This would have significance for transgender and intersex persons who also express a non-binary gender identity.

A state-of-the-art review study carried out in the context of the EU funded pilot project Health4LGBTI reports that primary research and grey literature overwhelmingly suggest that significant health inequalities exist for lesbian, gay, bisexual, trans and intersex people[72]. The report states that whilst accessing care, LGBTIQ+ people are more likely to report unfavourable experiences including – but not limited to: "prejudicial attitudes and intolerant or discriminatory behaviour of staff including inappropriate curiosity;

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[67] *P v S and Cornwall County Council* (n 61).

[68] European Commission Union of Equality: LGBTIQ Equality Strategy 2020-2025 (n 47) 5–6.

[69] Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security 1978.

[70] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (n 49).

[71] European Commission. Directorate General for Justice and Consumers. (n 3) 77.

[72] Laetitia Zeeman and others, 'State-of-the-Art Study Focusing on the Health Inequalities Faced by LGBTI People: State-of-the-Art Synthesis Report (SSR)' 25.

unequal treatment; needs not being recognised (e.g. lesbian women not being invited for cervical screening due to wrongly being assumed that they are a 'low-risk' group); LGBTI people being subjected to humiliation; denial of access to treatment (e.g. assisted reproductive technology); or fear of disclosure of gender identity, sexual orientation or sex characteristics"[73].

Intersex individuals face several obstacles to access to healthcare: pathologisation of their bodies and sex characteristics, access to funding, long waiting lists or requirements to have medical approvals (including gender dysphoria diagnostics) for treatments they may need, as well as the lack of medical specialists in their home country[74]. Reports indicate a deficit in adult healthcare for intersex individuals due to the combined factors of unnecessary treatment in childhood and lack of medical research on adult situations[75]. Kimberley Zieselman of interACT: Advocates for Intersex Youth indicates "It's sadly common for intersex adults to avoid health care providers because of the difficult experiences we've had as children. That puts us at risk of poor health outcomes"[76]. Recent research in Italy indicates a severe deficit in knowledge of Intersex variations in general healthcare[77]. Therefore, intersex individuals require increased protection regarding unnecessary harmful practices in childhood, but also recognition of specific health needs and protection from cross-discrimination in adult care.

There is currently very little research on intersex health inequalities and healthcare experiences[78] as well as lack of case-law, possibly due to the absence of protection for intersex people against such discriminatory treatment in access to healthcare[79].

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[73] ibid 5–6.

[74] European Commission. Directorate General for Justice and Consumers. (n 3) 77–83.

[75] Daniela Crocetti and others, 'Towards an Agency-Based Model of Intersex, Variations of Sex Characteristics (VSC) and DSD/Dsd Health' (2020) 23 Culture, Health & Sexuality 500.

[76] Kimberly Zieselman, 'In the Intersex Community, We're Desperate for Quality Care. Doctors Aren't Listening' <https://www.statnews.com/2017/10/26/intersex-medical-care/>.

[77] Marta Prandelli and Ines Testoni, 'Inside the Doctor's Office. Talking about Intersex with Italian Health Professionals' (2021) 23 Culture, Health & Sexuality 484, 1–16 <https://www.tandfonline.com/doi/full/10.1080/13691058.2020.1805641> accessed 1 January 2023.

[78] Zeeman and others (n 72) 35.

[79] European Commission. Directorate General for Justice and Consumers. (n 3) 82.

EU law does not provide protection for differences in pension treatments or similar welfare benefits based on sexual orientation or marital status unless these treatments can be considered as part of 'employment conditions' and are, thus, bound to the notion of remuneration[80]. This was the case, for instance, in the *Maruko*[81], *Romer*[82] and *Hay*[83] rulings. In the *Maruko* ruling the ECJ found that the complainant – who had been in a 'life partnership' with his deceased partner - had the right to receive a survivor's pension:

> the complainant wished to claim the 'survivor's pension' from the company that ran his deceased partner's occupational pension scheme. The company refused to pay, on grounds that survivors' pensions were only payable to spouses and the complainant had not been married to the deceased. The CJEU accepted that the refusal to pay the pension amounted to unfavourable treatment and that this was less favourable in relation to the comparator of 'married' couples. The CJEU found that the institution of 'life partnership' in Germany created, in many aspects, the same rights and responsibilities for life partners as for spouses, particularly with regard to state pension schemes. It admitted that for the purposes of this case, life partners were in a similar situation to spouses. The CJEU then went on to state that this would amount to direct discrimination based on sexual orientation. Thus, the fact that they were unable to marry was indissociable from their sexual orientation[84].

In the similar *Romer* ruling, the ECJ found it discriminatory for pensioner who had entered into a registered life partnership with his same-sex partner to receive a supplementary retirement pension lower than that granted to a married pensioner[85].

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[80] W Chiaromonte and A Guariso, 'Discriminazioni e Welfare', *La tutela antidiscriminatoria. Fonti, strumenti, interpreti* (G Giappichelli Editore 2019) 390; Chiara Favilli and Nicole Lazzerini, 'Discrimination(s) as Emerging from Petitions Received' 80; Carmelo Danisi, 'Lavoro, Assunzioni e Omofobia Alla Corte Di Giustizia' (14 May 2013) <http://www.articolo29.it/2013/la-prima-applicazione-della-direttiva-200078-alla-discriminazione-subita-da-una-persona-omosessuale-in-materia-di-assunzione-la-sentenza-c-8182-della-cgue/>.

[81] *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECJ Case C-267/06.

[82] *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] ECJ Case C-147/08.

[83] *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [2013] ECJ Case C-267/12.

[84] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 50.

[85] *Jürgen Römer v Freie und Hansestadt Hamburg* (n 82) para 52.

In *Hay*, the ECJ deemed discriminatory a situation where an employee having concluded a civil solidarity pact with a person of the same sex was not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage[86].

The ECJ has also ruled on several cases concerning transgender individual's access to social security and pension schemes. For instance, in *KB v National Health Service Pensions Agency*[87], the applicant was in a long-term relationship with a transgender man with which she could not get married to because transgender individuals were not able to legally have their gender recognized nor marrying under English law at the time[88]. Therefore, the Court ruled in 2004 that while there was no less favourable treatment based on sex *per se*[89], the applicant was treated less favourably on the basis of gender confirmation. In other words, there was a difference of treatment between couples that had assigned different legal genders at birth, and different-gender couples, where one of the parties had transitioned[90]. Similarly, in 2006, in *Richards v Secretary of State for Work and Pensions*[91] the Court deemed discriminatory the refusal to award a retirement pension at the pensionable age for women (60 years old) to a transgender woman who had undergone female confirmation surgery[92]. Building on these cases, the Court of Justice had to interpret, in *MB v Secretary of State for Work and Pensions*[93], whether a transgender woman could be refused a retirement pension since she had not obtained a formal acknowledgment of her preferred gender. In this case, due to a national law aimed

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[86] *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (n 83) para 47.

[87] *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECJ Case C-117/01.

[88] ibid 30–33.

[89] ibid 29.

European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 172–173. European Commission. Directorate General for Justice and Consumers. (n 3) 50–51.

[91] *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECJ Case C-423/04.

[92] ibid 38; European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 173; European Commission. Directorate General for Justice and Consumers. (n 3) 51.

[93] *MB v Secretary of State for Work and Pensions* [2018] ECJ Case C-451/16.

at preventing same-sex marriages, the applicant would have had to legally request an annulment of her marriage to obtain a Gender recognition certificate[94]. The applicant and her wife refused to annul their union and thus, the applicant's gender was still legally the gender assigned to her at birth. The Court deemed that the directive on equal treatment for men and women in matters of social security[95] precluded the application of a requirement that, "in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender be unmarried in order to qualify for a State retirement pension".

With regards to transgender rights, although the ECHR does not provide specifically for a right to healthcare the ECtHR has ruled on several cases involving discrimination in accessing healthcare and found they could fall within the ambit of the Article 14[96]. In 2007 in *L v Lithuania*, the Court ruled over the right to undergo gender confirmation surgery: more specifically, a violation of Article 8 was found due to Lithuania's failure to introduce implementing legislation to enable a transgender man to undergo gender confirming surgery and change his gender marker on his official documents[97]. Moreover, the Court acknowledged that the circumstances of the that case left the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity[98]. In 2015 the Court has also clarified in *Y.Y. v. Turkey* that requiring the applicant to no longer be able to procreate[99] to undergo gender confirmation surgery was a violation of Article 8. Similarly, making the legal gender recognition of a person conditional on undergoing sterilisation surgery or treatment[100] was found to be in violation of Articles 3 and 8 of the ECHR in *AP, Garcon and Nicot v. France* and *X and Y v. Romania*. However,

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[94] European Commission. Directorate General for Justice and Consumers. (n 3) 52–53.

[95] Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (n 69).

[96] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 127.

[97] *L v Lithuania* [2007] European Court of Human Rights (ECtHR) Application no. 27527/03.

[98] ibid 59.

[99] *YY v Turkey* [2015] European Court of Human Rights (ECtHR) Application no. 14793/08 [119–122].

[100] *AP, Garcon and Nicot v France* [2017] European Court of Human Rights (ECtHR) Applications nos. 79885/12, 52471/13 and 52596/13 [131]; *X and Y v Romania* [2021] European Court of Human Rights (ECtHR) Application nos .2145/16 et 20607/16 [165].

the Court also found in *AP, Garcon and Nicot v. France* that that a prior psychiatric diagnosis for purposes of legally changing the gender identity marker on official documents could be required[101]. With regards to medical expenses, the Court found in *Van Kück v. Germany* that the burden placed on the applicant to prove the medical necessity of treatment, including irreversible surgery to the private health insurance was disproportionate[102]. In *Schlumpf v. Switzerland* the Court found that a two-year observation period to then be able to ask for the reimbursement of medical costs incurred for a gender confirmation surgery was contrary to Article 8, also due to the applicant's relatively advanced age[103].

1.2 Overview of EU policies on the freedom of movement law

1.2.1 Context and background to European freedom of movement law

Whereas Articles 10 and 19 of the TFEU and Articles 20 and 21 of the Charter prohibit discrimination, Articles 21, 45, 49 and 56 TFEU guarantee the right of EU citizens to move and reside in the territory of another Member State. For non-EU nationals, Article 79 TFEU on the need to develop a common EU immigration policy grants EU decision makers the right to legislate on the conditions of entry and residence for third-country nationals and procedures for issuing the necessary permits.

The freedom of movement of both individuals and families can also benefit from measures taken by the EU under another branch of law, namely, cooperation in civil matters. According to Article 81 TFEU[104] the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases relating to relationships

[101] *AP, Garcon and Nicot v. France* (n 100) paras 143–144.

[102] *Van Kück v Germany* [2003] European Court of Human Rights (ECtHR) Application no. 35968/97 [84–86].

[103] *Schlumpf v Switzerland* [2009] European Court of Human Rights (ECtHR) Application no. 29002/06 [115–116].

[104] Consolidated version of the Treaty on the Functioning of the European Union 2020 art 81.

between private persons, such as family law, property law and contract law. However, adopting measures concerning family law with cross-border implications has proven to be very difficult in the past, as paragraph 3 of Article 81 TFEU provides that the Council has to act unanimously after consulting Parliament.

Historically, the early 2000s were the pivotal moment for the recognition of the right to freedom of movement of LGBTIQ+ couples, during the heated negotiation procedures leading to the adoption of the "Citizenship" Directive[105].

Indeed, the terminology used by this directive and various other legal texts that regulate legal migration use a gender-neutral language in reference to the family members that can accompany or join the worker (European citizen or third country) in a Member State.

The directive includes among family members who can accompany a European citizen "the spouse" and "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State". Should the family member not fall under the above definitions but is the "partner with whom the Union citizen has a durable relationship, duly attested", the directive nevertheless provides for the obligation for the host State to facilitate their entry and residence.

In 2018, citing the gender-neutral language of the directive following an established jurisprudence on the right to freedom of movement and long-term residence status for EU citizens and their families, the Court of Justice established, in the landmark *Coman*

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

ruling[106], that all EU citizens and their family members - including registered partners - have the right to move and reside freely in the EU.

The same reasoning could be used to interpret the "Family Reunification" Directive[107] which also recognizes, in art. 4 par. 1, reunification of third-country nationals with "the spouse" and in par. 3 allows Member States to choose whether to authorize reunification also with the "unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship" or with the "third country national who is bound to the sponsor by a registered partnership". Furthermore, various directives concerning particular types of workers from third countries (researchers, highly skilled workers, workers in the field of intra-corporate transfers) refer to the definition of family pursuant to art. 4 par. 1 of the "Family Reunification" Directive and allow Member States to recognize more favourable provisions with respect to family reunification.

According to several reports[108] a dozen Member States currently allow same-sex partners to apply for family reunification provided for in the "Family Reunification" Directive and several Member States extend this right also to highly qualified workers[109].

Nevertheless, various reports denounce the lack of application of these rights in practice, as well as the numerous bureaucratic obstacles to the movement and reunification of LGBTIQ+ couples in the European Union: for example, some of the Member States where marriage between LGBTIQ+ couples is legal refuse to recognize a same-sex

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[106] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [2018] ECJ Case C-673/16.

[107] Directive 2003/86/EC of 22 September 2003 on the right to family reunification 2003.

[108] European Commission, Report on the implementation of Directive 2003/86/EC on the right to family reunification 2019; European Migration Network, 'Family Reunification of Third-Country Nationals in the EU plus Norway: EMN Synthesis Report' [2017] Directorate General Migration and Home Affairs, European Commission <https://emn.ie/files/p_201704190426462016_family_reunification_synthesis_report_April2017.pdf>.

[109] PERMITS foundation, 'Access of Family Members of Blue Card Holders to the Employment Market in EU Member States' <https://www.permitsfoundation.com/wp-content/uploads/Access-of-family-members-of-Blue-Card-holders-to-employment-in-EU-05.05.2015-1.pdf>.

marriage contracted in another EU Member State if the marriage is not recognized in the couple's Member State of origin[110].

Furthermore, as underlined by the European Commission "trans, non-binary and intersex people are often not recognised in law or in practice, resulting in legal difficulties for both their private and family life, including in cross border situations"[111].

Within in its LGBTIQ strategy, the Commission has presented in December 2022 a proposal for a Regulation aimed at harmonising at EU level the rules of private international law relating to parenthood (see Chapter 4.2). In the LGBTIQ strategy, the Commission also vowed to "explore possible measures" to support the mutual recognition of same-gender spouses and partners[112], possibility in the form of Guidelines on how Member States should interpret EU freedom of movement legislation with regards to same-sex couples in light of the *Coman* ECJ ruling[113] (see *infra*) [114].

[110] Tryfonidou and Wintemute (n 22) 15; Network of European LGBTIQ* Families Associations – NELFA, 'Freedom of Movement in the European Union: Obstacles, Cases, Lawsuits...' <http://nelfa.org/inprogress/wp-content/uploads/2020/01/NELFA-fomcasesdoc-2020-1.pdf>.

[111] European Commission Union of Equality: LGBTIQ Equality Strategy 2020-2025 (n 47) 15.

[112] ibid 16.

[113] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (n 106).

[114] European Parliament Multimedia Centre, 'Presentation of Commission's Proposal for a Regulation on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on Creation of a European Certificate of Parenthood at the European Parliament's Committee on Legal Affairs (JURI)' (9 January 2023) <https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-legal-affairs_20230109-1500-COMMITTEE-JURI> accessed 20 January 2023.

Chapter II : Judicial law-making in anti-discrimination law

In a system of multi-level protection of fundamental rights, the two 'European Courts' (the Court of Justice of the European Union and the European Court of Human Rights) have played a decisive and complementary *judicial law-making* role through the interpretation, definition and identification of fundamental rights in national (ECtHR) and European (ECJ) laws.

Historically, jurisprudence of the two Courts has often rectified the shortcomings of the European Union created by the lack of political will of its Member States or due to the limits of its competences.

The decisions of the two Courts, taken individually or resulting from a close dialogue between them, have had a considerable impact on the protection of human rights and, in particular, on rights linked to the protection against discrimination that are not directly covered by European policies or laws.

2.1 Overview of anti-discrimination rights recognised by the jurisprudence of the ECtHR

With regards to discrimination on the grounds of **sexual orientation** and **gender identity**, the ECtHR has adopted a more extensive approach than the ECJ by judging situations relating to private and family life, an area outside the competences of the European Union (for a more detailed analysis see *below* Chapter 3.1.1). For example, the ECtHR recognized as discriminatory the refusal of the adoption of a child by a single gay woman[115] and recognized that the notion of 'family life'' applied to same-sex couples[116] as well as families with a transgender parent[117]. In 2013, the judges of Strasbourg -

[115] *EB v France* [2008] European Court of Human Rights (ECtHR) Application no. 43546/02.

[116] *Schalk and Kopf v Austria* [2010] European Court of Human Rights (ECtHR) Application no. 30141/04.

[117] *X, Y and Z v the United Kingdom* [1997] European Court of Human Rights (ECtHR) Application no. 21830/93 [37].

considering the growing recognition on the European continent of civil unions for persons of the same sex - considered that Greece, introducing the possibility of contracting civil unions exclusively for heterosexual couples, and without motivating the exclusion of gay couples from this regime, had unfairly discriminated against same-sex couples[118].

Both the ECtHR and the ECJ have adopted a progressive approach discrimination on the basis of **age**. For instance, the ECtHR ruled on the protection of minors trialled for criminal offences as adults in Court[119] and a large number of rulings condemn discriminatory treatment of people of all ages in all areas of their lives (whether or not subject to EU competence).

With regards to the protection of the **definition of disability**, the ECtHR has extended the definition to include people with diabetes in specific circumstances[120] and has condemned the detention in prison[121] and in some cases of forced imprisonment in psychiatric hospitals[122].

In the case of discriminations based on **religious and personal beliefs**, the ECHR has a much broader scope of application than European law and the ECtHR has often referred to both art. 9 of the ECHR (freedom of thought, conscience and religion), art. 8 (right to respect for private and family life) in conjunction with art. 14 (non-discrimination). For example, the ECtHR ruled on the refusal to grant parental rights in view of a parent's religious convictions, violence based on the victims' faith and the inability of certain churches to provide religious education in schools and to conclude officially recognised religious marriage[123]. Notably, the Court also ruled in several cases in which the right to religious non-discrimination had been opposed to the right to non-discrimination on

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[118] *Vallianatos and Others v Greece* [2013] European Court of Human Rights (ECtHR) Applications nos. 29381/09 and 32684/09 [91–92].

[119] *T v the United Kingdom* [1999] European Court of Human Rights (ECtHR) Application no. 24724/94.

[120] *Glor v Switzerland* [2009] European Court of Human Rights (ECtHR) Application no. 13444/04 [53].

[121] *Price v the United Kingdom* [2001] European Court of Human Rights (ECtHR) Application no. 33394/96.

[122] *Stanev v Bulgaria* [2012] European Court of Human Rights (ECtHR) Application no. 32238/04.

[123] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 30–31.

grounds of sexual orientation[124]. That said, in a controversial ruling in 2014, the ECtHR[125] found that the ban imposed by French law on wearing the burqa and niqab (i.e., the full veil) in public was not contrary to the ECHR.

2.2 Overview of anti-discrimination rights recognised by the jurisprudence of the ECJ

As discussed *supra*, the Court of Justice recognized in the *Mangold*[126] ruling of 2005 the existence of a *general principle of equal treatment* and instructed the national courts to ensure, within the limits of their jurisdiction, "the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law".

With regards to discrimination on the grounds of **sexual orientation**, as seen *supra*, in 2018 the Court of Justice established that, although Member States have the freedom whether or not to authorize same-sex marriages, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory[127]. With regards to employment, as we will analyse in detail *infra*, the Court of Justice decided in the *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford ruling*[128] that a non-profit association was entitled to act in court, including in respect of a claim for damages, in the presence of facts considered discriminatory for a category of people the association protects. In that same ruling the Court also recognized that a statement to the radio of the intention to never hire LGBTIQ+ individuals violated the anti-

[124] *Eweida and Others v the United Kingdom* [2013] European Court of Human Rights (ECtHR) Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10.

[125] *SAS v France* [2014] European Court of Human Rights (ECtHR) Application no. 43835/11.

[126] *Werner Mangold v Rüdiger Helm* (n 25).

[127] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (n 106).

[128] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* [2020] ECJ Case C-507/18.

discrimination protection provided by the "Equality Framework" Directive[129] (see Chapter 2.4.1). The ECJ reached a similar verdict in 2023 in the *TP (Monteur audiovisuel pour la télévision publique)* ruling[130] (see Chapter 2.4.3) where it found that self-employed individuals also benefited from protection against discrimination in cases where, due to their sexual orientation, they were excluded from concluding or renew contracts with a company.

As mentioned *supra*, both the ECtHR and the ECJ have adopted a progressive approach discrimination on the basis of **age**: the ECJ has for example ruled on the working age limit for people wrongly considered "too old"[131]. It should be noted that the ECHR does not expressly mention the right to non-discrimination on grounds of age and that, in the case of EU law, it is included in the "Equality Framework" Directive[132] and therefore limited to the sector of employment. In 2021, the Court of Justice found[133] that Poland had undermined the irremovability and independence of judges of the Supreme Court by, inter alia, lowering the retirement age for judges of the court of last instance and applied the new lower retirement age to judges in active service, without leaving the decision on whether to take advantage of the lower retirement age to the sole discretion of the judges concerned.

With regards to the protection of **persons with disabilities**, the ECJ has so far extended the notion of disability to "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" albeit "over a long period of time"[134] and has extended the protection against discrimination in the field of employment also to the caregiver a of disabled

[129] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44).

[130] *JK v TP SA* [2023] ECJ Case C-356/21.

[131] *Werner Mangold v Rüdiger Helm* (n 25).

[132] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44).

[133] *European Commission v Republic of Poland* [2021] ECJ Case C-791/19.

[134] *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECJ Case C-13/05.

child[135]. The Court of Justice also found in 2019 that the dismissal of a disabled worker due to having productivity below a given rate, a low level of multi-skilling and a high rate of absenteeism, would constitute indirect discrimination unless the employer had beforehand provided that worker with reasonable accommodation in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities[136].

In the case of discriminations based on **religious and personal beliefs**, similarly to the ECtHR, the ECJ found in 2021 that an employer's internal rule prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users[137].

The protection of seekers and beneficiaries of **international protection** has also been considerably extended by the ECtHR and the ECJ's fruitful dialogue and case-law and is closely linked to the fight against discrimination. In fact, the difference between a "*discriminatory act*" and an "*act of persecution*" is limited to the severity of the deprivation of fundamental rights suffered by the victim[138]. Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees defines a refugee as a person who "*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;*". The very notion of "*persecution*", a key element in granting

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[135] *S Coleman v Attridge Law and Steve Law* [2008] ECJ Case C-303/06.

[136] *DW v Nobel Plastiques Ibérica SA* [2019] ECJ Case C-397/18.

[137] *IX v WABE eV and MH Müller Handels GmbH v MJ* [2021] ECJ Joined Cases C-804/18 and C-341/19.

[138] Carmelo Danisi, 'Crossing Borders between International Refugee Law and International Human Rights Law in the European Context: Can Human Rights Enhance Protection against Persecution Based on Sexual Orientation (and Beyond)?' (2019) 37 Netherlands Quarterly of Human Rights 359, 369–371 <http://journals.sagepub.com/doi/10.1177/0924051919884758> accessed 5 February 2023; UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees' para 17 <https://www.refworld.org/docid/50348afc2.html> accessed 19 February 2023; Maria Chiara Vitucci, 'La Tutela Dell'orientamento Sessuale. Dall'incriminazione Delle Condotte Omosessuali All'emersione Del Diritto a Non Essere Discriminati' (2012) 4 Riv. Aic 8.

asylum seekers refugee status, has been the subject of several important ECJ and ECtHR rulings.

In 2010, the Court ruled that "*there may be an act of persecution as a result of interference with the external manifestation of [a] freedom*", in this case, the possibility for two asylum seekers to show their religion in public without risking inhuman and degrading treatment and/or death[139].

Similarly, in 2013, the Court ruled that a person who risks being legally sanctioned (through detention in prison, for example) for "*homosexual acts*" (such as, for example, holding hands publicly) can legitimately seek asylum in the EU as "*to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it*."[140]. The ECtHR came to the same conclusions in *I.K v. Switzerland*[141] and *B. and C. v. Switzerland*[142].

These developments in case-law - both in the extension and recognition of the continuous re-definition of the *principle of equal treatment* and in the protection of individuals against discriminatory acts - have increased considerably in recent years and demonstrate both the topicality of the issue in European law and the need for a special interest in new developments.

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[139] *Bundesrepublik Deutschland v B (C-57/09) and D (C-101/09)* [2010] ECJ Joined cases C-57/09 and C-101/09 [72].

[140] *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* [2013] ECJ Joined Cases C-199/12 to C-201/12 [70–71].

[141] *IK v Switzerland* European Court of Human Rights (ECtHR) Application no. 21417/17.

[142] *B and C v Switzerland* [2020] European Court of Human Rights (ECtHR) Applications nos. 889/19 and 43987/16; Marco Balboni and Carmelo Danisi, 'Rassegna di giurisprudenza europea: Corte europea dei diritti umani' (March 2021) <https://www.dirittoimmigrazionecittadinanza.it/archivio-fascicoli/fascicolo-2021-n-1/115-rassegne-di-giurisprudenza-n-1-2021/rassegne-di-giurisprudenza-europea-n-1-2021/212-rassegna-di-giurisprudenza-europea-corte-europea-dei-diritti-umani>.

2.3 Recent concepts developed by the jurisprudence of the ECJ and the ECtHR

For the past three decades, significant improvements to the principle of equality and right to non-discrimination have been recognized by both the ECJ and the ECtHR.

Future legislative revisions or proposals on the right to non-discrimination should transpose concepts developed by the recent ECJ and ECtHR jurisprudence possibly benefiting LGBTIQ+ persons such as:

Discrimination by association: cases where a person is discriminated against not because they have a specific characteristic, but because they are associated with someone who does have these characteristics.

In the *S Coleman v Attridge Law and Steve Law* ruling[143], the ECJ found that where an employer treats an employee less favourably than another employee in a comparable situation - and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee - such treatment is contrary to the prohibition of direct discrimination laid down by the directive. Similarly, the ECtHR has ruled on several cases dealing with discrimination by association[144]. In 2016 in *Guberina v. Croatia*[145] the Court recognised the State's failure to take account of the needs of child with disabilities when determining the applicant father's eligibility for tax relief on the purchase of suitably adapted property.

In *Škorjanec v. Croatia* the ECtHR analysed the State's failure to investigate racially motivated act of violence against victim by association and stated that:

> under the Convention the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence exists not only with regard to acts of violence based on the victim's actual or perceived personal status or characteristics but also with regard to acts of violence based on the victim's actual or perceived association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic [in this case,

[143] *S Coleman v Attridge Law and Steve Law* (n 135).

[144] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 13,28,31.

[145] *Guberina v Croatia* [2016] European Court of Human Rights (ECtHR) Application no. 23682/13.

> being of Roma origin]. Indeed, some hate-crime victims are chosen not because they possess a particular characteristic but because of their association with another person who actually or presumably possesses the relevant characteristic. This connection may take the form of the victim's membership of or association with a particular group, or the victim's actual or perceived affiliation with a member of a particular group through, for instance, a personal relationship, friendship or marriage […][146].

In *Molla Sali v. Greece*[147] the Court ruled in favour of an applicant, who, as the beneficiary of a will made in accordance with the Civil Code by a testator of Muslim faith, was treated differently on the basis of 'other status', namely the testator's religion.

"Victimless" discrimination[148]: in the *Feryn* ruling[149], the ECJ found, in a case were an employer publicly stated he would not hire foreigners, that his statement violated EU law even in the absence of a specific injured party. In the *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* ruling[150], the ECJ found that national courts can recognize the payment of pecuniary damages to an anti-discrimination association even where there is no identifiable complainant.

Reversed burden of proof: where facts from which it may be presumed that there has been discrimination are established before a court, the burden of proof shifts to the defendants who must prove that there has been no breach of the principle of equal treatment. In the *Asociaţia Accept* ruling[151], the ECJ found that homophobic statements made by the patron of a professional football club shifted the burden of proof on to the club to prove that it did not have a discriminatory recruitment policy. Likewise, the

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[146] *Škorjanec v Croatia* [2017] European Court of Human Rights (ECtHR) Application no. 25536/14 [66]; Marco Balboni and Carmelo Danisi, 'Rassegna di giurisprudenza europea' (Luglio 2017) <https://www.dirittoimmigrazionecittadinanza.it/archivio-fascicoli/fascicolo-2017-n-2/22-rassegne-di-giurisprudenza/rassegne-di-giurisprudenza-europea/24-rassegna-di-giurisprudenza-europea>.

[147] *Molla Sali v Greece* [2020] European Court of Human Rights (ECtHR) Application no. 20452/14.

[148] For a detailed analysis of the concept of "victim" see: Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale* (n 11) 191–194.

[149] *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* [2008] ECJ Case C-54/07.

[150] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128).

[151] *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* [2013] ECJ Case C-81/12; Alberto Guariso and Mariagrazia Militello, 'La Tutela Giurisdizionale', *La tutela antidiscriminatoria* (G Giappichelli Editore 2019) 461–462.

ECtHR has recognised that the burden of proof may rest on the authorities to provide where events in issue lie within their exclusive knowledge or in cases where it would be "extremely difficult in practice for the applicant to prove discrimination"[152].

Requirement to **assess the applicant's personal situation "exactly as it stands"**: the ECtHR, in its *Andrejeva v. Latvia*[153] ruling of 2009, stressed that prohibition against discrimination meaningful only if the applicant's personal situation was assessed exactly as it stood. In other words, the Court proscribes the possibility to dismiss the applicant's claim on the ground that that person could have avoided the discrimination by previously performing a certain action – for example, in this ruling – by acquiring a certain nationality[154].

Protection of witnesses of discrimination against retaliation: cases protecting persons against retaliation from their employers when they participate in a discrimination complaint of a third party. In the *Hakelbracht* ruling[155], the ECJ clarified that the protection against retaliation applies to all employees who have informally supported the person who has been discriminated against.

Discrimination by assumption (or perception): cases where a person is discriminated against not based on characteristics that that person really possesses, but on traits that are ascribed to the person by someone else. This kind of discrimination concerns cases where a person is being treated less favourably because the respondent mistakenly perceives them to have a protected characteristic. For example, in the ECtHR *N v Sweden* ruling[156], the Court found that individuals can be at particular risk of ill-treatment if returned to third countries where they are perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system.

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[152] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 21.

[153] *Andrejeva v Latvia* [2009] European Court of Human Rights (ECtHR) Application no. 55707/00.

[154] ibid 91–92.

[155] *Jamina Hakelbracht and Others v WTG Retail BVBA* [2019] ECJ Case C-404/18.

[156] *N v Sweden* [2010] European Court of Human Rights (ECtHR) Application no. 23505/09.

The ECtHR has also developed extensive case-law on the **general duty of the State to protect** against ill treatment, investigate and punish those responsible and **prevent hatred-motivated violence** and investigate discriminatory motives[157]. The duty to protect includes the requirement for States to:

- Take measures designed to ensure that individuals are not subjected to ill-treatment.
- Put in place effective criminal law provisions to deter the commission of offences against personal integrity[158]. These include a series of procedural obligations such as the duty to institute and conduct an investigation. In *Oganezova v. Armenia*[159] the Court held that authorities had failed to provide adequate protection to a LGBTIQ+ bar owner and activist from homophobic arson, physical and verbal attacks and to carry out effective investigation.
- Adequately punish those responsible. For example, in *Sabalić v. Croatia*[160] where the police had not addressed the prejudice-based violence behind a man having punched and kicked the applicant due to her sexual orientation and by giving him a modest fine, the Court found authorities had failed their procedural obligations under the ECHR[161].

To prevent hatred-motivated violence, authorities also have to:

- Apply effective criminal-law mechanisms when they are confronted with indications of violence motivated by a discrimination ground. For example, in

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[157] 'Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons' 7–13 <https://www.echr.coe.int/Documents/Guide_LGBTI_rights_ENG.pdf>; 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 39, 54.

[158] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 54.

[159] *Oganezova v Armenia* [2022] European Court of Human Rights (ECtHR) Applications nos. 71367/12 and 72961/12.

[160] *Sabalić v Croatia* [2021] European Court of Human Rights (ECtHR) Application no. 50231/13.

[161] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 39; 'Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons' (n 157) 12.

Women's Initiatives Supporting Group and Others v. Georgia[162] the Court condemned the State's failure to take operational preventive measures to protect applicants from LGBTIQ+ prejudice-motivated violence, conduct an effective investigation and ensure the IDAHOBIT rally proceeded peacefully, all the more given that the authorities had failed to secure a timely and objective criminal investigation and punishment of the perpetrators of the previous year's IDAHOBIT event[163].

- Investigate the existence of a possible link between a discriminatory motive and an act of violence[164]: indeed, treating prejudice-motivated crimes as ordinary cases "would be tantamount to official acquiescence to, or even connivance with, hate crimes"[165].

The ECtHR has also ruled on several occasions on the need to protect **a minority group even when their rights are not accepted by the majority of a population[166]**. For instance the Russian government argued in *Bayev and Others v. Russia* that "the majority of Russians disapprove of homosexuality and resent any display of same-sex relations". The ruling concerned the legislative prohibition on the promotion of homosexuality among minors which the ECtHR found was reinforcing stigma and prejudice and encouraging homophobia.
In 2017 the Court replied that while:

> "it is true that popular sentiment may play an important role in the Court's assessment when it comes to the justification on the grounds of morals […]there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and

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[162] *Women's Initiatives Supporting Group and Others v Georgia* [2021] European Court of Human Rights (ECtHR) Applications nos. 73204/13 and 74959/13.

[163] ibid 76.

[164] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 54.

[165] 'Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons' (n 157) 10.

[166] For a detailed analysis on the conception of this concept see: Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale* (n 11) 130–132; Carmelo Danisi, 'Contextualising Non-Discrimination: Towards a New Approach for Sexual Minorities Under the ECHR', *The European Convention on Human Rights and the Principle of Non-Discrimination* (Editoriale Scientifica Napoli 2017) 206–207.

> a situation where that support is relied on in order to narrow the scope of the substantive protection. The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention"[167].

The Court reached the same conclusion also in January 2023 in its Grand Chamber ruling *Fedotova and Others v. Russia*[168], concerning the absence of any form of legal recognition and protection for same-sex couples. In this case as well, the Government submitted in Russia there was widespread opposition to same-sex relationships. The Court, citing its previous jurisprudence, argued that:

> the Court has already rejected the Government's argument that the majority of Russians disapprove of homosexuality, in the context of cases concerning freedom of expression, assembly or association for sexual minorities. […] the Grand Chamber considers that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.
>
> The Court finds that these considerations are entirely relevant in the present case, meaning that the allegedly negative, or even hostile, attitude on the part of the heterosexual majority in Russia cannot be set against the applicants' interest in having their respective relationships adequately recognised and protected by law[169].

[167] *Bayev and Others v Russia* [2017] European Court of Human Rights (ECtHR) Applications nos. 67667/09 and 2 others - see appended list [70].

[168] *Fedotova and Others v Russia [GC]* [2023] European Court of Human Rights (ECtHR) Applications nos. 40792/10, 30538/14 and 43439/14.

[169] ibid 218–219.

2.4 Intersectional and multiple discrimination

According to the FRA, intersectional discrimination describes a situation where "several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination"[170].

Intersectionality was first coined in 1989 by American civil rights advocate and leading scholar of critical race theory, Kimberlé Williams Crenshaw[171] to explain the disadvantage suffered by black women on the basis of their sex and race, a disadvantage that was "lost on the discourses of three fields – discrimination law, feminism, and the civil rights movement of the US"[172].

Shreya Atrey, citing the works of Ange-Marie Hancock, Maria Miller Stewart and Harriet Jacobs greatly summarised the dynamic of "sameness and difference" within intersectional discrimination:

> They showed how Black women not only suffered from state-sanctioned racism and slavery, and exploitation at the hands of their female masters, including sexual exploitation by white men, but also violence by Black men within their communities. Thus, while Black women suffered from patriarchal structures which inflicted white women (lower level of employment and wages, gender bias, sexual exploitation by men), and racial domination which subjugated Black men (slavery, segregation, lower level of employment and wages, racial stereotypes), they simultaneously also suffered racial and patriarchal violence at the hands of white women and Black men respectively. The former made their experience akin to the experiences of white women based on their sex and Black men based on their race; the latter made their experience distinct in their own right.[173]

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[170] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 59.

[171] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics"(1989)', *University of Chicago Legal Forum*.

[172] Shreya Atrey, *Intersectional Discrimination* (1st edn, Oxford University Press 2019) 34 <https://academic.oup.com/book/35116> accessed 10 January 2023.

[173] ibid 40–41.

Unfortunately, whereas academic research and literature on intersectional discrimination has flourished over the past 30 years, EU law[174] and ECJ[175] as well as ECtHR case-law are still lagging behind.

Council of Europe: developments of the concept of intersectional and multiple discrimination

The ECtHR has ruled on several cases with an intersectional premise without, however, expressly referring to the violations found as part of 'intersectional discrimination'. For example, in the *B.S. v. Spain*[176] ruling the Court recognised that the applicant was discriminated against on the basis of her race, gender and profession, in *N.B. v. Slovakia*[177] the applicant felt she had been discriminated against as a woman and her belonging to a family in the Roma community, and in the *Carvalho Pinto de Sousa Morais v. Portugal* ruling[178], the Court found the applicant had been discriminated against because of her age and sex. In 2021, the Court concluded in *Yocheva and Ganeva v. Bulgaria*[179] that the first applicant had suffered discrimination on the grounds of both her family status and her sex[180], having been denied surviving parent allowance as the single mother of minor children of an unknown father.

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[174] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 41.

[175] Barbera and Guariso (n 26) 56–57.

[176] *BS v Spain* [2012] European Court of Human Rights (ECtHR) Application no. 47159/08.

[177] *NB v Slovakia* [2012] European Court of Human Rights (ECtHR) Application no. 29518/10 [28].

[178] *Carvalho Pinto de Sousa Morais v Portugal* [2017] European Court of Human Rights (ECtHR) Application no. 17484/15.

[179] *Yocheva and Ganeva v Bulgaria* [2021] European Court of Human Rights (ECtHR) Applications nos. 18592/15 and 43863/15.

[180] ibid 116,125.

European Union: developments of the concept of intersectional and multiple discrimination

Multiple discrimination has been hinted at and only in relation to women in the preambles of the Employment Equality Directive[181] and the Racial Equality Directive[182] as follows:

> In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

Protection against intersectional discrimination is not explicitly provided for by primary or secondary EU law instruments. Furthermore, in the *David L Parris v Trinity College Dublin and Others* ruling[183], the Court ruled that:

> Articles 2 and 6(2) of Directive 2000/78 [the "Equality Framework" Directive] must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation.

Thus, at least under the *Parris* reasoning, it appears that, at present, the EU courts are more reluctant to embrace an intersectional analysis where it is not specifically provided for in the relevant legislation[184]. Recent rulings *IX v WABE eV and MH Müller Handels GmbH v MJ*[185] and *LF v SCRL*[186] on the possibility for women to wear Islamic headscarves at work attest to this point[187].

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[181] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44) para 3.

[182] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (n 44) para 14.

[183] *David L Parris v Trinity College Dublin and Others* [2016] ECJ C-443/15.

[184] Martin (n 18) 432.

[185] *IX v WABE eV and MH Müller Handels GmbH v MJ* (n 137).

[186] *LF v SCRL* [2022] ECJ Case C-344/20.

[187] See notably: Nozizwe Dube, 'Not Just Another Islamic Headscarf Case: LF v SCRL and the CJEU's Missed Opportunity to Inch Closer to Acknowledging Intersectionality'.

However, the Commission has vouched to implement its LGBTIQ strategy "using intersectionality as a cross-cutting principle: sexual orientation, gender identity/expression and/or sex characteristics will be considered alongside other personal characteristics or identities, such as sex, racial/ethnic origin, religion/belief, disability and age". Therefore, it is hoped that, moving forward, both in terms of legislation and policy, intersectionality can play a broader role in the protection of individuals across the Union.

2.4 In depth analysis of recent LGBTIQ+ landmark rulings and developments relating to the right to non-discrimination

2.4.1 ECJ: NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford[188]

Introduction

The *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* ruling (the present case)[189], can be best summarized through the aviary metaphors used by Advocate General Eleanor Sharpston in her opinion[190]: the ruling balances freedom of expression with the "volatility" of discriminatory statements and analyses which roles members of associations can play in the fight against discrimination, whether they have beaks, wings and feathers or not.

This Court of Justice of the European Union (ECJ) case raises many interesting issues and builds on the previous rulings of 2008 –*Feryn*[191] – and 2013 – *Asociatia Accept*[192] rulings.

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[188] Sections of this chapter were previously published as: Chiara De Capitani, 'No More Fluttering/Fleeting Line between Discrimination in Employment and the Right to Freedom of Expression: The CJEU Judgment in NH v Associazione Avvocatura per i Diritti LGBTI — Rete Lenford' (*EU Law Analysis*, 26 July 2020) <https://eulawanalysis.blogspot.com/2020/07/no-more-flutteringfleeting-line-between.html> accessed 7 February 2023.

[189] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128).

[190] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* [2019] ECJ Case C-507/18.

[191] *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (n 149).

[192] *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* (n 151).

In all three cases, an employer (*Feryn*) or a person perceived as being capable of exerting a decisive influence on the recruitment policy of an employer (*Asociatia Accept*, present case) publicly stated that they would not hire a person from a protected category (ethnic minorities for *Feryn*, LGBTIQ+ individuals for *Asociatia Accept* and present case).

All three cases were brought forward by associations, with no identifiable complainant and, in the case of *Asociatia Accept* and the present case, the statements were released to the public while the employer had no ongoing or planned recruitment procedures[193].

Therefore, the Court tries to answer the following questions:

Can discriminatory statements fall under the scope of the directive when no recruitment procedures are ongoing? If so, following which criteria?

How can national Courts assess the balance between the right to freedom of expression and combating discrimination in employment and occupation?

Where no identifiable complainant can be found, can an association bring legal proceedings and ask to obtain pecuniary damages in circumstances that are capable of constituting discrimination?

Finally, proof of the fruitful dialogue between judges of the ECJ and the ECtHR, this analysis will underline recent rulings released following the present case on the ECtHR's interpretation on how to balance the proportionality between protection against discrimination and its interference with the right to freedom of expression.

Facts of the case

During an interview in a radio programme a lawyer (NH) stated that he would never hire a "homosexual person" to work in his law firm nor wish to use the services of such persons. At the time when he made those remarks, there was no current recruitment procedure open at NH's law firm.

[193] Silvia Borelli, Alberto Guariso and Lara Lazzeroni, 'Le Discriminazioni Nel Rapporto Di Lavoro', *La tutela antidiscriminatoria* (G Giappichelli Editore 2019) 185–186.

Having considered that NH had made remarks constituting discrimination on the ground of sexual orientation, the Associazione Avvocatura per i diritti LGBTI — Rete Lenford (the Associazione), brought proceedings against him, asking that he be ordered – among other sanctions – to pay damages to the Associazione for non-material loss.

The action was successful at first instance and upheld on appeal, therefore NH appealed once more in cassation before the Supreme Court of Cassation, Italy (the referring court).

The referring court expresses doubts as to whether the Associazione has standing to bring proceedings against NH and ask for pecuniary damages, since the case has no identifiable complainant. The referring court also asks whether NH's statements – in light in particular of the absence of an open recruitment position – fall within the scope of the "Equality Framework" Directive[194] on the basis that they concern 'access to employment', or whether they should be regarded as mere expressions of opinion.

Analysis

Past, present, and possible future discrimination

NH believes that since there was no current or planned recruitment procedure at his law firm at the time he was interviewed, his statements should not be considered to have been made in a professional context and thus would fall outside of the scope of the "Equality Framework" Directive.

However, Article 3 (1) (a) of that directive aims at protecting all persons, as regards both the public and private sectors: "in relation to conditions for access to employment". Since the directive is "a specific expression, in the areas that it covers, of the general prohibition of discrimination" laid down in Article 21 of the Charter and because of its objectives and the nature of the rights it seeks to safeguard, the Court notes that its scope, defined in Article 3, "cannot be defined restrictively".

The Court has already found in the rulings *Feryn* and *Asociatia Accept* that discriminatory statements can hinder the "access to employment" of a protected category.

[194] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44).

Indeed, as stated by Advocate General Maduro and recalled by both the Court and AG Sharpston in the present case:

> In any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin, they stand no chance of being hired. Therefore, a public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical[195].

Furthermore, discriminatory statements have a lasting effect in time.

In the *Feryn* ruling, the Court, interpreting Article 8 of the "Racial Equality" Directive[196] (which is identical to Article 10 of the "Equality Framework" Directive) established that past statements create "presumption of a discriminatory recruitment policy" which the employer can rebut in Court.

The Court in the present judgment seems to confirm the duration in time, in the past, present but also possibly in the future, as it recognizes – in its answer to the first question – that statements made "outwith any current or planned procedure" can amount to discrimination as long they fulfil a number of non-hypothetical criteria[197], which we'll examine now.

The interpretation of 'access to employment'

Both the AG and the Court proceed by highlighting a list of criteria National Courts have to follow to establish when discriminatory statements present a sufficient link with 'access to employment' to fall under the scope of the "Equality Framework" Directive.

First, the status of the person making the statements and the capacity in which they made them, which must establish either that they are a potential employer or are, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment

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[195] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* (n 190) para 57.

[196] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (n 44).

[197] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128) para 58.

decision of a potential employer, or, at the very least, may be perceived by the public or the social groups concerned as being capable of exerting such influence, even if they do not have the legal capacity to define the recruitment policy of the employer concerned or to bind or represent that employer in recruitment matters.

The latter point is particularly interesting given that both in *Asociatia Accept* and in the present case both authors of the discriminatory statements, during their respective interviews, claimed and acted as if they played an important role and a very influential part in the recruitment process of their company[198], and were perceived as such by the public. However, ironically, their exact status within the company was either unclear[199] or was becoming less important than what they were telling and presenting the public[200].

This criterion of assessing the status of the person making the statements and the capacity in which they made them to assess the existence of a discriminatory act recalls the ECtHR's reasoning in the 2007 *Bączkowski and Others v. Poland*[201] ruling. In that case, the Court considered that decisions banning a march to raise awareness about sexual orientation discrimination had been influenced by the personal opinions that the Mayor of Warsaw had presented in an interview when the permission to hold the assemblies was already pending before the municipal authorities[202]. These opinions had, as a result, affected in a discriminatory manner the applicants' right to freedom of assembly[203].

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[198] *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* (n 151) para 35; *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* (n 190) para 20.

[199] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128) para 43.

[200] *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* (n 151) para 32.

[201] *Bączkowski and Others v Poland* [2007] European Court of Human Rights (ECtHR) Application no. 1543/06.

[202] ibid 100.

[203] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 11.

Furthermore, National Courts, following the *Asociatia Accept* ruling, should consider as part of their assessment of these criteria whether the actual employer did or did not clearly distance itself from the statements concerned[204].

The second criterion to consider is the nature and content of the statements concerned. They must relate to the conditions for access to employment or to occupation with the employer concerned and establish the employer's intention to discriminate on the basis of one of the criteria laid down by the "Equality Framework" Directive. This has clearly been the case for all three rulings where three individuals publicly stated they would not hire ethnic minorities (*Feryn*) or LGBTIQ+ individuals (*Asociatia Accept*, present case) within "their" company.

It's interesting to note that in her opinion, the AG adds to these criteria that the statements must also "be of such a nature as to dissuade persons belonging to the protected group from applying if and when a vacancy with that potential employer becomes available"[205]. The Court does not add this element to the list of criteria but will consider it when assessing the interference of the directive's application with the right to freedom of speech (see *infra*).

Finally, the third criteria National Courts have to consider is the context in which the statements at issue were made;

> —in particular, their public or private character, or the fact that they were broadcast to the public, whether via traditional media or social networks — must be taken into consideration[206].

Unfortunately, neither the Court nor the AG elaborate on why they believe this distinction between private and public statements is of such relevance. We can assume, given the AG's beautiful paragraph at the beginning of her opinion, that public statements "have wings" and "travel fast and spread quickly", meaning they are "disseminated rapidly and

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[204] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128) para 41.

[205] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* (n 190) para 55.

[206] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128) para 46.

have consequences". The likelihood that NH's statements on the radio reached, hurt and affected many members of the LGBTIQ+ community because of their publicity and fluttering in newspapers and social media is without question. However, as the AG herself notes "one can easily imagine the chilling effect of homophobic 'jokes' made by a potential employer in the presence of LGBTI applicants" (in a private setting, presumably). Since *Feryn*, *Asociatia Accept* and the present case all concern public statements, hopefully the Court will elaborate on this aspect of "statements" made in a private setting at another time.

The interference with freedom of expression

The AG notes in her opinion that the referring court "expresses doubts as to whether NH's statements fall within the scope of (the "Equality Framework" Directive) on the basis that they concern 'employment', or whether they should be regarded as mere expressions of opinion, unrelated to any discriminatory recruitment procedure"[207]. Furthermore, she notes[208] that at the hearing the Italian Government emphasised that the statements were not made during a "serious broadcast with the participation of employers and news journalists" but during an "irony-filled programme of political satire".

Both the AG and the Court proceed thus to examine why the above interpretation of the "Equality Framework" Directive is not affected by the possible limitation to the exercise of freedom of expression using the parameters provided by Article 52 (1) of the Charter which, as Professor Peers puts it[209], "deals with the arrangements for the limitation of rights".

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[207] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* (n 190) para 25.

[208] ibid 26.

[209] Steve Peers and others (eds), 'Article 52', *The EU Charter of Fundamental Rights : A Commentary* (2nd edn, Hart Publishing 2021) 1611 <http://www.bloomsburycollections.com/book/the-eu-charter-of-fundamental-rights-a-commentary-1/article-52-judge-sacha-prechal-is-responsible-solely-for-the-section-concerning-article-52-5-and-steve-peers-is-solely-responsible-for-the-remainder-o/> accessed 26 November 2021.

Indeed, the present case has sparked controversy also among some academics[210] which believe the AG and the Court have failed to truly assess the proportionality between protection against discrimination and its interference with the right to freedom of expression - I do not believe this to be the case, especially in light on the "necessity requirement" that I will analyse further on.

Professor Peers' comments on the scope and interpretation of Article 52(1) of the Charter[211] provide useful guidance to assess the judgment of the Court.

Article 52(1) of the Charter contains three different elements:

- a procedural rule (limitations on rights 'must be provided for by law');
- a rule on the justifications for limiting rights ('objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'), and
- several interlinked rules on the balancing test to be applied as between rights and limitations (the obligation to 'respect the essence of' the rights; the 'principle of proportionality'; and the requirement of necessity).

The Court and AG go through all the above-cited elements in an orderly fashion.

The limitations to the exercise of the freedom of expression that may flow from the "Equality Framework" Directive are indeed provided for by law, since they result directly from that directive.

They respect the essence of the freedom of expression, since they are applied only for the purpose of attaining the objectives of said directive, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection; Further to this argument, the Court that:

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[210] J Miller, 'In a Tight Spot, the Court of Justice Delivers a Lopsided Judgment: NH v Associazione Avvocatura per i Diritti LGBTI—Rete Lenford'; Palmina Tanzarella, 'Il Caso Taormina e La Corte Di Giustizia. Dalla Libera Espressione Alla Discriminazione' (2020) 2 Rivista di diritto dei media 289 <https://www.medialaws.eu/rivista/il-caso-taormina-e-la-corte-di-giustizia-dalla-libera-espressione-alla-discriminazione-2>.

[211] Peers and others, 'Article 52' (n 209).

> recital 11 of the directive states that discrimination based inter alia on sexual orientation may undermine the achievement of the objectives of the FEU Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons. (The) directive is thus a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter[212];

They respect the principle of proportionality in so far as the prohibited grounds of discrimination and the material and personal scope are defined in the directive, and the interference with the exercise of freedom of expression does not go beyond what is necessary to attain the objectives of the directive, in that only statements that constitute discrimination in employment and occupation are prohibited.

Finally, the Court elaborates with more detail the last requirement, the "necessity test": the limitations to the exercise of freedom of expression arising from "Equality Framework" Directive are necessary to guarantee the rights in matters of employment and occupation of persons who belong to a protected group. The AG opinion underlines[213] the following section of Article 10(2) of the ECHR which seems to be perfectly complementary with Art 52(1) of the Charter:

> the exercise of (freedom of expression) carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society (…) for the protection of (…) rights of others.

Analysing the "necessity test" from another perspective, the Court adds that considering statements as falling outside the scope of that directive solely because they were made

> outwith a recruitment procedure, in particular in the context of an audiovisual entertainment programme, or because they allegedly constitute the expression of a personal opinion" could make the "very essence of the protection afforded by that directive in matters of employment and occupation (…) become illusory[214].

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[212] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128) paras 37–38.

[213] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* (n 190) para 70.

[214] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128) para 54.

Finally, the Court aligns itself with the AG opinion that "in any recruitment process, the principal selection takes place between those who apply, and those who do not" and mentions a paragraph of her opinion[215], where she quotes a section of AG Maduro's opinion in *Feryn*:

> (A) public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical. To ignore that as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue.

Associations with standing to bring legal proceedings

The Court moves on to the first question: whether the Equality Framework Directive[216] must be interpreted as precluding national legislation under which an association of lawyers whose objective is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically, on account of that objective and irrespective of whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

The Court analyses step by step the various facets of this complex question.

According to Article 9(2) of the Equality Framework Directive, Member States are to ensure that associations, organisations or other legal entities which have a legitimate interest in ensuring that the provisions of the directive are complied with, may engage, either on behalf or in support of a complainant, with his or her approval, in any judicial

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[215] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford, Opinion of Advocate General Sharpston* (n 190) para 57.

[216] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44).

and/or administrative procedure provided for the enforcement of obligations under the directive.

Since no injured party can be identified in the present case, Article 9(2) of the directive does not require an association such as that at issue in the main proceedings to be given standing in the Member States to bring judicial proceedings. Nevertheless, Article 8(1) of the Equality Framework Directive provides that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive. This is the case for Italy where Article 5 of its Legislative Decree n° 216/2003 provides that "trade unions, associations and organisations (…) shall also have standing in cases of collective discrimination where it is not automatically and immediately possible to identify individuals affected by the discrimination".

Therefore, as was the case with *Asociatia Accept*, the Court recalls that Article 9(2) of the Equality Framework Directive in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.

In those cases, it is for that Member State to decide under which conditions an association such as that at issue in the main proceedings may bring legal proceedings and for a sanction to be imposed in respect of such discrimination.

With regards to sanctions, the Court, quoting *Asociatia Accept*, recalls that sanctions are required, in accordance with Article 17 of the Equality Framework Directive, to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party. As noted by Djelassi & Mertens[217], sanctions can therefore, include the

[217] Anissa Djelassi and Romain Mertens, 'Déclarations Publiques Discriminatoires: La Cour de Justice Étend La Protection Contre Les Discriminations Dans l'emploi: Commentaire de l'arrêt NH c. Associazione Avvocatura per i Diritti LGBTI-Rete Lenford (GC) Du 23 Avril 2020 (C-507/18)' [2020] Institut d'études Européennes (IEE), Université libre de Bruxelles <https://www.iee-ulb.eu/blog/actualites/la-cjue-etend-la-protection-contre-les-discriminations-dans-lemploi>.

payment of pecuniary damages also in the present case where there is no identifiable complainant and no ongoing recruitment procedure.

Similarly, the Court leaves Member States to determine whether the for-profit or non-profit status of the association is to have a bearing on the assessment of its standing to bring such proceedings. The AG provides further insight on this issue: mentioning the written observations of the Greek Government, she analyses the possible risk that a profit-making association abusing the right to bring proceedings in order to enhance its profits, which, according to the Greek Government, would jeopardise the attainment of the objectives of the directive. First, she notes that given the uncertainty inherent in litigation a "trigger-happy" approach to launching actions would itself be "a risky strategy for a commercially minded association to adopt". Secondly, it is the duty of the national court to verify if necessary that the Associazione is complying with its stated objectives to protect the interests of the persons in question and with its statutes as regards its status.

Although not repeated by the Court, another aspect of the AG's opinion in this issue is worth mentioning: apparently NH had argued that the Associazione could not be considered to have a legitimate interest to enforce the rights and obligations deriving from the directive since its members were lawyers and trainee lawyers and supposedly they were not all LGBTIQ+ persons. The AG Opinion finds this argument irrelevant and notes that "one does not require, of a public interest association dedicated to protecting wild birds and their habitats, that all its members should have wings, beaks and feathers". She underlines that "there are many excellent advocates within the LGBTI community, who can and do speak eloquently in defence of LGBTI rights. That does not mean that others who are not part of that community – including lawyers and trainee lawyers motivated simply by altruism and a sense of justice – cannot join such an association and participate in its work without putting at risk its standing to bring actions".

Conclusions

The present case fills a series of remaining gaps and completes the trilogy of rulings (*Feryn, Asociatia Accept*, present case) on discriminatory statements made in a public setting against hiring employees from protected categories.

There are many more aspects that hopefully the Court will clarify in the future: what about statements made in a private setting?

What about categories of individuals that are protected by Article 21 of the Charter but not by the scope of the directive (discriminations based on social origin, genetic features, language, political or any other opinion, property, birth)?

The abbreviation LGBTI is often used in the ruling, yet could the directive be considered to apply to members of that community other than gay and bisexual individuals?

Nevertheless, this case will likely have an important impact in the daily lives of LGBTIQ+ individuals, whether they are thinking of applying for a job or currently working with a discriminating employer or persons with/perceived to have an influential role within the company.

Furthermore, as noted by Djelassi & Mertens[218], the implications of this case cover all groups of persons protected by the anti-discrimination directives.

Recent developments by the ECtHR on the conflict between protection against discrimination and freedom of expression

Almost a year after the above ruling, the ECtHR released two judgments with many similarities to the present case and an interesting interpretation on how to balance the proportionality between protection against discrimination and its interference with the right to freedom of expression.

In *Budinova and Chaprazov v. Bulgaria*[219] and *Behar and Gutman v. Bulgaria*[220] the Court analysed two cases where the same politician had made public statements harassing and inciting to discrimination against Jewish individuals through passages in two books and Roma individuals in a series of statements made in his television programme,

[218] ibid.

[219] *Budinova and Chaprazov v Bulgaria* [2021] European Court of Human Rights (ECtHR) Application no. 12567/13.

[220] *Behar and Gutman v Bulgaria* [2021] European Court of Human Rights (ECtHR) Application no. 29335/13.

interviews, speeches and a book.

The Court condemned Bulgaria's domestic courts failure to afford redress to the discriminated applicants and underlined a series of tests to assess whether negative public statements about a social group could be seen as affecting the 'private life' of individual members of that group to the point of triggering the application of Article 8[221].

These tests include an assessment as to whether the offending statements have reached a certain level (to be seen as capable of impacting on the sense of identity of the offended group and on the feelings of self-worth and self-confidence of that group's members to the point of triggering Article 8 and a 'threshold of severity' [222].

Based on its previous case-law the ECtHR clarified that the relevant factors for deciding whether public statement about a social or ethnic group have affected the "private life" of its members, include, but are not necessarily limited to[223]:

> (a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole), (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype), and
> (c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity. It cannot be said that one of those factors invariably takes precedence; it is the interplay of all of them that leads to the ultimate conclusion on whether the "certain level" required […] and the "threshold of severity" […] has been reached, and on whether Article 8 is thus applicable. The overall context of each case – in particular the social and political climate prevalent at the time when the statements were made – may also be an important consideration.

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[221] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 29.

[222] *Behar and Gutman v. Bulgaria* (n 220) para 67; *Budinova and Chaprazov v. Bulgaria* (n 219) para 68.

[223] *Budinova and Chaprazov v. Bulgaria* (n 219) para 63; *Behar and Gutman v. Bulgaria* (n 220) para 67.

Furthermore, the Court, citing its previous case-law, underlined that "expression that promotes or justifies violence, hatred, xenophobia or another form of intolerance cannot normally claim protection" and that serious criminal-law sanctions on journalists or politicians in cases of hate speech or incitement to violence may be justified. Finally, even statements made by members of parliament "deserve little, if any, protection" when their content is at odds with the democratic values of the Convention system. Indeed, as the Court points out, the exercise of freedom of expression carries with it the "duties and responsibilities" referred to in Article 10 para 2 of the ECHR[224], namely:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Court's tests to assess whether negative public statements about a social group could be seen as affecting the 'private life' of individual members of that group to the point of triggering the application of Article 8 introduce some interesting elements compared with the *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* ECJ ruling.

Compared with the latter ECJ ruling, the ECtHR seems to focus more on the impact the statement has on the attacked individuals and their position in society, in particular by adding the following requirements for Courts to analyse (compared with the *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* ECJ ruling) :

- the characteristics of the attacked group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position vis-à-vis society as a whole),
- the degree to which a statement could convey a negative stereotype about the group as a whole, and the specific content of that stereotype, and

[224] European Convention on Human Rights (ECHR) 1950 [Treaty No.005].

- the extent to which they could be considered to have affected a core aspect of the group's identity and dignity.

Together, these three rulings[225] will play an important part in the protection of LGBTIQ+ individuals and provide national Courts with a key to understand and balance the proportionality between the right to freedom of expression and its interference with the right to protection against discrimination whether in the social-economic or private sphere.

2.4.2 ECtHR: Lee v. the United Kingdom

Introduction

The 7th of December 2021 the ECtHR declared the *Lee v. the United Kingdom*[226] application inadmissible. The case, famously referred to as the "gay cake" or "Irish cake" case required both domestic and ECtHR courts to strike a balance between LGBTIQ+ equality in access to goods and services and religious objections in the commercial sphere. The history surrounding the case, several of the third-party interventions[227] and the Court's reasoning to declare the application inadmissible are what make this legal battle interesting. The latter in particular has been criticised in the media by several academics, NGOs and media outlets[228].

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[225] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128); *Budinova and Chaprazov v. Bulgaria* (n 219); *Behar and Gutman v. Bulgaria* (n 220).

[226] *Lee v. the United Kingdom* (n 14).

Robert Wintemute, 'Application No. 18860/19, Lee v. United Kingdom, European Court of Human Rights, First Section: Written Comments of FIDH, CAJ, AIRE CENTRE, ILGA-EUROPE, NELFA, and ECSOL' <https://caj.org.uk/wp-content/uploads/2022/01/Written-Comments-2020-10-26-FINAL.pdf>. *Lee v. the United Kingdom* (n 14) paras 62, 66.

[228] Steve Foster, 'The "Gay Cake" Case before the European Court Human Rights: More than a Little Misunderstanding' (2021) 26 Coventry Law Journal <https://publications.coventry.ac.uk/index.php/clj/article/view/813> accessed 12 January 2023; Haroon Siddique, '"Gay Cake" Row: Man Loses Seven-Year Battle against Belfast Bakery' *The Guardian* (6 January 2022) <https://www.theguardian.com/law/2022/jan/06/gay-cake-row-man-loses-seven-year-battle-against-belfast-bakery> accessed 12 January 2023; Anezka Turek, 'Stonewall Calls "Gay Cake" Court Loss "a Backwards Step for Equality"' (*The Big Issue*, 6 January 2022) <https://www.bigissue.com/news/activism/stonewall-calls-gay-cake-court-loss-a-backwards-step-for-equality/> accessed 12 January 2023; 'The European Court Of Human Rights Declares The Cake Case On Gay Marriage Inadmissible' (*Human Rights Pulse*) <https://www.humanrightspulse.com/mastercontentblog/the-european-court-of-human-rights-declares-

Facts of the case

The commented case and the assessment of the domestic courts

The applicant, Mr Gareth Lee, is a gay man part of an organisation called 'QueerSpace' aimed at raising LGBTIQ+ visibility, supporting LGBTIQ+ community activities and facilitating communication. The applicant planned to bring a cake to an event on 17 May 2014 aimed at marking a highly political time: the end of the Northern Ireland Anti-Homophobia and Transphobia Week and gathering political momentum towards legislation for same-sex marriage (since the Northern Ireland Assembly had just rejected for the third time a motion to introduce legislation enabling same-sex marriage)[229].

The applicant had been a client of a bakery called 'Ashers Baking Co. Limited' ('the bakery') and wanted to make use of their services. In particular, he had seen a promotional leaflet where they offered the possibility to ice cakes with graphics of the client's choosing. The Court notes that the promotional leaflet did not indicate that there was any limitation on the graphics which would be accepted. Therefore the applicant placed an order for a cake with characters from a children's television show, the logo of QueerSpace and a headline stating: "Support Gay Marriage"[230]. Although that day his order was received and paid, a couple of days later he received a call from the bakery apologizing and offering a refund stating they refused to proceed with the order as they were a Christian business and should not have taken the order to begin with[231].

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the-cake-case-on-gay-marriage-inadmissible> accessed 12 January 2023; Tom Lowenthal, 'Lee v UK: Exhausting Domestic Remedies | OHRH' <https://ohrh.law.ox.ac.uk/lee-v-uk-exhausting-domestic-remedies/> accessed 12 January 2023; Clare Ryan, 'Lee v. The United Kingdom: A Trend Toward Heightened Pleading Standards?' (*Strasbourg Observers*, 11 April 2022) <https://strasbourgobservers.com/2022/04/11/lee-v-the-united-kingdom-a-trend-toward-heightened-pleading-standards/> accessed 12 January 2023; Natalie Alkiviadou, 'A Missed Opportunity for LGBTQ Rights' (*Verfassungsblog*) <https://verfassungsblog.de/a-missed-opportunity-for-lgbtq-rights/> accessed 12 January 2023.

[229] *Lee v. the United Kingdom* (n 14) paras 5–7.

[230] ibid 8.

[231] ibid 9.

The applicant, with the help of the Equality Commission for Northern Ireland, brought an action to the County Court against the bakery and its owners, Mr and Mrs McArthur ('the defendants'), claiming that he had been discriminated against contrary to several domestic provisions prohibiting direct or indirect discrimination on grounds of sexual orientation, political opinion or religious belief.

The claims of both parties in front of the County Court are interesting: the applicant argued that he had neither asked the bakery to support nor to promote the same-sex marriage cause, but just to bake a cake. The defendants, on their part, argued that they based their refusal for that same reason but regardless of the applicant's sexual orientation, they would have refused orders with that slogan also from heterosexual customers and, *vice versa*, would have supplied a cake to the applicant without a pro-same sex marriage slogan[232].

The County Court found that the defendants had directly discriminated against the applicant on two grounds: sexual orientation and political opinion[233]. Firstly, with regards to the discrimination on grounds of sexual orientation, the Court stated that as the bakery was not a religious organisation but a commercial business there were no exceptions in domestic law that allowed their refusal to provide goods and services. Secondly, with regards to the highly political circumstances of the time and the ongoing political debate in Northern Ireland, the applicant's support of same-sex marriage amounted to a political opinion.

The Court recognised that there were competing rights in this case: between Article 9 of the ECHR protecting the right to hold religious views of the defendants and the rights of the applicant to enjoy his right to private like without discrimination (Article 14 in conjunction with Article 8 ECHR). However, the Court found that the domestic laws put forward by the applicant created limitations to the right of the defendant's manifestation of religious beliefs which were necessary in a democratic society. The applicant's case was against the bakery, rather than its owners, and the defendants were entitled to hold

[232] ibid 12.

[233] ibid 13–14.

and manifest their religious beliefs but not in the commercial sphere if this would be contrary to the rights of others[234].

The Court analysed the case also in light of Article 10 ECHR on 'freedom of expression' but found that the defendants had not been required to support, promote or endorse the applicant's views[235].

The defendants appealed the decision and the Court of appeal upheld the County Court's ruling adding its own interesting interpretation of the case.

The Court of Appeal contextualised the competing rights at stake in the case:

> "[49] Northern Ireland has a large and strong faith community. The commitment to religion is fulfilled not just by regular worship but informs every aspect of the manner in which those of faith conduct their lives. Many of those are people who have played an active part in commerce and taken on leadership roles within the commercial world. It is plainly of importance to this jurisdiction that such people should continue to contribute to the well-being of the Northern Ireland economy and that there should be no chill factor to their participation.
>
> [50] The LGBT community has endured a history of considerable discrimination in this jurisdiction. Homosexual acts in private between consenting males were criminalised until 1985. The effect was to diminish the participation of gay people in many aspects of our community life. Those who were gay were reluctant to expose their sexuality and some were subjected to blackmail and other intimidation. The potential for conflict between the rights of the LGBT community and the religious community has unfortunately long been a feature of public debate in Northern Ireland and it is notable that in Dudgeon v UK (1981) 4 EHRR 149 the ECHR recorded that the strongest opposition to the decriminalisation of homosexual acts between consenting males came from the religious community. It is obviously of importance that the LGBT community should feel able to participate in the commercial life of this community freely and transparently. All of this sets the context for this appeal."

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[234] ibid 16.

[235] ibid 18.

The Court also found that there had been associative direct discrimination against the applicant due to his association with the LGBTIQ+ community and underlined the possibility for arbitrary abuse if businesses were free to choose what services to provide to the gay community on the basis of religious belief. In line with the County Court ruling the Court of Appeal agreed that the defendants had not been required to promote or support same-sex marriage[236].

The defendants appealed to the Supreme Court which, the 10 October 2018 set aside the declarations and order for damages previously made by the County Court.

The Supreme Court also overturned several arguments raised by the County Court and the Court of Appeal.

With regards to the Court of Appeal's claim that the applicant had been directly discriminated due to his association with the LGBTIQ+ community, the Supreme Court dismissed such claim as it "found no evidence that the bakery had discriminated on that or any other prohibited ground in the past. The evidence was that they had both employed and served gay people and treated them in a non-discriminatory way"[237].

The Supreme Court then found that there had been no discrimination against the applicant on grounds of sexual orientation. The Supreme Court dissected the message promoting same-sex marriage from the claim that there had been discrimination on grounds of sexual orientation because the benefit from the message on the cake could "accrue not only to gay people but also to the children, parents, families and friends of gay people who wished to marry"[238]. In other words, "the [defendants'] objection was to the message and not to any particular person or persons".

On the alleged discrimination due to the applicant's political opinion, the Supreme Court expressed doubts as:

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[236] ibid 22.

[237] ibid 25.

[238] ibid 26.

> There was no less favourable treatment on this ground because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man.

The Supreme Court proceeded by analysing the defendants' ECHR rights. The Court believed that the defendants rights under Article 9 'Freedom of thought, conscience and religion' and 10 'Freedom of expression' were at stake since the defendants were both required to promote a cause they did not believe in by baking that case and, secondly, they risked being associated with it ("Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign"). In other words, according to the Supreme Court, the bakers by "being required to produce the cake they were being required to express a message with which they deeply disagreed"[239].

Thus, the Supreme Court concluded that while there was the possibility that the applicant had been discriminated on grounds of his political opinion, the domestic laws he relied on "should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree unless justification is shown for doing so".

The applicant therefore complained to the ECtHR under Articles 8, 9 and 10 (alone and in conjunction of Article 14) of the ECHR that his rights were interfered with by a public authority (the Supreme Court) by its decision to dismiss is claim and that the interference was not proportionate.

Analysis

The ECtHR's assessment of the cases' admissibility

The ECtHR, in an 11-paragraph-short explanation, declared the application inadmissible because it considered that the Convention arguments had not been raised before the

[239] ibid 32.

domestic authorities since the applicant had not invoked his Convention rights at any point in the domestic proceedings. The author agrees with the criticisms raised in the media by several academics, NGOs and media outlets about the ECtHR's reasoning[240].

In essence, the Court held that the Convention complaint presented before it should have been aired "either explicitly or in substance, before the national courts" as:

> "It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument"[241].

Inadmissibility grounds due to missing procedural and technical requirements during the first instance and appeal proceedings

The Court starts by underlining it believes that the applicant should have invoked his Convention rights expressly during the domestic proceedings instead of referencing exclusively the domestic laws relating to his case. However, the applicant had argued he had formulated his initial claim correctly and by reference to domestic laws since the relevant provisions of those laws were aimed at protecting rights under Articles 8, 9, 10 and 14 of the ECHR. He considered, therefore, to have relied on his Convention rights in substance which he believed was fully recognised by the domestic courts: the County Court, for instance, had stated expressly that it was faced with competing rights under the Convention. Also, the violations complained of had 'crystallised' following the ruling of the Supreme Court[242].

This stringent requirement by the Court has been considered by academics and commentators alike as a "signal [of] a heightened pleading standard in Strasbourg"[243] in

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[240] Steve Foster (n 216); Haroon Siddique (n 216); Anezka Turek (n 216); 'The European Court of Human Rights Declares The Cake Case On Gay Marriage Inadmissible' (n 216); Tom Lowenthal (n 216); Clare Ryan (n 216); 'A Missed Opportunity for LGBTQ Rights' (n 216).

[241] *Lee v. the United Kingdom* (n 14) para 68.

[242] ibid 56.

'The European Court Of Human Rights Declares The Cake Case On Gay Marriage Inadmissible' (n 228).[243] ibid.

line with the increasingly difficult admissibility standards of the ECtHR. This new requirement would mean, in practice, that domestic lawyers would have to raise Convention rights in every domestic case in anticipation it could make its way to the ECtHR[244].

Secondly, the Court finds, even if the domestic laws referred to by the applicant were enacted to protect Convention-related rights, "those provisions protect consumers only in a very limited way […] against discrimination in access to goods and services" and cannot thus – according to the Court – be said to protect consumers' substantive rights under Articles 8, 9 or 10 of the Convention[245]. This argument is debatable as Article 8 has been interpreted as covering the sphere of employment under certain circumstances[246] and past case-law from the ECtHR mentioned the right of "applying for a service" and "access to a particular profession" as falling under Article 8 ECHR[247].

Inadmissibility grounds relating to the Supreme Court ruling

The ECtHR then reminds that while the protection against discrimination in the domestic laws is 'free-standing' Article 14 ECHR is ancillary in nature and must therefore be attached to the violations of other rights enshrined in the ECHR[248]. However, the Court does not see how the findings of the Supreme Court and the consequences of those findings are linked to a discrimination on grounds of either Article 8, 9, or 10 of the ECHR[249].

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[244] Lowenthal (n 228).

[245] *Lee v. the United Kingdom* (n 14) para 70.

[246] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) paras 48–49; Wintemute (n 227) 1.

[247] Wintemute (n 227) 1.

[248] *Lee v. the United Kingdom* (n 14) para 72.

[249] ibid 73.

Several organisations and academics[250] have criticised the Supreme Court's reasoning and whether it had balanced the competing rights of the applicant (including, first and foremost, Article 8) and the defendants' proportionately.

The argument that there was no evidence that the bakery had discriminated in the past has been considered a lenient approach to a possible first offence[251] and an argument that could make many cases of discrimination very hard to prove. Likewise, the fact that the bakery had employed and served gay people in the past should not be construed as a non-rebuttable presumption of innocence[252].

Furthermore, as seen *supra*, the Supreme Court dissected the message promoting same-sex marriage from the discrimination on grounds of sexual orientation because the message on the cake could benefit individuals not belonging to the LGBTIQ+ community as well. Therefore, it found, "the [defendants'] objection was to the message and not to any particular person or persons".

This assessment is perplexing for three reasons.

Firstly, it minimises the value of the content of the message on the cake which was the request for same-sex couples to be granted adequate recognition and protection of their relationship, a set of rights the ECtHR has consistently defended throughout the years. Indeed, while the Article 12 of the ECHR (in conjunction or not with Article 14) does not impose an obligation to grant same-sex couples the right to marry specifically[253], the ECtHR has recognised since 2010 that the partnership between same-sex couples falls under "private life" as well as "family life" within the meaning of Article 8[254] and has developed since then a consolidated jurisprudence defending the need to provide for the

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[250] Matthew Burton, 'The Bakery as Battleground' (*Verfassungsblog*, 20 October 2018) <https://verfassungsblog.de/the-bakery-as-battleground/> accessed 12 January 2023; Wintemute (n 227) 8–9.

[251] Burton (n 250).

[252] ibid.

[253] 'Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons' (n 157) 38.

[254] *Schalk and Kopf v. Austria* (n 116) paras 94–95.

core needs relevant to a same-sex couple in a stable committed relationship[255]. One year after this decision, in January 2023, the ECtHR reiterated the importance for a State to provide adequate legal recognition and protection to same-sex couples in its Grand Chamber *Fedotova and Others v. Russia* ruling[256]:

> Having regard to its case-law […], the Court confirms that in accordance with their positive obligations under Article 8 of the Convention, the member States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship[257].
>
> […] This interpretation of Article 8 of the Convention is guided by the concern to ensure effective protection of the private and family life of homosexual people. It is also in keeping with the values of the "democratic society" promoted by the Convention, foremost among which are pluralism, tolerance and broadmindedness[258].
>
> […] the recognition and the protection of a couple are inextricably linked[259]. […]
>
> […] In the present case, [t]he partners are unable to regulate fundamental aspects of life as a couple such as those concerning property, maintenance and inheritance except as private individuals entering into contracts under the ordinary law, rather than as an officially recognised couple […]. Nor are they able to rely on the existence of their relationship in dealings with the judicial or administrative authorities. Indeed, the fact that same-sex partners are required to apply to the domestic courts for protection of their basic needs as a couple constitutes in itself a hindrance to respect for their private and family life […][260].

The present case is a missed opportunity for the Court to analyse and balance the right to the protection of same-sex couples to private and family life under Article 8 – which

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[255] *Vallianatos and Others v. Greece* (n 118) paras 91–92; *Oliari and Others v Italy* [2015] European Court of Human Rights (ECtHR) Applications nos. 18766/11 and 36030/11; *Pajić v Croatia* [2016] European Court of Human Rights (ECtHR) Application no. 68453/13; *Taddeucci and McCall v Italy* [2016] European Court of Human Rights (ECtHR) Application no. 51362/09.

[256] *Fedotova and Others v. Russia [GC]* (n 168).

[257] ibid 178.

[258] ibid 179.

[259] ibid 202.

[260] ibid 203.

represents a fundamental intimate aspect of an LGBTIQ+ person's life - with the defendant's claim they did not believe nor want to promote said right.

Additionally, the historic context of the message also plays an important factor: the ability to contract a civil union or marriage was a right denied to the LGBTQ+ community, including the applicant, at the time of the Supreme Court ruling[261].

Moreover, while anyone could be in favour of supporting same-sex marriage, this does not sever the protected characteristic of sexual orientation from a message which is "intimately connected to this community"[262].

Also on this point, it is worth noting the cases' third-party comments by Mr Jonathan Cooper OBE and Professor Paul Johnson:

> in introducing [domestic legislation] the United Kingdom Parliament had given careful and extensive consideration to how best to deal with the clash of rights at the heart of the present case. The balance was achieved by creating an exception in law for organisations whose purpose was, inter alia, to advance, practice or teach the practice or principles of a religion or belief. It did not extend this exception to an organisation whose sole or main purpose was commercial[263].

Furthermore, according to the cases' third-party comments by Professor Wintemute (on behalf of FIDH, CAJ, AIRE CENTRE, ILGA-EUROPE, NELFA, and ECSOL)[264]: Article 14 ECHR imposes a positive obligation on the legislature or judiciary to provide legal protection against discrimination in access to goods and services on the basis of sexual orientation:

> From *Danilenkov*, *Redfearn*, *Eweida*, and *I.B.*, it is clear that the Court has imposed positive obligations on Council of Europe member states (through their legislatures or courts) to protect private-sector employees against discrimination because of their membership of a trade union or a political party, or a manifestation of their religion, or their being HIV-positive (their health or disability). What varies in these four judgments is whether the positive obligation was imposed

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[261] Burton (n 250).

[262] ibid.

[263] *Lee v. the United Kingdom* (n 14) para 62.

[264] Wintemute (n 227).

> under a single Convention Article (9 or 11), as in *Eweida* and *Redfearn*, or under a combination of Article 14 and another Convention Article (8 or 11), as in *I.B.* and *Danilenkov*. There is no reason not to apply the reasoning in these four judgments to access to goods and services made available to the public by private-sector businesses[265].

According to them, the Supreme Court failed to interpret the domestic law in a way that discharged the positive obligation to provide protection against sexual orientation discrimination in the provision of goods and services[266].

Back to the present case, the ECtHR concludes by declaring the application inadmissible due to the fact that the applicant's approach is "contrary to the subsidiary character of the Convention machinery" since:

> the applicant deprived the domestic courts of the opportunity to consider both the applicability of Article 14 to his case and the substantive merits of the Convention complaints on which he now relies. Instead, he now invites the Court to usurp the role of the domestic courts by addressing these issues itself.[267]

Conclusions

The Stonewall organisation, the UK's leading charity for LGBTQ+ rights has criticised the ECtHR for leaving "the door open to legal uncertainty across the UK and causes continued unease for our communities" [268] and considered the decision "a backwards step for equality. Human rights belong to people, not businesses. No business should discriminate against their customers, and no discriminatory behaviour should be held up by equality law"[269].

As seen *supra*, the ECtHR has played a leading role in the development of legal concepts that render judicial proceedings on grounds of discrimination in domestic courts fairer

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[265] ibid 4.

[266] ibid 8.

[267] *Lee v. the United Kingdom* (n 14) para 78.

[268] Turek (n 228).

[269] Siddique (n 228).

and more straightforward including, but not limited to: the possibility to have the burden of proof reversed, the requirement to assess the applicant's personal situation "exactly as it stands", the general duty of the State to protect against ill treatment and need to protect a minority group even when their rights are not accepted by the majority of a population (see Chapter 2.3). Conversely, bringing a case in front of the ECtHR and having it declared admissible has become increasingly difficult in the past years: in 2021, the ECtHR declared 32,961 applications inadmissible or struck out of the list, amounting to 91% of applications disposed of judicially for that year (in which the Court delivered 3131 judgments). Likewise, for 2020, 37289 applications were declared inadmissible or struck out of the list of cases while 1901 judgments were delivered[270].

Furthermore, an analysis on the merits of the case would have provided clarity on how to balance the rights to private life and non-discrimination in access to goods and services with the rights to freedom of speech and thought, conscience and religion. Due to the ancillary nature of Article 14 ECHR to other Articles of the Convention, ECtHR equality jurisprudence has been defined as "anaemic" by Professor Clare Ryan[271], with very little guidance on how to interpret the right to non-discrimination in the access of goods and services.

It also left unaddressed what Professor Wintemute called a "disguised religious exemption" for goods or services that can be characterised as involving a "message"[272]: can commercial organisations discriminate a protected category with the excuse that they do not approve a message relating to their rights? E.g.: "We do not object to your sexual

[270] 'EUROPEAN COURT OF HUMAN RIGHTS STATISTICS' (2021) <https://www.echr.coe.int/Documents/Stats_annual_2021_ENG.pdf> accessed 25 January 2023.

[271] Ryan (n 228).

[272] Robert Wintemute (n 215) 8–9; Professor Angioletta Sperti reached a similar conclusion in: Angioletta Sperti, 'Libertà Religiosa e Divieto Di Discriminazione in Base All'orientamento Sessuale: Alcune Riflessioni a Partire Dalle Pronunce Sull'obiezione Del Pasticciere' (26 May 2019) 14 <http://www.articolo29.it/2019/liberta-religiosa-divieto-discriminazione-base-allorientamento-sessuale-alcune-riflessioni-partire-dalle-pronunce-sullobiezione-del-pasticciere/>.

orientation (or your sex/race/religion/disability), we object to the sexual orientation (sex/race/religion/disability) mentioned in your message"[273]?

Interestingly, the Grand Chamber of the ECtHR ruled in January 2023 on a diametrically opposite case concerning the temporary suspension of children's fairy tale book depicting same-sex relationships and its subsequent labelling as harmful to children under the age of 14. In *Macatė v. Lithuania*[274] the Court found that:

> "[…] the Court is firmly of the view that measures which restrict children's access to information about same-sex relationships solely on the basis of sexual orientation have wider social implications. Such measures, whether they are directly enshrined in the law or adopted in case-by-case decisions, demonstrate that the authorities have a preference for some types of relationships and families over others – that they see different-sex relationships as more socially acceptable and valuable than same-sex relationships, thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, however limited in their scope and effects, are incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.[275]„

The Court concluded that the interference with the applicant's right to freedom of expression had not pursued a legitimate aim and found there had been a violation of Article 10 of the ECHR.

With regards to the commented case, we might hear more about it as the applicant's solicitor, Ciaran Moynagh, calling the decision "a missed opportunity to address the substantive issues raised" said he and the applicant would consider whether to launch a fresh domestic challenge[276].

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[273] Wintemute (n 227) 9.

[274] *Macatė v Lithuania [GC]* [2023] European Court of Human Rights (ECtHR) Application no. 61435/19.

[275] ibid 215.

[276] Siddique (n 228).

2.4.3 ECJ: TP (Monteur audiovisuel pour la télévision publique)[277]

Introduction

In *TP « (Monteur audiovisuel pour la télévision publique)»*[278] (the present case) the ECJ analyses a case dealing with the protection of self-employed individuals providing goods and services, discrimination on the basis of sexual orientation and its balancing with the right to freedom of contract.

Building on the previous *HK v Danmark and HK/Privat* case[279], this landmark ruling has been celebrated[280] for its progressive interpretation of the protection provided by EU anti-discrimination law but, most of all, for its broad definition of which 'workers' are protected by it, "making labour law fit for all those who labour"[281]. Indeed, this case covers the situation self-employed workers (whose rights lack clarity at EU level)[282] but also of workers that may not fall into that category but 'provide goods and services'.

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[277] Sections of this chapter have been published as: Chiara De Capitani, 'Anti-Discrimination and Labour Rights: CJEU Confirms Protection from Discrimination (Including on Grounds of Sexual Orientation) Covers Self-Employed Workers' (*EU Law Analysis*, 24 March 2023) <http://eulawanalysis.blogspot.com/2023/03/anti-discrimination-and-labour-rights.html> accessed 1 April 2023.

[278] *J.K. v TP S.A.* (n 130).

[279] *Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat* [2022] ECJ Case C-587/20.

[280] 'CJEU Recognizes Rights of Self-Employed LGBTIQ+ Persons in Landmark Judgment' <https://www.cov.com/en/news-and-insights/news/2023/01/cjeu-recognizes-rights-of-self-employed-lgbtiq-persons-in-landmark-judgment> accessed 13 February 2023; Nicola Countouris, Mark Freedland and Valerio Stefano, 'Making Labour Law Fit for All Those Who Labour' (17 January 2023) <https://www.socialeurope.eu/making-labour-law-fit-for-all-those-who-labour> accessed 13 February 2023; Marta Lasek-Markey, 'EU Law Protection from Discrimination Extends to Self-Employed Workers, Confirmed the CJEU in a Landmark Judgment with LGBT+ Rights in the Background' (*European Law Blog*, 6 February 2023) <https://europeanlawblog.eu/2023/02/06/eu-law-protection-from-discrimination-extends-to-self-employed-workers-confirmed-the-cjeu-in-a-landmark-judgment-with-lgbt-rights-in-the-background/> accessed 6 February 2023.

[281] Countouris, Freedland and Stefano (n 280).

[282] Lasek-Markey (n 280).

Facts of the case

From 2010 to 2017, J.K. (the applicant) entered into a series of consecutive short-term contracts with TP, a public television channel in Poland, as a self-employed individual. During this time, J.K. worked on editing material for trailers and features that were later used in TP's promotional materials. He worked under the supervision of W.S. He worked two one-week shifts per month with another journalist, as assigned by W.S.

In August 2017, TP was planning to reorganize its structure and transfer J.K's tasks to a new unit. Two new employees were appointed to handle the reorganization and to assess the associates who would be transferred.

At meetings in October and November of that year, J.K. received a positive evaluation and was listed among the associates who passed the assessment. On November 20th, J.K. and TP entered into a one-month work contract. On November 29th, J.K. received his work schedule for December, which included two weeks of service.

However, on December 4th, J.K. and his partner published a Christmas music video promoting tolerance towards same-sex couples on their YouTube channel. Two days later, on December 6th, TP cancelled J.K's first week of service, and on December 20th, J.K. was informed that he would not be required for the second week as well. As a result, J.K. did not perform any service in December and was not paid for it. Subsequently no new contract for specific work was established between him and TP, and the decision to end the work collaboration was made by the employee(s) responsible for carrying out the reorganization.

J.K. filed a case at the District Court for the Capital City of Warsaw (the referring Court) seeking compensation, claiming that he was the victim of direct discrimination by TP due to his sexual orientation. He alleges that the probable reason for the cancellation of his work periods and the termination of his employment with TP was the publication of the previously mentioned Christmas music video on YouTube. TP argues that the case should be dismissed, as there is no guarantee of contract renewal in its practice or law.

The referring Court is uncertain to which extent self-employed workers are covered by the scope of the Equality Framework Directive[283] and has doubts about the compatibility of Polish Equality Law with the directive.

Analysis

Absence of analysis as to whether there was discrimination

Recital (15) of the Equality Framework Directive states that:

> The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice […].

Following this and since the referring court based its request for a preliminary ruling on the premise that J.K's sexual orientation was the reason behind the refusal by TP to conclude the contract, neither the opinion of Advocate General Ćapeta (the AG)[284] nor the ECJ analyse whether the applicant has actually been discriminated or not.

This is regrettable as the case itself raised several interesting elements previously not addressed by the ECJ.

For one, the fact that the applicant's shift was cancelled (and subsequently his contract not renewed) merely two days after his publication of a video aimed at promoting tolerance towards same-sex couples is quite suspicious and bears some resemblance with the *Hakelbracht* ruling[285] (see Chapter 2.3). In that ruling, the ECJ clarified that the protection against retaliation afforded by the Gender Equality Directive[286] applies to all employees who have informally supported a person who has been discriminated against. In that case, a company had dismissed an employee only 8 months after she had objected

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[283] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44) para (15) Preamble.

[284] *JK v TP SA, Opinion of Advocate General Ćapeta* [2022] ECJ Case C-356/21 [Footnote 2].

[285] *Jamina Hakelbracht and Others v WTG Retail BVBA* (n 155).

[286] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (n 49) art 24.

to their refusal to hire a woman based on the latter's pregnancy, a fact that the referring court in that case presumed to be retaliatory behaviour and that the ECJ duly noted in its ruling[287].

This presumption is all the more legitimate as J.K had worked regularly for 7 years for the public television channel, TP.

Additionally, the decision to end the work collaboration was made by the newly recruited employee(s) responsible for carrying out the reorganization of the television channels' structure only a couple of months after the applicant had received a positive evaluation and was listed among the associates who passed the assessment for said reorganization.

Furthermore, in its request for a preliminary ruling, the referring court notes that one or two days after the publication of the Christmas video a meeting took place which was attended by – among others – the applicant's immediate supervisor W.S. and the employees responsible for carrying out the reorganization. While the meeting focused on the creation of content for Christmas to be broadcasted, one of the employees responsible for carrying out the reorganization made a sarcastic joke about the fact that "(Channel 1) already had a spot and its own Santas". After the meeting, one of the employees responsible for carrying out the reorganization (possibly the same who made the sarcastic joke) gave instructions to W.S. to suspend the applicant and assign his shifts to another person.

The joke during a meeting expressly referring to the applicant's video promoting tolerance towards same-sex couples (where a man dressed as Santa kisses another man) and following request to suspend him might hint to a correlation between the suspension (and following non-renewal) of the applicant's contract and his sexual orientation.

As seen supra (Chapter 2.4.1) so far the ECJ currently has ruled on three cases[288] where an employer or a person perceived as being capable of exerting a decisive influence on

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[287] *Jamina Hakelbracht and Others v WTG Retail BVBA* (n 155) para 24.

[288] *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (n 149); *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării* (n 151); *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128).

the recruitment policy of an employer stated that they would not hire a person from a protected category. In these three cases, these statements were always public. In this specific case, it would have been interesting for the referring Court to ask the ECJ clarifications as how to assess situations where statements made privately implying prejudice are followed by a termination decision.

Finally, the referring court reported that the employees and associates of the editorial office where the applicant performed his tasks within the defendant's organisation were aware of the applicant's sexual orientation and that the defendant (TP) has argued that "the applicant's sexual orientation was common knowledge". This argument resonates in part with the previously commented *Lee v. the United Kingdom* ECtHR ruling[289] (see Chapter 2.4.2) where the defendants (a bakery) had argued that they had employed and served gay people in the past and that their refusal to provide a good was not based on the applicant's sexual orientation but on their refusal to put a pro-same sex marriage slogan on a cake. In the author's opinion, this could have led to interesting reflections not only as to the discrimination of the present cases' applicant on matters of employment, but also its implications as a possible retaliation to his right to freedom of expression in producing a video aiming at tolerance towards same-sex couples.

Scope of the protection afforded against discrimination in relation to access to employment

The first question the ECJ and the AG try to answer is whether Article 3 (1)(a) of the Equality Framework Directive[290] covers situations such as the one in the present case. According to said provision, the directive applies to 'conditions for access to employment, to self-employment or to occupation'. Both the ECJ and AG proceed with examining what 'conditions for access to employment, self-employment or to occupation' entail: since the directive does not refer to national law to define this concept, it must be given an autonomous and uniform interpretation across the European Union.

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[289] *Lee v. the United Kingdom* (n 14).

[290] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (n 44) art 3 (1)(a).

The Court starts by noting, following its previous reasoning in *HK v Danmark and HK/Privat*[291], that the usual meaning in everyday language of 'employment', 'self-employment' and 'occupation' must be construed broadly and "cover conditions for access to any occupational activity, whatever the nature and characteristics of such activity"[292]. In *HK v Danmark and HK/Privat* the Court had found that the post of sector convector of an organisation of workers constituted a real and genuine professional activity[293]. Therefore, the applicant in that case was protected by the Equality Framework Directive against discrimination on grounds of her age, even though her post was a political post (decided with elections by the members of that organisation)[294].

The Court reaches a similar conclusion in the present case, noting that it was not the intention of the EU legislature to restrict the application of the Equality Framework Directive solely to positions held by individuals classified as 'workers' according to Article 45 of the TFEU. As a matter of fact, whereas the Equality Framework Directive was adopted on the basis of the (current) Article 19 (1) TFEU conferring the EU the power to combat discrimination, Article 45 TFEU only protects workers "as the weaker party in an employment relationship"[295]. In fact, the Court reiterates, the Equality Framework Directive applies to "all persons […] whatever the branch of the activity and at all levels of the professional hierarchy" and was adopted to eliminate all discriminatory obstacles in the field of employment[296].

What constitutes "work" and its intersection with "provision of goods and services"

The Court, while noting that a wide range of occupational activities are protected by the Equality Framework Directive, proceeds to highlight activities falling out of the scope of

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[291] *Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat* (n 279).

[292] ibid 27; *J.K. v TP S.A.* (n 130) para 36.

[293] *Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat* (n 279) para 35.

[294] ibid 36–39.

[295] ibid 34; *J.K. v TP S.A.* (n 130) paras 40–43.

[296] *Ligebehandlingsnævnet acting on behalf of A v HK/Danmark and HK/Privat* (n 279) paras 29, 34; *J.K. v TP S.A.* (n 130) paras 38, 43.

that directive which are "the mere provision of goods and services to one or more recipients"[297].

Furthermore, the Court adds that, to fall under the scope of the directive, occupational activities must:

1. be genuine,
2. be pursued in the context of a legal relationship that is
3. characterised by a degree of stability[298].

The Court does not further define these three requirements but applies them to the present case (while leaving it for the referring court to decide whether the applicant satisfies these criteria): J.K prepared personally specific work for the public television, depended on the assignment of his shifts and had received a positive evaluation[299]. In other words, the Court finds, J.K pursued a genuine and effective occupational activity on a personal and regular basis for the same recipient, which enabled him to earn (at least in part) his livelihood[300].

The fact that the three criteria above seem to apply to the present case creates a situation where his 'occupational activity' with the company does not even need to be classified as 'employment' or 'self-employment' to fall under the scope of the directive[301].

This broad interpretation of the scope of the directive is highly welcome and will likely protect a lot of self-employed individuals and providers of goods and services that are currently left out in an overly de-regularised and flexible labour market. The shift of focus from the AG and the Court from the conditions of employment decided by an employer

[297] *J.K. v TP S.A.* (n 130) para 44.

[298] ibid 45.

[299] ibid 46.

[300] ibid 47.

[301] ibid.

to, rather, the personal aspects of the work provided by the worker have been greeted favourably by academics[302].

Nevertheless, the exclusion by the court of "the mere provision of goods and services" from the scope of the directive is not very clear and seems to rebut its previous finding that "any occupational activity, whatever the nature and characteristics of such activity" is covered by the scope of the directive. Coupled with the requirements that an occupational activity "be genuine", "pursued in the context of a legal relationship" and that said relationship must be "characterised by a degree of stability" seem to exclude from the scope of the directive several occupational activities whereas currently, as the AG finds, "non-standard forms of work have increased, causing fragmentation in the labour market"[303].

Firstly, the definition of 'services' in Article 57 TFEU provides that they "shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration". This creates – for the author – a presumption that the payment of these services implies the existence of an occupational activity. The AG underlines in her opinion that a person may be simultaneously self-employed a provider of goods and services since "as recipients of their goods or services , we 'buy' their work and the end product of that work at the same time"[304].

Secondly, the Court does not further define in particular what constitutes a 'genuine' occupational activity and while the author agrees that the existence of a legal relationship and its level of stability do create a presumption of an existing occupational activity, it is unclear why the lack thereof should be excluded from its scope. With regards to the "level of stability" required of the legal relationship, it is interesting to note that the AG believes that in the present situation the "continuity of work" of the applicant (who had worked

[302] Countouris, Freedland and Stefano (n 280).

[303] *J.K. v TP S.A., Opinion of Advocate General Ćapeta* (n 284) para 63.

[304] ibid 41.

for seven years for TP) does not make any difference: "previous working relationships are unrelated to applying for a job and succeeding in concluding a contract"[305].

Conversely, the AG opinion provided a far-reaching definition of what may constitutes 'work'. She argues that the Equality Framework Directive aims at protecting access to work from discrimination "in all the different forms in which work can be offered"[306]. For her, work refers both to the activity and the result of that activity[307] and the way in which someone approaches the same occupational task vary widely:

> A person can earn his or her living by working for only one or for multiple 'employers'; for longer or shorter periods of time; part-time or only seasonally; at one place, or at different places; using his or her own tools or somebody else's. Likewise, work can be agreed on the –basis of time (for example, 20 hours per month), or on the basis of the tasks to be performed (for example, painting six walls white)[308].

Therefore, she adds, "different legal frameworks" should not be relevant for the application of the directive as long as the person engages in 'personal work'[309]. She further adds that whether a potential employer 'buys' the work or the 'goods and services' provided by a person, a company's refusal to conclude a contract because of a discrimination ground unrelated to the worker's capacity to perform the work prevents their access to that particular job and, therefore, limits their access to work[310]:

> There is no problem accepting that such discrimination should not be allowed if [the person providing the work was] seeking traditional employment. Why should the same not apply in all other situations where [that person] was offering [his/her] work on the basis of contracts for goods

[305] ibid 95–97.

[306] ibid 61.

[307] ibid 62.

[308] ibid 64.

[309] ibid 66.

[310] ibid 79–80.

> or services concluded with [them] as a person, or on the basis of contracts for goods or services concluded with [their] company, but promising [their] personal work?[311]

Finally, she highlights that exempting the personal provision of goods and services from the purview of the Equality Framework Directive could create a loophole that would allow companies or individuals to bypass anti-discrimination laws by opting to purchase goods or services instead of employing a service provider[312]. This would be contrary to the useful effect of that directive, she finds.

Both the Court and the AG come to the conclusion that the ability to enter into a contract for specific work may be an essential factor for someone like the applicant to effectively pursue their professional activities and that, thus, such ability may fall under the scope of 'conditions for access' to self-employment[313].

Termination

The Court and AG proceed to examine whether Article 3 (1)(c) applying the protection conferred by the Equality Framework Directive to "employment and working conditions, including dismissals" applies to the present case.

That provision does not explicitly mention 'self-employment', but the AG and the Court's findings described above on Article 3 (1)(a) apply as well here[314]: since the "Equality Framework" Directive was adopted to remove all discriminatory obstacles, its terms must be construed broadly:

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[311] ibid 81.

[312] ibid 85.

[313] *J.K. v TP S.A.* (n 130) para 50; *J.K. v TP S.A., Opinion of Advocate General Ćapeta* (n 284) paras 80, 88.

[314] *J.K. v TP S.A.* (n 130) paras 53–54; *J.K. v TP S.A., Opinion of Advocate General Ćapeta* (n 284) para 101.

> It follows that the protection conferred by [the directive] cannot depend on the formal categorisation of an employment relationship under national law or on the choice made at the time of the appointment of the person concerned between one type of contract and another[315].

While the Court recognises that the concept of 'dismissal' is usually applied to the termination of an employment contract it agrees with the AG that Article 3 (1)(c) also covers the unilateral termination of any activity covered by Article (1)(a) of that directive[316].

Exceptions on grounds of public security, public order, prevention of criminal offences and protection of the health and rights and freedoms of others

Article 2 (5) of the Equality Framework Directive lays down exceptions to the application of the directive which "must be interpreted strictly"[317]: where national measures are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Furthermore, while the directive mandates that discrimination on the grounds of sexual orientation in employment is prohibited, Poland's transposition of the directive only extends this prohibition to sex, race, ethnic origin, and nationality with respect to freedom of contract.

The AG and the Court proceed to balance the rights enshrined in the Equality Framework Directive with the 'freedom of contract' granted by the Polish domestic law and Article 16 of the Charter ('Freedom to conduct a business'). An analysis of the aims of said Polish law (protection against discrimination) coupled with the fact that freedom of contract is not an absolute right leads the Court and AG to the conclusion that freedom of contract has not been disproportionately limited by the Equality Framework Directive[318].

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[315] *J.K. v TP S.A.* (n 130) para 55.

[316] ibid 60–62; *J.K. v TP S.A., Opinion of Advocate General Ćapeta* (n 284) para 102.

[317] *J.K. v TP S.A.* (n 130) para 71; *J.K. v TP S.A., Opinion of Advocate General Ćapeta* (n 284) para 105.

[318] *J.K. v TP S.A., Opinion of Advocate General Ćapeta* (n 284) paras 106–131.

Conclusions

This landmark ruling will likely have a significant impact on EU equality and labour law alike.

Firstly, all grounds of discrimination currently recognised by secondary EU law will benefit from this ruling. Indeed, the scope of application of all EU equality directives that have similar wording to that of the Equality Framework Directive will be impacted[319] by the Court's definitions of 'conditions for access to employment, to self-employment or to occupation', 'self-employment' and 'occupational activity'.

With regards to LGBTIQ+ rights specifically, while the ruling will have a clear-cut impact on bisexual and gay individuals, it is not clear what its impact could be as regards other members of the LGBTIQ+ community. As explained in Chapter I, the existing EU gender equality legal framework anchors transgender and intersex equality within the binary concept of sex, likely excluding non-binary persons[320]. Furthermore, existing provisions on gender identity have covered only individuals who intend to undergo or have undergone gender transition-related surgery(ies)[321].

It also remains to be seen whether categories of individuals that are protected by Article 21 of the Charter but not by the scope of the directive (discriminations based on social origin, genetic features, language, political or any other opinion, property, birth) can be considered to be afforded the same protection.

Secondly, with regards to labour law, the focus on the person doing the work and the 'personal' work they provide instead of the contract the employer has negotiated with them will hopefully be further analysed by the AG and the Court in future rulings.

Furthermore, as noted by the Court, the protection afforded by the directive "extends to the professional relationship concerned in its entirety". While the present case concerned

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[319] Countouris, Freedland and Stefano (n 280).

[320] European Commission. Directorate General for Justice and Consumers. (n 3) 47.

[321] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 46.

the conditions for pursuing and terminating an activity, the author believes it safe to assume it affords protection to workers also while performing their 'occupational activities' under the scope of the directive. For instance, other sections of Article 3 (1), may afford protection against discriminatory retaliation with regards to promotions, vocational guidance and training and pay.

2.5 Pending and ongoing cases

Several interesting cases concerning the protection against discrimination of LGBTIQ+ individuals are currently pending before the ECJ and the ECtHR. A non-exhaustive analysis of pending LGBTIQ+ cases shows they mainly concern discrimination in employment, access to healthcare and to life insurance at the ECtHR. The ECJ also has several interesting pending cases with a cross-border element (see Chapter 3.3).

With regards to discrimination in **employment**, two interesting cases are currently pending before the ECtHR against Russia. In *Oleynik v. Russia*[322], a private foundation interviewed then confirmed their interest in hiring the applicant as a training manager. After asking him about his sexual orientation and finding out he is gay they withdrew their job offer. In *Krupnova v. Russia*[323] the applicant's was dismissed as a music teacher at a state school for children for "immoral behaviour" after her pictures with her same-sex partner had been made available on the Internet with unrestricted access by a third person.

Access to healthcare remains a crucial issue for members of the LGBTIQ+ community.

With regards to gender identity and gender expression, lack or complexity of legal gender recognition procedures, the requirement to undergo transition-related procedures beforehand and to pay for them remain – separately or jointly - at the centre of several pending court cases. In *Geonea v. Romania*[324] the applicant – who was required to undergo and pay transition-related procedures to obtain his recognition - complains of the

[322] *Oleynik v Russia* European Court of Human Rights (ECtHR) Application no. 4086/18.

[323] *Krupnova v Russia* European Court of Human Rights (ECtHR) Application no. 49014/16.

[324] *Geonea v Romania* European Court of Human Rights (ECtHR) Application no. 54708/21.

lack of a clear, fair and predictable domestic legal framework concerning the legal gender recognition of transgender people. By the same token, the applicant in *Csata v. Romania*[325] was denied legal gender recognition due not her not wanting to undergo transition-related procedures. In *Á.C. and others v. Hungary*[326] two applicants complain about Hungary's absence of legal provisions outlining the process for recognizing their gender identity.

According to the applicant in *W.W. v. Poland*[327], the decision to deny her access to feminising hormone therapy in prison resulted in emotional distress that endangered her well-being and increased the risk of suicide. She alleges that the decision was driven by discriminatory motives and that she lacked any effective means of challenging it.

Access to healthcare as well as protection against discrimination and *refoulement* are the key elements of *L.B. v. France*[328]. The case concerns an intersex individual of Moroccan nationality who was expelled to Morocco after his asylum application was denied, despite having undergone gender transition-related treatment in France. The individual argued that the expulsion effectively terminated his transition-related healthcare, as such treatment was unavailable in Morocco. Additionally, as intersexuality is prohibited in Morocco, the individual claimed that he would be viewed as a gay person there facing the risk of social exclusion and criminal prosecution. The individual also asserted that the termination of his medical and surgical treatments made it impossible for him to affirm his gender identity.

In *Grochulski v. Poland*[329] the applicant complains about the inability to jointly enrol with his same-sex partner in a **private life insurance** scheme designed for couples.

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[325] *Csata v Romania* European Court of Human Rights (ECtHR) Application no. 65128/19.

[326] *ÁC and others v Hungary* European Court of Human Rights (ECtHR) Applications nos. 66078/17 and 12918/19.

[327] *WW v Poland* European Court of Human Rights (ECtHR) Application no. 31842/20.

[328] *LB v France* European Court of Human Rights (ECtHR) Application no. 67839/17.

[329] *Grochulski v Poland* European Court of Human Rights (ECtHR) Application no. 131/15.

Chapter III : Judicial law-making in freedom of movement law

3.1 Freedom of movement-related concepts developed by the jurisprudence of European Courts

3.1.1 Components of 'family life' and right to protect 'family unity'

The rights to respect for private and family life guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR[330]. They protect both the 'private life' of an individual/family and the 'family life' itself.

The ECtHR has recognised since 2010 that the partnership between same-sex couples falls under 'private life' as well as 'family life' within the meaning of Article 8[331] and has developed since then a consolidated jurisprudence defending the need to provide for the core needs relevant to a same-sex couple in a stable committed relationship[332].

As we will see below, the ECtHR jurisprudence has also acknowledged sooner "modern patterns of family life" for the purposes of Article 8 of the ECHR, protecting *de facto* family relationships (taking into account the "reality of ties between family members, as well as evidence of close personal links such as relationship of emotional dependency")[333]. The ECJ, in contrast, had adopted until recently a stricter approach by recognising the existence of family ties for the purpose of migration and freedom of movement rights only where there were formal legal or biological links between family

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Silvia Pfeiff, 'Is There a Fundamental Right to Cross-Border Permanence of Elements of Personal and Family Status?', *L'accès aux droits de la personne et de la famille en Europe* (Bruylant 2022) 27–29. Steve Peers and others (eds), 'Article 7 (Family Life Aspects)', *The EU Charter of Fundamental Rights : A Commentary* (2nd edn, Hart Publishing 2021) 195 <http://www.bloomsburycollections.com/book/the-eu-charter-of-fundamental-rights-a-commentary-1/article-7-family-life-aspects-this-chapter-was-written-by-shazia-choudhry-in-the-first-edition-it-has-been-updated-by-miriam-kullmann-for-the-second-e/> accessed 26 November 2021.

[331] *Schalk and Kopf v. Austria* (n 116) paras 94–95.

[332] *Vallianatos and Others v. Greece* (n 118) paras 91–92; *Oliari and Others v. Italy* (n 255); *Pajić v. Croatia* (n 255); *Taddeucci and McCall v. Italy* (n 255).

[333] ICF S.A., 'ICF Final Report - Recognition of Parenthood between MSs' 11 <https://commission.europa.eu/system/files/2023-01/ICF%20Final%20Report%20-%20Recognition%20of%20parenthood%20between%20MSs%20-%20FINAL.pdf> accessed 18 January 2023.

members[334]. Nevertheless, recent ECJ rulings show a shift towards the ECtHR interpretation on the recognition of rights to family life and unity for families having less stringent biological or legal bonds.

These developments are of particular interest to this research as the majority of complains brought forward by LGBTIQ+ individuals before the ECtHR concern complaints under Article 8 of the Convention[335]. For the purpose of this research, we will focus on the notion of 'family life' and, due to the EU's limited scope of application in this regard, of 'family unity' within migration policies to assess the broadening definition of 'family' in the case-law of the ECJ and ECtHR.

The ECtHR has defined several aspects of what may be considered 'family life' and whether that right may include the right to found a family: in *E.B. v. France* - on the refusal of an applicant's request for authorisation to adopt a child – the Court affirmed that:

> the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt […]. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family […], or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father […], or the relationship that arises from a genuine marriage, even if family life has not yet been fully […], or the relationship that arises from a lawful and genuine adoption […][336].

Nevertheless, although Article 8 might not guarantee a right to adopt *per se*, should the contracting State have foreseen additional rights in that regard (e.g. allowing a single person to adopt or recognizing second-parent adoption to unmarried couples) it may not apply these rights in a discriminatory manner (e.g. granting them only to heterosexual individuals/couples)[337].

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[334] ibid 11–12.

[335] 'Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons' (n 157) 17.

[336] *E.B v France* (n 115) 41.

[337] 'Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons' (n 157) 39; *E.B v France* (n 115); *X and Others v Austria* [2013] European Court of Human Rights (ECtHR) Application no. 19010/07.

In the 2021 *Valdís Fjölnisdóttir and Others v. Iceland* ruling[338], the ECtHR also recognized the family life between a same-sex couple and their non-biological child born abroad via surrogacy. Notwithstanding the absence of a biological link between the three applicants nor a recognised legal tie, the court recognised genuine personal ties between them due to the role and recognition by the third applicant of the same-sex couple as his parents and the uninterrupted passage of time spent together, the third applicant's entire life[339].

However, the Court found no violation in the State's refusal to formally register them as his parents, considering a fair balance had been struck between the applicants' right to respect for family life and the general interests which the State had sought to protect by the ban on surrogacy[340].

As regards the return of irregularly staying third-country nationals, the ECJ has ruled several cases in the past years on the need to take into account the right to family unity before adopting decisions return, even when the person to whom the return decision is addressed is not a minor but their father. These developments, although they concern the interpretation of the Returns Directive[341], are increasingly defining and broadening the concept of 'family unity' as a right to be protected by EU law and might therefore have implications on the right of same-sex couples and families to move, reside, and not be returned by Member States.

The *M. A. v État belge* ruling[342] concerned a father who was considered a threat to public order due to having committed several offences whereas the *LM v Centre public d'action sociale de Seraing* ruling[343] concerned a father who could not afford to support his

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[338] *Valdís Fjölnisdóttir and Others v Iceland* [2021] European Court of Human Rights (ECtHR) Application no. 71552/17.

[339] ibid 58–62.

[340] ibid 75.

[341] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 2008.

[342] *M A v État belge* [2021] ECJ Case C-112/20.

[343] *LM v Centre public d'action sociale de Seraing* [2020] ECJ Case C-402/19.

seriously ill adult daughter without receiving social assistance from the Member State of residence[344]. In both cases the Court held that the need to protect the family life of these children under Articles 5 (a) and 14 (1) (a) of the Returns Directive[345] prevailed over the prerogative of the state to return their fathers to a third state.

Similarly, in 2016, the ECtHR - with regards to the definition of 'family unity' for migratory purposes - highlighted in *Novruk and Others v. Russia* that the link between adult children and their parents falls under the head of 'private life' within the meaning of Article 8 of the Convention, all the more since the applicant's relationship with her son indicated personal, social and economic ties[346].

The definition of 'dependency' between family members for the purposes to facilitate entry and residence to and within the EU has also been subject to recent interpretation by the ECJ. In the *SRS and AA v Minister for Justice and Equality* ruling[347] pronounced the 15 of September 2022, the Court was considered that the definition of dependent family member could cover the family life of first cousins and should be considered to include three types of dependency:

1. Financial dependence,
2. Physical dependence (situations where serious health grounds require the personal care of a family member) and
3. Membership of the household (genuine dependence between two or more persons sharing domestic life[348]).

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[344] See further : Chiara De Capitani, 'Arrêt « CPAS de Seraing » : application de la directive retour au ressortissant d'un pays tiers ayant un enfant majeur atteint d'une maladie grave' (2021) 4 Journal de droit européen 180.

[345] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (n 341).

[346] *Novruk and Others v Russia* [2016] European Court of Human Rights (ECtHR) Applications nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14 [88–89].

[347] *SRS and AA v Minister for Justice and Equality* [2022] ECJ Case C-22/21.

[348] ibid 21–26.

This third provision is highly welcomed and has to be assessed by national authorities following several factors including, but not limited to: degree of kinship but also the closeness of the family relationship, the reciprocity and the strength of the ties between these two persons[349]. Lastly, the duration of the domestic life has to be taken into account and include – where relevant – the time lived together before and after the possible naturalisation of the 'sponsor' family member[350].

The 'relation of dependency' between family members for the purpose of granting a derived right of residence to a third-country nationals has been interpreted by the ECJ as applying also for EU citizens who have never exercised their right to freedom of movement. In a now consolidated jurisprudence[351], the ECJ has found that in these cases, where relationship of dependency exists between an EU citizen and a third-country national of such a nature that - in the event of a refusal to grant a derived right of residence to the third-country national - the Union citizen would be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred by his/her EU citizenship under Article 20 TFEU.

3.1.2 The concept of 'own resources'[352]

In the *X v Belgische Staat* ruling[353], the Court of Justice of the European Union clarified the notion of 'resources', a precondition in several directives to the right to migrate to the Union territory. Indeed, the requirement that a citizen of the Union or a national of a third State have a certain quantity and quality of 'resources' in order to be able to reside or circulate on the territory of the Union is present in many directives, with a view to

[349] ibid 27.

[350] ibid 29.

[351] *HC Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* [2017] ECJ Case C-133/15; *KA and Others v Belgische Staat* [2018] ECJ Case C-82/16; *Subdelegación del Gobierno en Ciudad Real v RH* [2020] ECJ Case C-836/18; *Subdelegación del Gobierno en Toledo v XU and QP* [2022] ECJ Joined Cases C-451/19 and C-532/19.

[352] Sections of this chapter were previously published in French as : Chiara De Capitani, 'Arrêt «X c. État Belge »: la notion de ressources stables, régulières et suffisantes en droit européen des migrations' (2020) 6 Journal de droit européen 268.

[353] *X v Belgische Staat* [2019] ECJ Case C-302/18.

ensuring that the person concerned is not or does not become a burden for the host Member State.

Although each directive provides for differences in the quantity, stability and regularity of these 'resources', the Court has listed elements allowing the character and content of these to be analysed.

The Court also ruled, for the first time, on the possibility of the plaintiff referring not only to 'own resources', but to resources made available by a non-nuclear family member: this interpretation has several aspects innovations for European immigration law and, possibly, the migration or cross-border rules applicable to LGBTIQ+ couples.

In this ruling concerning the denial by Belgian authorities to grant the long-term resident status to a third-country national, the Court clarifies, for the first time, that refusing an application for this status on the sole ground that the resources come from a third party is contrary to the objective pursued by the "long term residence" directive and, implicitly, the freedom of movement and family reunification directives as well.

The Court finds, indeed, that it is not the source of the resources, but rather their lasting and sufficient character, taking into account the individual situation of the person concerned, which is decisive to grant the applicant a legal residence status[354].

The Court cites, for example, as factors to be taken into account: the legally binding nature of a commitment of cost bearing by a third party or a member of the applicant's family, the family link between the applicant for long-term resident status duration and the member or members of the family willing to support him, the nature and permanence of the resources of the member or members of the applicant's family.

In the past, the Court had previously recognised that the 'sponsoring' third party may be the parent, the unmarried partner or the spouse[355]. However the commented ruling is – to

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[354] Marco Balboni and Carmelo Danisi, 'Rassegna di giurisprudenza europea' (March 2020) <https://www.dirittoimmigrazionecittadinanza.it/archivio-fascicoli/fascicolo-2020-n-1/91-rassegne-di-giurisprudenza/rassegne-di-giurisprudenza-europea-n-1-2020/161-rassegne-di-giurisprudenza-europea>.

[355] Alessandra Lang, 'Impact of the Regulations on the Free Movement of Persons in the EU' in Ilaria Viarengo and Francesca C Villata (eds), *Planning the Future of Cross Border Families : A Path Through Coordination* (1st edn, Hart Publishing 2020) 364

the author's knowledge – the first case in which the Court has expressed itself on the possibility of an applicant availing itself of a guarantee emanating from a non-nuclear family member (namely a brother) and, more broadly, a third party.

The Court thus recognized the possibility, for any third party, of being the source of the applicant's resources provided that said resources are stable, regular and sufficient. In this context, the Court does not exclude the possibility that a legally binding commitment of cost bearing issued by a third party may, in a given situation, meet the requirements of the directive – it being understood that it is for the authorities of the Member States concerned to establish, following an examination *in concreto*, compliance with these requirements.

The idea that the right to move and reside within the Union should be linked to a commitment of cost bearing by a third party is thus reminiscent of the concept of private sponsorship in matters of asylum. For LGBTIQ+ couples and families whose couple or parental relationship might not be recognized or formalised by the law of their State of origin, this ruling might have important implications for example allowing one member of the family to sponsor their partner or children's visa to go and reside in a Member State while they remain abroad.

3.2 In depth analysis of recent LGBTIQ+ landmark rulings and developments relating to freedom of movement[356]

In this section we will analyse the judgments that have contributed considerably to the recognition of the rights of LGBTIQ+ people and families first in the ECHR, then in the European Union. We will focus the analysis on the cross-border aspects of LGBTIQ+

<http://www.bloomsburycollections.com/book/planning-the-future-of-cross-border-families-a-path-through-coordination/ch25-impact-of-the-regulations-on-the-free-movement-of-persons-in-the-eu/> accessed 12 January 2021.

[356] Sections of this chapter were previously published in Italian as: Chiara De Capitani and Adele Del Guercio, 'L'Europa Come Zona Di Libertà per i Migranti LGBTIQ+: Alcune Considerazioni Critiche' in Fabio Amato (ed), *Genere, sesso, migrazione: riflessi transdisciplinari* (I edizione, DeriveApprodi 2021) <https://deriveapprodi.com/libro/genere-sesso-migrazione/>.

rights: the obstacles experienced respectively as individuals, as a couple or as a single-parent family to the right to migrate from a third country or to move within the European Union.

In accordance with a well-established jurisprudence of the ECHR, the protection of LGBTIQ+ rights and the prohibition of discriminating against people on the basis of their gender identity and sexual orientation are guaranteed by the ECHR, mainly in Article 8 on respect for private and family life in conjunction with Article 14 on the prohibition of discrimination.

The ECtHR has ruled on several cases relating to the right to family reunification of same-sex couples[357]. In particular, the *Taddeucci and McCall v Italy* case[358] concerned Italy's refusal to grant a residence permit to the same-sex third-country partner of an Italian citizen. At the time of the appeal, Italy recognized the right to family reunification only for married couples and only allowed heterosexual couples to marry. The ECtHR recognized that the prerequisite of marriage, which same-sex couples could not access under national law, constituted an "insurmountable obstacle" to obtaining a residence permit and constituted a violation of Articles 8 and 14 of the ECHR. It is also at the request of the Strasbourg Court that Italy has introduced the law on civil unions into its own system (Legge 20 maggio 2016 n. 76).

With regards to gender identity the Strasbourg judges have repeatedly condemned the absence or bureaucratic complexity of the legal procedures for gender recognition[359], which, as we will see below, can preclude the right to freedom of movement and recognition of the parentage relationship between transgender parents and their children. For example, the ECtHR found that the prerequisite of undergoing transition-related surgery(ies) to legally recognize the gender of two applicants constituted an unjustified

[357] *Oliari and Others v. Italy* (n 255); *Pajić v. Croatia* (n 255); *Taddeucci and McCall v. Italy* (n 255).

[358] *Taddeucci and McCall v. Italy* (n 255).

Rana v Hungary [2020] European Court of Human Rights (ECtHR) Application no. 40888/17. *YT v Bulgaria* [2020] European Court of Human Rights (ECtHR) Application no. 41701/16; *SV v Italy* [2018] European Court of Human Rights (ECtHR) Application no. 55216/08.

interference with their right to respect for private life[360]. In the 2020 ruling *Rana v. Hungary* the Court found that the State's refusal to legally change the gender and name of a transgender refugee from Iran because he did not have a birth certificate from Hungary was in violation of Article 8[361]. This case was all the more paradoxical because the Government submitted the applicant could have contacted the Iranian authorities to have his gender change registered in Iran[362] whereas the applicant had been granted asylum in Hungary because he had been persecuted due to his gender identity in Iran[363].

As for the jurisprudence of the Court of Justice, as brought up *supra*, it is only in 2018, with the *Coman* ruling[364], that the Court confirmed the terminological neutrality of the notion of 'spouse', which can therefore include the same-sex spouse of the Union citizen within the meaning of the Citizenship Directive[365].

Although the ruling only concerns the application of said directive, it would be unreasonable to consider that the term 'spouse' has a different meaning limited to heterosexual couples. The same applies, in my opinion, to the interpretation of the other types of gender-neutral family relationships used by the aforementioned directives, for example with regard to the use of "partner" or "citizen linked to the sponsor by a registered relationship".

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[360] *X and Y v. Romania* (n 100).

[361] *Rana v. Hungary* (n 359) para 42.

[362] ibid 34.

[363] ibid 7; Carmelo Danisi and Nuno Ferreira, 'Anche i Rifugiati Transgender Hanno Diritto al Cambio Del Nome: Un Passo Avanti Nel Riconoscimento Dei Bisogni Dei Richiedenti e Rifugiati SOGI in Ambito CEDU' (22 July 2020) <http://www.articolo29.it/2020/anche-rifugiati-transgender-diritto-al-cambio-del-nome-un-passo-avanti-nel-riconoscimento-dei-bisogni-dei-richiedenti-rifugiati-sogi-ambito-cedu/>; Marco Balboni and Carmelo Danisi, 'Rassegna di giurisprudenza europea: Corte europea dei diritti umani' (2020) <https://www.dirittoimmigrazionecittadinanza.it/rassegne/rassegna-di-giurisprudenza-europea/195-rsse>.

[364] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (n 106).

[365] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (n 105).

The *Coman* ruling, while constituting a milestone in affirming the right to free movement has had so far limited practical implications. The case in question has in fact a limited scope: it concerns only married couples, where one of the two spouses is a citizen of a third country and only if the couple has "genuinely resided" (for at least three months) and got married in a Member State of the Union[366]. Because family law constitutes a matter of competence of the Member States, the EU can only adopt measures having transnational implications, and the ECJ has limited itself to rule on the obligation to authorize the residence of the spouse who is a citizen of a third country, leaving the host or home Member State. Member States retain the prerogative to recognize him and the European citizen as "spouses" for other legal purposes: property regime and tax provisions, social security, pension and succession, citizenship and nationality, right of visit in case of hospitalization, insurance coverage against accidents and illness, succession in the lease contract and other rights inherent to private family law[367].

3.2.1 V.M.A. v Stolichna obshtina, rayon 'Pancharevo' case[368]

Introduction

"A child is in no way responsible for the differences in the scales of values in society between EU Member States", notes Advocate General Juliane Kokott (the AG) in her opinion[369]. Yet, unfortunately, children of rainbow families face the very real risk to have

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[366] Amanda Spalding, 'Where next after Coman?' (2019) 21 European Journal of Migration and Law 117, 122–123; Katarina Hyltén-Cavallius, 'Residence and Family Reunification Rights', *EU Citizenship at the Edges of Freedom of Movement* (1st edn, Hart Publishing 2020) 60–61 <http://www.bloomsburycollections.com/book/eu-citizenship-at-the-edges-of-freedom-of-movement/ch4-residence-and-family-reunification-rights/> accessed 22 November 2020; Alessandra Lang, 'Il Mancato Riconoscimento Del Matrimonio Tra Persone Dello Stesso Sesso Come Ostacolo Alla Libera Circolazione Delle Persone Nell'Unione - Il Caso Coman' (2018) 2 GENIUS 138, 148–150 <http://www.geniusreview.eu/2018/11/>.

[367] Lang (n 366) 148–149.

[368] Sections of this chapter were previously published in English and French as: Chiara De Capitani, 'Rainbow Families and the Right to Freedom of Movement – the V.M.A.v Stolichna Obshtina, Rayon "Pancharevo" Case' (*EU Law Analysis*, 11 January 2022) <http://eulawanalysis.blogspot.com/2022/01/rainbow-families-and-right-to-freedom.html> accessed 7 February 2023; Chiara De Capitani, 'Arrêt « Stolichna Obshtina » : homoparentalité et liberté de circulation au sein de l'Union européenne' (2022) 3 Journal de droit européen 107.

[369] *VMA v Stolichna obshtina, rayon „Pancharevo", Opinion of Advocate General Kokott* [2021] ECJ Case C-490/20.

their legal ties to one or both parents disappear once they cross the border of their Member State of residence. A recent study by the European Parliament (the EP Study)[370] found that in at least 11 EU Member States same-sex couples with children may not be legally recognised as the joint parents of their children.

The present Grand Chamber ruling, *V.M.A v Stolichna obshtina, rayon 'Pancharevo'*[371] tackles a recurring problem faced by rainbow families: the refusal from an EU Member State to recognise a birth certificate issued in another Member State that indicates two parents of the same sex as the legal parents of a child. This ECJ ruling builds on the 2019's *Coman* ruling[372] and allows the AG and the ECJ to explore and clarify several aspects of the tension between the cross-border protection of family life and the best interests of the child with a Member States' protection of its national identity.

Finally, six months after the present ruling, the Court reiterated its conclusions by reasoned order in *Rzecznik Praw Obywatelskich v K.S. and Others*[373].

Facts of the case

A same-sex couple composed of a Bulgarian national (V.M.A, the applicant) and a British national (K.D.K) have been residing in Spain since 2015 and built their family life there: they married in 2018 and welcomed a baby daughter (S.D.K.A) in 2019. The Spanish authorities issued the child a birth certificate recognising both partners as her mothers and not disclosing who gave birth to her.

V.M.A requested the Bulgarian authorities issue her daughter a Bulgarian birth certificate, a pre-condition under Bulgarian law to issue identity documents certifying the latter's Bulgarian citizenship. However, Bulgarian law only recognises heterosexual marriages and the parentage of children as composed of a father and a mother. Therefore, Bulgarian authorities rejected the application for the issuing of a Bulgarian birth certificate on two

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[370] Tryfonidou and Wintemute (n 22).

[371] *VMA v Stolichna obshtina, rayon „Pancharevo"* [2021] ECJ Case C-490/20.

[372] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (n 106).

[373] *Rzecznik Praw Obywatelskich v KS and Others* [2022] ECJ Case C-2/21.

grounds: the absence of information concerning the child's birth mother and the fact that the registration of two same-sex parents in a birth certificate is contrary to Bulgarian public policy. The applicant brought an action against the refusal decision before the Administrative Court of the City of Sofia (the referring court).

Analysis

The Court's answer to the recast 'judgment of Solomon'

This already complex case is off to a rocky start when, at the hearing, the Bulgarian Government refutes the referring court's claim that the child is a Bulgarian national. The referring court considers[374] that the child has Bulgarian nationality under Article 25(1) of the Constitution of Bulgaria stating that "a person is a Bulgarian national if at least one of the parents is a Bulgarian national". On the other hand, the Bulgarian government considers that the Bulgarian mother, to be recognized as such, has either to disclose that she gave birth to the daughter or proceed to become the "legal mother" following Article 64 of the Family Code.

These hypothetical possibilities offered by the government create a twisted 'judgment of Solomon'-type of situation for both mothers: they can either sacrifice their daughter's claim to Bulgarian citizenship and the derived family law rights this implies with the Bulgarian mother or they can defend their daughter's right to Bulgarian citizenship by claiming the Bulgarian mother is the sole mother, severing the British mother's parent-child relationship to her daughter in Bulgaria.

The Court, however, did not believe that the threat of splitting the child in two should have been the way to reach a fair compromise, quite the contrary.

Firstly, the Court claims that the referring court alone has jurisdiction in this matter, so the ECJ's ruling will consider that S.D.K.A. has Bulgarian nationality by birth due to the Bulgarian constitution.

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[374] *VMA v Stolichna obshtina, rayon „Pancharevo": Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice* [2020] ECJ Case C-490/20.

Secondly, the Court clarifies, the daughter - in her capacity as a Union citizen - can rely on the rights pertaining to Union citizenship, including Article 21(1) of the TFEU also against her Member State of origin and even she was born in another Member State and has never travelled to her State of origin[375].

Thirdly, since every citizen of the Union has the right to move and reside freely within the territory of the Member States, Article 4(3) of the Citizenship Directive[376] requires Member States to issue their nationals identity documents and, the Court clarifies "this document has to be issued regardless a of whether a new [Bulgarian] birth certificate is drawn up"[377].

Fourthly, such identity document must enable the daughter to move and reside freely within the territory of the Member States with each of her two mothers.

Lastly, since Article 21(1) TFEU includes the right to lead a normal family life with ones' family members and the Spanish authorities have lawfully established the parent-child relationship between S.D.K.A and her two parents all Member States have to recognize V.M.A and K.D.K as having the right to accompany that child within the territory of Member States when exercising her freedom of movement. Whether one of the mothers gave birth to the daughter or whether her parents are biological or legal does not seem to be of interest to the Court: the fact that one Member States has recognised them as parents is sufficient to require all other Member States to mutually recognize this birth certificate for the purpose of freedom of movement. In practical terms also the same-sex parents of a child are entitled to a document which mentions them as being entitled to travel with their child: this document can be drawn up also by the host Member State and may be a birth certificate (like the present case).

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[375] *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371) para 42.

[376] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (n 105).

[377] *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371) para 45.

The fragile balance between national identity, public policy and fundamental rights, including the right to respect for family life

The Court proceeds with analysing whether Article 4(2) of the TEU protecting Member States national identity could serve as a justification for the Bulgarian authorities' refusal to issue a birth certificate and an identity document to S.D.K.A.

Building on the *Coman* case, the Court recalls that the concept of public policy as a "justification for a derogation from a fundamental freedom must be interpreted strictly". Recognizing the parent-child relationship between the child and each of her parents in the context of the child's exercise of her rights under Article 21 TFEU does not undermine the national identity or pose a threat to the public policy of that Member State (which is thus still free to decide whether or not to allow same-sex marriage and parenthood under its national law).

The reverse of the medal is that "a national measure that is liable to obstruct the exercise of freedom of movement of persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter" and, the Court finds, Bulgaria's 'judgment of Solomon'-style proposals would be contrary to several fundamental rights of each mother and their daughter. For instance, the right to respect for private and family life, guaranteed by Articles 7 of the Charter and 8 of the ECHR and following the case-law of the ECtHR and the ECJ, cover both the mutual enjoyment by parent and child of each other's company and the relationship of same-sex couples.

The right to have the best interests of the child taken into account, guaranteed by Article 24 of the Charter translates also in obligations for Member States deriving from the UN Convention on the Right of the Child not to discriminate the latter (Article 2) including on the basis of the sexual orientation of the child's parents when registering their name and nationality (Article 7).

Interestingly, with regards to the need to take due account to the provisions of the Convention on the rights of the Child when interpreting Article 24 of the Charter, the Court refers to its previous *M. A. v État belge* ruling[378] (see *supra*).

Lastly, these rights would risk being violated also whether S.D.K.A did not have Bulgarian nationality. In that case, both her and her mother K.D.K would fall under the definition of 'spouse' and 'direct descendant' within the meaning of Article 2 of the Citizenship Directive due to the fact that V.M.A is a Union citizen and is therefore also protected by Article 21(1) TFEU.

The finding by the Court that the definition of 'direct descendant' covers the child of a same-sex couple will likely extend to the right to family reunification of third country nationals currently provided by several EU instruments. For instance, various directives concerning certain types of workers from third countries (researchers, highly skilled workers, workers in the field of intra-corporate transfers) refer to the definition of family pursuant to art. 4 par. 1 of the Family reunification Directive[379] and allow Member States to recognize more favourable provisions with respect to family reunification. As the Family reunification Directive includes in its list of family members the 'spouse' and 'minor children' of the applicant, by analogy, same-sex migrant couples with or without children should benefit from these provisions.

Implementation of the rights recognized by the present case

The impact this ruling will have on the day-to-day life of this family is unclear at this stage.

Firstly, there is no exhaustive list of the "rights under Article 21 TFEU and secondary legislation relating thereto" to which S.D.K.A has a right to nor a precise definition of the rights that the "right to lead a normal family life" under Article 21 (1) TFEU would entail. The AG clarifies that, since the definition of 'direct descendant' under the Citizenship Directive must also be adopted with regard to the concept of the 'family members' of a

[378] *M A v État belge* (n 342).

[379] Directive 2003/86/EC of 22 September 2003 on the right to family reunification (n 107).

migrant worker for the purposes of the "Freedom of movement for workers" Regulation[380] S.D.K.A may claim, for example the social and tax advantages associated with V.M.A. By the same reasoning, said Regulation could also cover her admission to that Member State's general educational, apprenticeship and vocational training courses according to Professor Steve Peers.

Secondly, unfortunately, neither the Court nor the AG elaborate on which parental rights K.D.K is entitled to as a non-EU citizen but as the 'spouse' of one. The AG notes that preventing K.D.K from being recognized as a parent would exclude her from "all the parental duties requiring proof of parental status […], medical decisions or any type of administrative procedure on behalf of the child". Indeed, the fundamental rights granted by the European Union on many of these issues could vary greatly depending on whether they fall partially inside or outside of the EU's competences.

For instance, as the EP study points out[381], if the legal parent dies:

> the child becomes an orphan and it is then up to the family of the legally recognised parent or, in the absence of that, the State, to determine whether the non-recognised parent will even be allowed to maintain links with the child or, ideally, be recognised as the child's parent. The child, also, does not have any (legal) ties with the family of origin of the parent who is not legally recognised as a parent. Hence, the failure to legally recognise the parent-child relationship creates uncertainty and, with it, insecurity both for the parents and the child as it, in effect, denies their relationship.

Her rights as a 'spouse' of an EU citizen are also limited. As the EP study found with regards to the implementation of the *Coman* case: "the ECJ does not yet require [the Member State of origin] to recognise a same-sex married couple […] for instance in relation to family, tax, social security, pensions, inheritance, citizenship/nationality, and medical law, e.g. hospital visitation and consultation"[382].

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[380] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union 2011 (OJ L).

[381] Tryfonidou and Wintemute (n 22) 80.

[382] ibid 42.

Finally, as noted by ILGA's Head of Litigation Arpi Avetisyan: "implementation is the crucial part, which often is also the difficult and time-consuming one. […] In practice the referring court in Bulgaria will have to apply the ECJ judgment and the family will continue the process in Bulgaria. It can also mean further litigation, as it happened in the Coman case […], however in short – if Bulgaria or other countries that don't recognise same-sex unions refuse to implement the ECJ judgment, the European Commission can take legal action – namely infringement procedures. Just to reiterate, the Court specifically mentioned that MS cannot rely on protection of national identity (i.e. non-recognition of same-sex unions) to refuse the child and her family their rights to free movement".

Conclusions

This landmark ruling fills a series of gaps with regards to LGBTIQ+ rights, freedom of movement and the protection of 'family life'.

It's important to note that, with regards to issues of cross-border mobility relating to gender identity, the Court has not yet had the opportunity to rule on the rights of parental couples where one or both parents are transgender or non-binary. A 2020 report from Transgender Europe[383] notes that - in addition to the obstacles discussed above - these couples suffer from additional obstacles to freedom of movement and recognition of parental bond. For example, the absence or bureaucratic complexity of the legal procedures for gender recognition can also preclude the recognition of marriage, the birth certificate and the filiation relationship between parents and children.

Furthermore, while judicial law-making rulings by the ECJ and the ECtHR undoubtedly have led and will continue to give a critical contribution to the development of the rights of LGBTIQ+ individuals and families, in particular in a cross-border context, the key to an effective application of the principle of equality also lies in the acts and rulings of

[383] Dodo Karsay, 'Stuck on the Swing: Experiences of Trans Parents with Freedom of Movement in the EU' <https://tgeu.org/wp-content/uploads/2021/03/tgeu-stuck-on-the-swing.pdf>.

national legislators and judges[384]. In this regard, the Supreme Administrative Court of Poland requested in 2022 that the national administration recognize the Polish nationality of a child born of a surrogate mother and whose legal parents are two men – one of whom is a Polish national and the other a Canadian national, based on a Canadian birth certificate (ruling OSK 128/19 delivered by the Supreme Administrative Court). Interestingly, the Supreme Administrative Court of Poland cites in its reasoning the present ruling, which also testifies to a fruitful dialogue between judges between the national courts and the Court of Justice.

Rzecznik Praw Obywatelskich v K.S. and Others

Six months after the present ruling, the 24 June 2022, the Court decided in *Rzecznik Praw Obywatelskich v K.S. and Others*[385] to rule by reasoned order since the question referred to the Court for a preliminary ruling could be clearly deduced from the existing case-law (the *V.M.A v Stolichna obshtina, rayon 'Pancharevo'* ruling).

The case presented a very similar situation to that of *V.M.A v Stolichna obshtina, rayon 'Pancharevo'*: a same-sex married couple composed of two mothers, K.S., a Polish national, and S.V.D., tried to have their daughter (S.R.S.-D.)'s Spanish birth certificate transcribed into the Polish register of civil status. Polish authorities refused to do so as, under Polish law, "a child may have only a woman and a man as parents". The referring court brought the case in front of the ECJ noting that the provisions currently applicable did not effectively guarantee the right to freedom of movement of a child such as S.R.S.-D., who "is indisputably a Polish citizen" and, therefore, a citizen of the Union.

The ECJ came to the same conclusions as its previous ruling and ordered that:

> "in the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the authorities of a Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national

[384] Stefano Catalano (ed), 'Il principio di non discriminazione', *La carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela: atti del convegno svoltosi nell'Università degli studi di Milano a venti anni dalla sua proclamazione* (G Giappichelli editore 2022) 290–291.

[385] *Rzecznik Praw Obywatelskich v K.S. and Others* (n 373).

(i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status, and (ii) is obliged to recognise, as is any other Member State, the document from another Member State that permits that same child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States."[386]

3.2.2 ECtHR: S.-H v. Poland

Introduction

The 16 of November 2021 the ECtHR declared the *S.-H. v. Poland*[387] application inadmissible: the case concerns two children's inability to obtain Polish nationality by descent due to their being born via surrogacy in the US to a same-sex couple. The case bears striking similarities with several previous rulings of the ECtHR: *Mennesson v. France*[388], *Labassee v. France*[389] and *Valdís Fjölnisdóttir and Others v. Iceland*[390] but, interestingly, the Court's considers there has been no violation of Article 8 ECHR following an interesting – albeit perplexing - reasoning. The *Mennesson v. France* and *Labassee v. France* rulings concern the refusal to grant legal recognition to parent-child relationships in France which were legally established in the US between children born through surrogacy to two heterosexual couples. *Valdís Fjölnisdóttir and Others v. Iceland* similarly concerns Iceland's refusal to recognize the parental link between a same-sex couple and their non-biological child, also born via surrogacy. The case also bears

[386] ibid 53.

[387] *S-H v Poland* [2021] European Court of Human Rights (ECtHR) Applications nos. 56846/15 and 56849/15.

[388] *Mennesson v France* [2014] European Court of Human Rights (ECtHR) Applications nos. 56846/15 and 56849/15; For a comprehensive overview see: Anna Maria Lecis Cocco Ortu, 'L'obbligo Di Riconoscimento Della Genitorialità Intenzionale Tra Diritto Interno e CEDU: Riflessioni a Partire Dal Primo Parere Consultivo Della Corte Edu Su GPA e Trascrizioni' (8 November 2019) <http://www.articolo29.it/2019/lobbligo-riconoscimento-della-genitorialita-intenzionale-diritto-interno-cedu-riflessioni-partire-dal-primo-parere-consultivo-della-corte-edu-gpa-trascrizioni/> and Alexander Schuster, 'GPA: La Tutela Del Minore Limite Invalicabile' (14 April 2019) <http://www.articolo29.it/2019/gpa-la-tutela-del-minore-limite-invalicabile/>.

[389] *Labassee v France* [2014] European Court of Human Rights (ECtHR) Application no. 65941/11.

[390] *Valdís Fjölnisdóttir and Others v. Iceland* (n 338).

resemblance to the ECJ's *V.M.A v Stolichna obshtina, rayon 'Pancharevo'*[391] and *Rzecznik Praw Obywatelskich v K.S. and Others*[392] rulings with one main difference: these cases did not concern children born via surrogacy.

The present decision is deeply divisive among academics: it has been welcomed by anti-surrogacy activists and academics[393] and criticised by other academics[394].

Facts of the case

The commented case and the assessment of the domestic courts

On a first interesting note this case, instead of being brought forward by the same sex-parents, the applicants in this action are their legally represented children, S.-H. and S. (the applicants), twins born in 2010 in in the US and currently living in Israel with their parents, Mr. S. and Mr. H. The children have dual Israeli and US nationality while their parents have Israeli citizenship and, Mr. S., is a Polish citizen as well[395].

The couple entered into a gestational surrogacy agreement with a Ms K.C. who was married to her husband, Mr D.C. While Ms. K.C carried the twins, the children were conceived from an egg from a donor and Mr. S's gametes. Once the children were born the Superior Court of California declared the same-sex couple the "natural, joint and equal parents" of the twin babies[396].

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[391] *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371).

[392] *Rzecznik Praw Obywatelskich v K.S. and Others* (n 373).

[393] European Centre for Law and Justice (ECLJ), 'Written Observations in the Case Schlittner-Hay v. Poland (N° 56846/15 & 56849/15)' <https://eclj.org/surrogacy/echr/schlittner-hay-v-poland-n-56846/15--56849/15?lng=en> accessed 14 January 2023.

[394] Sarah Ganty, 'Surrogacy as Citizenship Deprivation in S.-H. v. Poland' (*Strasbourg Observers*, 14 March 2022) <https://strasbourgobservers.com/2022/03/14/surrogacy-deprives-from-citizenship-in-s-h-v-poland/> accessed 14 January 2023.

[395] *S.-H. v. Poland* (n 387) para 4.

[396] ibid 5–6.

The children's biological and Polish father, Mr. S, applied in 2012 for his children's confirmation of their Polish citizenship to the Mazowiecki Governor. The Governor refused the applications considering that:

- the applicants had failed to submit their birth certificates as issued by a Polish civil registry office and that
- the Polish legal system did not allow for the concept of surrogacy and considered that a child's mother was the woman who had given birth to that child.

Therefore, due to the documents provided and the Polish legal system, the Governor found that the applicants' mother was the surrogate K.C., and, given the principle of presumption of paternity in Polish law, the applicants' father was K.C.'s husband – D.C[397].

The applicant's representative appealed first to the Minister of the Interior which upheld the first instance decision[398], then to the Warsaw Regional Administrative Court which also dismissed their appeal[399]. Finally, the applicant's representative applied to the Supreme Administrative Court which dismissed their cassation appeal, claiming that accepting the parenthood of same-sex couples would have been against public policy principles[400].

The applicants brought their case to the ECtHR, complaining of a violation of Article 8 taken alone and in conjunction with Article 14 of the ECHR[401]. They highlighted a series of important elements to the case[402]:

1. They argued that the circumstances of the case fell within the ambit of 'private and family life': the applicants had been denied Polish citizenship solely on

[397] *S.-H. v. Poland* (n 387).

[398] ibid 14–16.

[399] ibid 18–21.

[400] ibid 22–24.

[401] ibid 50.

[402] ibid 57–60.

discriminatory grounds, on considerations relating to their parents' sexual orientation.

2. They submitted that the domestic decisions had affected their private and family life: they were Polish Jews whose family members had been killed in the Holocaust and this heritage was extremely important to them.
3. They noted that they were afraid of returning since Mr. S's paternity was not recognised by the Polish authorities, thus putting their family in an uncertain legal vacuum, worsened by the fact that the Polish authorities had considered that the applicants' legal parents were the surrogate mother and her husband.
4. Furthermore, they were considering moving to Europe due to Israel's difficult geopolitical situation.

The ECtHR's assessment of the cases' admissibility

The Court starts by assessing the Government's objection of lack of jurisdiction *ratione materiae*. In order to reach the conclusion that a complaint is compatible *ratione materiae* with Article 8 of the Convention, a domestic measure has to be found to:

1. Have attained a certain level of seriousness and
2. be carried out in a manner causing prejudice
3. to personal enjoyment of the right to respect for one's private and/or family life.

The Court proceeds with analysing, using a consequence-based approach, whether Article 8 ECHR is applicable due to the domestic authorities' refusal to recognise the legal parent-child relationship with the applicants' biological father and the ensuing refusal to confirm the acquisition of Polish citizenship by descent.

The Court requires the applicants to show "convincingly" that the threshold was attained in their case and believes the applicants have not done so due to a series of elements we will analyse below.

1. *Absence of specific information about the family's plans to relocate to Poland*

The Court underlines it has not received specific information or details about the family's plans to relocate to Poland which, the Court finds, do not seem to be "imminent"[403].

2. Lack of consequences of the decisions to refuse the recognition of their Polish citizenship

The Court the considers that the applicants have not proved the direct consequences they have or could face due to the domestic authorities' refusal to confirm their acquisition of Polish citizenship noting that:

- they have never lived in Poland,
- the decisions have not rendered them stateless (they already have dual US/Israeli citizenship),
- the Court has not been alerted to any negative consequences or practical difficulties which they might encounter in Poland, resulting from the domestic courts' refusal to confirm the acquisition of Polish citizenship[404].

3. The legal parent-child relationship between the applicants and their parents is recognised in Israel

The Court then highlights what it believes to be the crucial difference between this case and the *Mennesson v. France*[405] and *Labassee v. France*[406] rulings. In the present case, while domestic authorities refused to legal parent-child relationship between the applicants and their parents (including their biological father, Mr. S.), this link is recognised in Israel, where the family resides. In *Mennesson v. France*[407] and *Labassee v. France*[408] the lack of possibility of recognition of the legal relationship between a child

[403] ibid 68.

[404] ibid 69.

[405] *Mennesson v. France* (n 388).

[406] *Labassee v. France* (n 389).

[407] *Mennesson v. France* (n 388) paras 100–101.

[408] *Labassee v. France* (n 389) para 78.

born via surrogacy abroad and the intended father, where he was the biological father, entailed a violation of the child's right to respect for his or her private life (Article 8 ECHR, taken alone)[409].

This also means, according to the Court, that the refusal to recognize the applicants as Polish citizens would not have any bearing on their family life (e.g. in the event of their intended parents' death or separation).

4. The applicants, as family members of an EU citizen are entitled to free movement within the EU

The Court affirms[410] that the applicants, as family members of an EU citizen, are entitled to free movement within the EU and to enjoy the right to move and reside in the territory of another Member State pursuant to the Citizenship Directive[411].

Finally, due to elements listed above, the Court declares that the complaint is incompatible *rationae materiae* with Article 8 of the ECHR[412] and, thus, finds that Article 14 cannot apply either[413].

Analysis

The Court in the present case seems to place a very high burden of proof on the applicants creating a paradoxical situation; indeed, the main violation complained of - the inability for the family to enjoy private and family life in Poland - has not happened at the time of the ruling because the applicants are not moving there exactly to prevent the violation from taking place. Should the applicants move permanently to Poland it is certain that

[409] *S.-H. v. Poland* (n 387) para 71.

[410] ibid 72.

[411] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (n 105).

[412] *S.-H. v. Poland* (n 387) para 76.

[413] ibid 80.

their private and family life would be impacted by the authorities' refusal to recognise them as a family and to recognise the applicant's Polish citizenship. However, how can they be tasked with proving the specific violations they would face since they have not happened yet?

The Court's argument that it has not received information about the family's plans to relocate to Poland follows the same logic: however, why should the family be planning a move when their family ties have been legally severed by that Country's authorities?

Other factors could have been taken into account. For instance, the fact that the family has gone through several degrees of jurisdiction in that Country in a legal battle that lasted three years (adding up to nine years counting the ECtHR application and ensuing decision) are a strong indicator of the value they place in moving to that country.

The argument that the applicants have not proven the direct consequences they have or could face due to the refusal to confirm the acquisition of Polish citizenship also appears unbalanced. The fact that the applicants have not faced direct ill consequences due to their not having lived in Poland does not refute the certainty that they would have faced many should they have moved there. The same limitations of rights applying in the *V.M.A v Stolichna obshtina, rayon 'Pancharevo'*[414] ruling (see Chapter 3.2.1) would apply here: the family's rights would be limited to the rights pertaining to freedom of movement legislation with the applicants being considered the 'direct descendants' of a Union citizen. Should they move there, the situation would worsen with time when the parents actually build a life in Poland and decide to work, buy property, contribute to the social security system and then possibly separate or die, leaving the applicants' rights uncertain and unclear. The non-Polish father's parental duties requiring proof of parental status would be jeopardized as well: the legal non-recognition of his parental status would not allow him to take medical decisions or any type of administrative procedure on behalf of the child. Even with regards to freedom of movement rights, the applicants derive them

[414] *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371).

from their sponsor, Mr. S. (the parent with Polish nationality) and will lose them when they reach the age of 21 years old or should that parent move or die.

For these same reasons, the Court's statement that the applicants, as family members of an EU citizen, should instead enjoy free movement within the EU and to enjoy the right to move and reside in the territory of another Member State pursuant to the Citizenship Directive limits the rights of the applicants to go and live in a country where – had they been born from a heterosexual couple with no surrogacy agreement – they'd have been recognised as nationals of.

The lack of direct consequences faced by the applicants due to their not being rendered stateless (being US and Israeli citizens) glosses over the parent's "extremely important" heritage as being the descendants of Polish Jews that had been killed in the Holocaust. Article 8 paragraph 1 of the Convention on the rights of the Child provides the obligation to respect the right of the child to preserve his or her identity, including nationality - a right that the Court acknowledges partially in its reasoning:

> while the provisions of Article 8 do not guarantee the right to acquire a particular nationality or citizenship, the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual[415].

and

> The Court is mindful that the domestic decisions have clearly had some repercussions on the applicants' personal identity. In addition, on a more practical level, as the situation stands to date, the applicants must have experienced some obstacles resulting from the fact that they do not have Polish (and consequently European) citizenship […][416].

An interesting analysis of the present decision by Dr. Sarah Ganty argues that citizenship has an important external dimension that the Court does not consider:

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[415] *S.-H. v. Poland* (n 387) para 65.

[416] ibid 73.

> As the Quality of Nationality Index shows, the external value (i.e. the settlement and travel freedoms) of Polish citizenship is 90.5%, while […] Israeli citizenship is 44.2%. Even if we compare the 'general worth' of citizenship, a metric which also comprises internal elements (considering the economic strength, human development, peace and stability of the country granting the status), Polish citizenship is ranked 20th at 77%, while Israeli citizenship is ranked 48th at 46.7%. In other words: not all citizenships are equal. If the Court wants to make human rights effective, it cannot continue pretending that there is an equality among citizenships[417].

Lastly, with regards to the argument that the legal parent-child relationship between the applicants and their parents is recognised in Israel, the Court does not delve further into the applicant's claim that they have a legitimate interest in moving to another country given Israel's historically difficult geopolitical situation[418].

Conclusion

Several important NGOs and foundations awaited this ruling, stating that "the ECtHR has the opportunity to develop standards for the protection of rights of children of same-sex families. The decision in the present cases will be of great importance for LGBTI families in Poland and in Europe"[419].

Alas, it was a missed opportunity for the Court to analyse the importance that nationality (including EU-citizenship) can have for a person's identity, the obstacles faced by rainbow families when moving from/to the European Union[420], the multiple grounds of discrimination and the discrimination by association faced by the applicants from national

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[417] Ganty (n 394).

[418] *S.-H. v. Poland* (n 387) para 58.

[419] Child Rights International Network Law the Helsinki Foundation for Human Rights, ILGA Europe, the Network of European LGBTIQ* Families Associations, the Polish Society of Anti-Discrimination, 'Amicus Curiae Brief in the Cases of Schlittner-Hay v. Poland (Application No. 56846/15) and Schlittner-Hay v. Poland (Application No. 56849/15)' para 37 <https://www.ilga-europe.org/sites/default/files/Schlittner%20-%20Amicus%20Brief_23%20July_FINAL_PDF.pdf> accessed 14 January 2023.

[420] Network of European LGBTIQ* Families Associations – NELFA (n 110); Tryfonidou and Wintemute (n 22).

authorities on grounds of their parent's sexual orientation and their birth via a surrogacy arrangement.

Surrogacy is a complex and controversial issue and might have played a part in the Court's shy approach in this case. Recommendations by the Child Rights International Network (CRIN), the Helsinki Foundation for Human Rights (HFHR), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGAEurope), the Network of European LGBTIQ* Families Associations (NELFA), the Polish Society of Anti-Discrimination Law in their 'amicus curiae brief' raise an interesting argument:

> The question of legality of surrogacy or legal recognition of same-sex relationships have to be distinguished from the issue of a status of a child born by a surrogate mother. The principle of human dignity forbids treating children in an unfair way in order to "punish" them for their parents' actions or using them as means to dissuade persons from concluding surrogacy agreements[421].

Furthermore, as noted by Dr Sarah Ganty's in her analysis of the ruling[422], the reason the Polish citizenship was refused to the applicants is significant: the domestic authorities treated the applicants differently on the basis of their family composition, circumstance of birth and the sexual orientation of the parents.

This case would also have offered the opportunity for the ECtHR - which is not bound by the competency limitations of EU law as the ECJ on is on private and family law - to fill the legal gaps that the Court of Justice could not address in its *V.M.A v Stolichna obshtina, rayon 'Pancharevo'*[423] and *Rzecznik Praw Obywatelskich v K.S. and Others*[424] rulings.

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[421] Law (n 419) para 38.

[422] Ganty (n 394).

[423] *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371).

[424] *Rzecznik Praw Obywatelskich v K.S. and Others* (n 373).

3.3 Pending and ongoing cases

A non-exhaustive analysis shows a great deal of cases concerning the recognition of LGBTIQ+ couples and families - often with a cross-border aspect - are still pending before the ECtHR.

With regards to the legal recognition of the right to marry, enter a civil union of same-sex couples or register a marriage/civil union contracted abroad, many appeals have been registered before the ECtHR. At least eight cases are against Poland[425], others are against Romania[426], Ukraine[427], Bulgaria[428]. One case against Romania is an appeal presented by the Coman-Hamilton couple, applicants of the ECJ *Coman* ruling referred to *supra*. With this appeal currently pending, the couple considers the protracted refusal of the Romanian authorities to recognize their marriage and its legal effects as a violation of the right to marry (Article 12 of the ECHR) and discrimination due to sexual orientation (Article 14) read in conjunction with Articles 6, par. 1, 8, 12 and 13 of the ECHR).

[425] *Formela and Formela v Poland* European Court of Human Rights (ECtHR) Application no. 58828/12; *Handzlik-Rosuł and Rosuł v Poland* European Court of Human Rights (ECtHR) Application no. 45301/19; *Szypuła v Poland and Urbanik & Alonso Rodriguez v Poland* European Court of Human Rights (ECtHR) Application nos. 78030/14 and 23669/16; *Grochulski v. Poland* (n 329); *Przybyszewska v Poland* European Court of Human Rights (ECtHR) Application no. 11454/17; *Starska v Poland* European Court of Human Rights (ECtHR) Application no. 18822/18; *Meszkes v Poland* European Court of Human Rights (ECtHR) Application no. 11560/19; *Andersen v Poland* European Court of Human Rights (ECtHR) Application no. 53662/20.

[426] *Coman and others v Romania* European Court of Human Rights (ECtHR) Application no. 2663/21; *AB and KV v Romania* European Court of Human Rights (ECtHR) Application no. 17816/21; *SKK and ACG v Romania* European Court of Human Rights (ECtHR) Application no. 5926/20; *Buhuceanu and Ciobotaru v Romania* European Court of Human Rights (ECtHR) Application no. 20081/19.

[427] *Maymulakhin and Markiv v Ukraine* European Court of Human Rights (ECtHR) Application no. 75135/14.

[428] *Koilova and Babulkova v Bulgaria* European Court of Human Rights (ECtHR) Application no. 40209/20.

The ECtHR will be called upon to rule as well on several cases relating to the recognition of the rights of same-sex[429] and transgender[430] parents (in cross-border situations or not).

With regards to the ECJ, the author has found only one pending case with cross-border elements pertaining to LGBTIQ+ rights. The *Asociația Accept*[431] case lodged the 3rd of January 2023 concerns the refusal by Romania to recognize the changes to the first name and gender marker by the United Kingdom to a transgender man with dual citizenship (Romanian and British).

Other interesting pending ECJ cases that do not *per se* concern LGBTIQ+ individuals concern the interpretation of "dependency" of family members for freedom of movement purposes[432].

[429] *AD-K and Others v Poland* European Court of Human Rights (ECtHR) Application no. 30806/15; *Modanese v Italy* European Court of Human Rights (ECtHR) Application no. 59054/19; *Nuti v Italy* European Court of Human Rights (ECtHR) Application nos. 47998/20 and 23142/21; *Bonzano v Italy* European Court of Human Rights (ECtHR) Application no. 10810/20; *X and Z v Poland* European Court of Human Rights (ECtHR) Application no. 9001/21; *Aspisi v Italy* European Court of Human Rights (ECtHR) Application no. 44453/19; *AP and RP v Poland* European Court of Human Rights (ECtHR) Application no. 1298/19; *SC and others v Switzerland* European Court of Human Rights (ECtHR) Application no. 26848/18; *RF and others v Germany* European Court of Human Rights (ECtHR) Application no. 46808/16.

[430] *YP v Russia* European Court of Human Rights (ECtHR) Application no. 8650/12; *AH and others v Germany* European Court of Human Rights (ECtHR) Application no. 7246/20; *Savinovskikh and others v Russia* European Court of Human Rights (ECtHR) Application no. 16206/19; *OH and GH v Germany* European Court of Human Rights (ECtHR) Applications nos. 53568/18 and 54741/18.

[431] *Asociația Accept* ECJ Case C-4/23.

[432] *GV v Chief Appeals Officer, Social Welfare Appeals Office, Minister for Employment Affairs and Social Protection, Ireland, Attorney General* ECJ Case C-488/21; *XXX v État belge* ECJ Case C-607/21.

Chapter IV : The 2022 Commission's legislative proposals relating to LGBTIQ+ rights

4.1 The legislative proposal aimed at strengthening the role and independence of equality bodies

4.1.1 Introduction

The European Commission presented the 7th of December 2022, as part of its 'Equality package', two directive proposals on standards for equality bodies ('the proposals')[433]. Equality bodies are public organisations that assist victims of discrimination, monitor and report on discrimination issues, and contribute to raising awareness of people's rights and the value of equality. The two proposals are identical yet separate because they were adopted under two different legal bases, requiring two different adoption procedures.

An analysis conducted by the Commission[434] concluded that implementation and enforcement of EU law preventing and combating discrimination at national level is still insufficient: "levels of discrimination remain high, and victims' awareness of their rights remains low"[435]. Due to vague and broad existing EU provisions concerning equality

[433] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC T_15; Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU 2022.

[434] COMMISSION STAFF WORKING DOCUMENT Analytical document Accompanying the documents Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU 2022.

[435] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and

bodies, the levels of protection and capacity to assist victims vary greatly between Member States[436]:

> [...] Notably, while the EU provisions on equality bodies mandate them to assist victims of discrimination, they do not specify what this entails. As a result, the scope of services that equality bodies provide to victims of discrimination may not match their needs and not be equivalent in all Member States. For example, some equality bodies do not provide legal advice [...] and others do not provide it for free [...]. Some do not engage in mediation and/or conciliation activities [...]. Equality bodies from less than half of Member States can represent victims[..], intervene in support of them [...] in court or engage in strategic litigation [...]. In a third of Member States, they can launch collective complaints [...] or bring proceedings to a court without an identifiable victim [...]. Half of the Member States [...] allow equality bodies to act as *amicus curiae* [...][437].

Indeed, EU equality directives currently do not specify how equality bodies should be structured and functioning and require them to combat discrimination only on the grounds of racial and ethnic origin and sex in specific fields.

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occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) 3.

[436] European Commission. Directorate General for Justice and Consumers. and European network of legal experts in gender equality and non discrimination., *A Comparative Analysis of Non-Discrimination Law in Europe 2021: The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom Compared.* (Publications Office 2022) 106 <https://data.europa.eu/doi/10.2838/909649> accessed 7 February 2023.

[437] COMMISSION STAFF WORKING DOCUMENT Analytical document Accompanying the documents Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 434) 11.

While most Member States have adopted more favourable provisions on the grounds and fields of discrimination covered by the mandate of their equality bodies, not all have done so[438].

NUMBER OF MEMBER STATES WHERE THE MANDATES OF EQUALITY BODIES GO BEYOND GROUNDS AND AREAS OF LIFE COVERED BY THE RACIAL EQUALITY DIRECTIVE AND THE EMPLOYMENT EQUALITY DIRECTIVE

	Areas of life			
Grounds of discrimination	**Education**	**Goods and services**	**Housing**	**Social protection and healthcare**
Age	24	21	21	21
Disability	25	24	24	24
Religion or beliefs	24	20	21	20
Sexual orientation	25	23	23	23

Figure 1: Table 8 of the report Equality in the EU: 20 Years on from the Initial Implementation of the equality directives. FRA Opinion 1/2021 (Publications Office of the European Union 2022) 41.

Source: FRA, based on information from Equinet

The Commission already tried to address these challenges by adopting a non-binding Recommendation on standards for equality bodies in 2018 ('the Recommendation')[439]; however, the Recommendation's application was both unequal and limited among Member States[440].

[438] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 41.

[439] 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies', vol 167 (2018) <http://data.europa.eu/eli/reco/2018/951/oj/eng> accessed 20 January 2023.

[440] COMMISSION STAFF WORKING DOCUMENT Analytical document Accompanying the documents Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 434) 7.

With the present legislative proposals, the Commission wishes to create a framework for equality bodies in the European Union covering all grounds of discrimination and in the fields set out by the existing equality directives. The proposals also try to bridge the existing significant differences[441] between equality bodies across Member States by creating common minimum standards on their mandate, powers, leadership, independence, resources, accessibility and effectiveness.

The proposals are part of several EU strategies and action plans: the gender equality strategy[442], the anti-racism action plan[443], the Roma strategic framework for equality, inclusion and participation[444] the LGBTIQ Equality Strategy[445], the strategy for the rights of persons with disabilities[446] and the strategy on combating antisemitism and fostering Jewish life[447].

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[441] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) 2; 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies' (n 439) para (18) Preamble.

[442] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Union of Equality: Gender Equality Strategy 2020-2025 2020.

[443] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Union of equality : EU anti-racism action plan 2020-2025 2020.

[444] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A Union of Equality: EU Roma strategic framework for equality, inclusion and participation 2020.

[445] European Commission Union of Equality: LGBTIQ Equality Strategy 2020-2025 (n 47).

[446] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030 2021.

[447] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030) 2021.

4.1.2 Analysis of the proposals

Choice of legal basis

The proposal relating to matters of equal treatment between women and men in the fields of employment, occupation, including self-employment[448] is based on Article 157(3) TFEU and will thus be negotiated and adopted following the ordinary legislative procedure.

The proposal relating to matters of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the area of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation as well as between women and men in matters of social security and in the access to and supply of goods and services[449] is based on Article 19(1) of the Treaty on the Functioning of the European Union (TFEU) and will thus be negotiated and adopted unanimously by the Council following the special legislative procedure.

This also means that while for the first proposal the Parliament will fully act as co-legislator and negotiate during interinstitutional trilogues with the Commission and Council, for the second proposal only its consent is required.

Choice of the instrument

The Commission decided to present these proposals in the form of a directive with the aim to strengthen equality bodies and guarantee common minimum standards while still

[448] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433).

[449] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433).

leaving Member States broad discretion on how to implement them in their domestic legislation.

Current provisions on equality bodies in existing equality directives will be deleted as they are incorporated in the current proposals.

Analysis of the contents of the proposal

The proposals cover the following competences and tasks for equality bodies:

- A general obligation of independence;
- A general obligation for Member States to allocate sufficient resources to equality bodies;
- Rules on prevention, promotion and awareness raising;
- Measures to provide assistance to victims of discrimination;
- Investigative powers and the right to issue opinions and recommendations;
- Role in litigation procedures;
- Rules with regards to the preparation of surveys and reports;
- Rules with regards to cooperation with other public and private entities.
- Rules on reports and strategic planning;

Since the proposals are identical, article numbers are the same for both proposals. However, the paragraph numbering of the preamble is not the same between proposals.

Independence

While previous equality directives only required equality bodies to act independently within the exercise of their competences, Article 3 lists specific requirements concerning their legal structure, accountability, budget, staffing and organisational matters. With regards to their internal structure, the preamble[450] recommends Member States not to set up equality bodies as part of a ministry of body taking instructions from the government

[450] ibid (17) Preamble; Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433) para (16) Preamble.

and that equality bodies should manage their own budget and resources. Moreover, Article 3 requires Member States to provide as well for transparent rules and safeguards concerning the selection, appointment, revocation and potential conflict of interest of the staff of equality bodies.

Specific attention should be paid to the recruitment and position of persons holding a managerial position, that, the preamble notes, should be independent, qualified for their position, and selected through a transparent process[451].

Furthermore, with regards to multi-mandate equality bodies, Article 3 para 4 requires Member States to put in place appropriate safeguards in their internal structure to guarantee that each different competence may all be exercised effectively.

These provisions are all highly welcomed, as a 2021 study by the European Commission[452] showed that issues relating to the independence of equality bodies and the appointment of staff in managerial positions are varied and widespread among Member States:

> […] in Germany, the position of head of the equality body has not been properly filled since 2018, due to delays in the appointment procedure. These delays have mainly been caused by court proceedings initiated against the proposed appointment due to the failure of the Government to respect the 'best selection principle'.[…] In some countries there is concern that specialised bodies are too close to Government, thereby jeopardising the independence of their work. For instance, the independence of the Portuguese equality body (the High Commission for Migration) is not stipulated in law, and it may be argued that it cannot exercise its competences independently due to its close links with the Prime Minister under whose authority its duties are carried out. Similar concerns arise in relation to […] the Italian National Office against Racial Discrimination, which

[451] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) para Preamble (17); Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433) para Preamble (16).

[452] European Commission. Directorate General for Justice and Consumers. and European network of legal experts in gender equality and non discrimination. (n 436).

> operates as a ministerial department, is fully dependent on the Department for Equal Opportunities and reports to the Prime Minister. The Spanish Council for the Elimination of Racial or Ethnic Discrimination is attached to the Ministry of the Presidency, Relations with Parliament and Equality, although it is not part of the ministry's hierarchal structure. However, representatives of all ministries with responsibilities in the areas referred to in Article 3(1) of the Racial Equality Directive have a seat on the council. […] Since 2014, the act defining the functions of the council has stated that it must exercise its functions 'with independence', although it is difficult to assess this de facto, given the large number of Government representatives. […] In Belgium, the newly created coalition Government of Flanders announced in September 2019 its intention to withdraw from Unia and set up a separate equality body for Flanders. […]. In Cyprus, the independence of the equality body is undermined by the absence of objective criteria for the appointment of the ombudsman and the lack of opportunities for candidates other than the one proposed by the Executive to be considered. The appointment in 2017 of the current ombudsman raised objections from NGOs, journalists and political parties who considered the appointment to be highly political and motivated by the appointee's close links with important media outlets. Since then, the ombudsman's work related to equality and non-discrimination issues is almost exclusively exercised without reference to the specific non-discrimination legal framework. […] In Bulgaria, although both Parliament and the President adopted rules in 2017 on the nomination of candidates for the equality body, the President's decision-making process remains discretionary and non-transparent under these rules. Similar concerns were raised in 2020 […] on Slovakia. […] In the Netherlands, there are important differences between the local anti-discrimination services throughout the country. While some are well financed and clearly independent, others do not receive the planned funding and operate under the supervision of local authorities[453].

Clauses on the independence of equality bodies are all the more urgent to protect the work of equality bodies. In fact, as that same report finds, political parties and other public authorities are currently challenging the work of some equality bodies with regards to LGBTIQ+ rights:

> In Poland, the Ombud has been facing increasing challenges as some political parties as well as a prominent legal think tank have attacked the Ombud's activities in support of the LGBTI community. There are concerns in Hungary that similar considerations contributed to the hasty

[453] ibid 119–120.

abolition of the Equal Treatment Authority, which had also been vocal in its support for the LGBTI community[454].

Resources

Research and literature on the subject shows that lack of resources – including both funding and staff – are one of the main obstacles for equality bodies to effectively perform their tasks[455].

Article 4 requires Member States to ensure that each equality body is provided with the human, technical and financial resources necessary to perform all its tasks and to exercise all its competences effectively. In this regard, the Recommendation included an additional provision highlighting that resources could be considered adequate only if they allowed equality bodies to carry out their functions within reasonable time and within deadlines established by national law[456].

Article 4, following the Recommendation, mandates Member States to allocate equality bodies with resources that should be sufficient to allow them to work effectively also in the event of increases in competences, increases in complaints, litigation costs and the use of automated systems. The preamble[457] also recommends that equality bodies' budget

[454] ibid 120.

[455] ibid 120–121; COMMISSION STAFF WORKING DOCUMENT Analytical document Accompanying the documents Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 434) 7, 10, 13,; 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies' (n 439) para (20) Preamble; *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 60; European Commission. Directorate General for Justice and Consumers. and European network of legal experts in gender equality and non discrimination. (n 436) 128.

[456] 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies' (n 439) ch 1.2.2. Resources, (1).

[457] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation,

should not suffer cuts "that are significantly higher than the average cuts to other public entities".

Prevention, promotion and awareness raising

Several surveys by the FRA have shown that a majority of respondents are not aware of the existence of equality bodies:

PROPORTION OF SURVEY RESPONDENTS WHO ARE NOT AWARE OF AN EQUALITY BODY, IN DIFFERENT FRA SURVEYS (%)

Survey	Group	Percentage of respondents who are NOT aware of an equality body
EU MIDIS II (2016)[a]	Main results (all groups, EU-28)	62
	Muslims	65
	Roma	71
	North Africans	66
	Sub-Saharan Africans	54
Roma and Travellers survey (2019)	Roma and Travellers (in six countries)	67
Fundamental Rights Survey (2019)	General population	48

Sources: FRA, EU-MIDIS II 2016, Roma and Travellers Survey 2019, Fundamental Rights Survey 2019.

Figure 2 Table 10 of the report Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021 (Publications Office of the European Union 2022) 54.

Sources: FRA, EU-MIDIS II 2016, Roma and Travellers Survey 2019, Fundamental Rights Survey 2019.

Article 5, focusing on preventive measures against discrimination, tries to address this issue. Equality bodies will be required, under the new proposals, to adopt two strategies: one to raise awareness of the general population on their services and existing anti-

equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) para 19; Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433) para 18.

discrimination rules, the second -focusing on the prevention of discrimination - on how they plan to engage with the public and communicate with individuals and groups at risk to promote equal treatment.

Interestingly, the Article requires equality bodies to adopt an intersectional approach in searching for the adequate communication tools and formats to use in these strategies:

> They shall focus in particular on disadvantaged groups whose access to information can be hindered, for example by their economic status, age, disability, literacy, nationality, residence status or their lack of access to online tools.

Assistance to victims

Article 6 specifies how equality bodies are to assist victims upon receiving their complaints (orally, in writing and online). Following its previous Recommendation[458], the Commission provides in the preamble[459] that such complaint should be possible "in a language of the complainant's choosing which is common in the Member State where the equality body is located". This provision enshrines both positive and negative aspects. On the one hand, it presumes that individuals belonging to a well-represented third-country community in the Member State will be able to present a complaint in their native language. On the other hand, there is no clarification as what constitutes a 'common language' in a Member State and other EU languages might also be left out due to this provision.

[458] 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies' (n 439) ch 1.2.3 (1).

[459] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) para (23); Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433) para (22).

Equality bodies have to inform victims on the legal framework and give advice targeted to their specific situation including on the services offered and related procedural aspects and remedies.

Information about the confidentiality rules applicable, on the protection of personal data and on the possibilities to obtain psychological or other types of relevant support (albeit from other bodies or organisations) must also be provided. To address under-reporting, following its Recommendation[460], the preamble recommends that confidentiality should be offered to witnesses and whistle-blowers, and as far as possible, to complainants[461].

Then, Equality bodies shall issue a preliminary assessment of a complaint and inform the applicants whether their complaint will be closed or whether there are grounds to pursue it further, including via the procedures described below.

Amicable settlement

Article 7 requires Member States to provide for the possibility of an amicable resolution of disputes, led by the equality body itself or another existing dedicated entity.

Opinions and decisions

Under Article 8 equality bodies, following a complaint or on their own initiative, shall be allowed to investigate possible cases of discrimination and issue a motivated opinion (non-binding) or decision (binding). Equality bodies shall have effective rights to access information which is necessary to establish whether discrimination has occurred.

[460] 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies' (n 439) ch 1.2.3 (3).

[461] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) para (23) Preamble; Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433) para (22) Preamble.

With regards to the content of the equality bodies' opinions or decisions, the proposal underlines they should include specific measures to "remedy any breach found and to prevent further occurrences". The Recommendation further added that where equality bodies are entitled under national law to take binding decisions, they should be able to issue "adequate, effective and proportionate sanctions"[462]. It remains unclear if "measures to remedy any breach found and to prevent further occurrences" may implicitly include sanctions in the case of binding decisions. Either way, according to Article 10, decisions shall be subject to judicial review.

The proposals further add that Member States shall establish nationally appropriate mechanisms for follow-up to opinions (i.e. feedback obligations) and for enforcement of decisions by equality bodies.

Litigation

Article 9 grants litigation powers to equality bodies, a provision highly welcomed since:

> Litigation may be a particular powerful tool, also expected to be effective at macro-level, beyond the resolution of individual cases, especially if used strategically, to elicit social, legal or policy change. […] Allowing equality bodies to litigate in support of several victims would be new for those Member States that have no tradition of collective redress mechanisms. Collective action is currently only possible, in discrimination cases, in seven Member States […]. Such a measure would be essential to assist groups of victims, and in particular all victims who would not go to court on their own, due to the cost, length and/or complexity of the procedure.

Building on ECJ case-law (See Chapters 2.3 and 2.4.1) the proposal grants equality bodies the right to act in their own name or in support of victims.

This ground-breaking provision will allow them in particular to act:

- where victims might not be able otherwise to access justice due to procedural and financial barriers or fear of victimisation[463];

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[462] 'Commission Recommendation (EU) 2018/951 of 22 June 2018 on Standards for Equality Bodies' (n 439) ch 1.1.2 para (5).

[463] Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation,

- in the absence of an identified victim (as was the case in the *Feryn* ruling[464]) and
- in support or on behalf of several victims.

Finally, the Article provides a "lighter way" for equality bodies to support court cases, by enabling them to submit oral or written statements to the courts (e.g. amicus curiae).

Access, accessibility and reasonable accommodation

Article 11 lists guarantees to access to equality bodies' services and publications and submit complaints throughout the territory of Member States at no cost to complainants.

Cooperation and consultation

While Article 12 grants equality bodies appropriate mechanisms to cooperate with other equality bodies and with relevant public and private entities Article 13 focuses on the need for public institutions to consult regularly equality bodies. The latter creates an obligation for public institutions to consult equality bodies on acts and policies involving questions of equality and non-discrimination and the obligation to do so in a timely manner.

Data collection and access to equality data

There are "substantial knowledge gaps and imbalances" regarding equality data in the European Union, with the FRA having found that "Member States tend not to have a coherent and systematic approach to equality data"[465].

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equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC (n 433) para (31) Preamble; Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 433) para (29) Preamble.

[464] *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* (n 149).

[465] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 63.

Equality data are of crucial importance to "identifying, making visible and understanding patterns of discrimination and structural inequality, and to devising policies and measures to tackle these"[466]:

> Common rules on data collection and access to statistical data for equality bodies for analytical purposes are key to improving statistical evidence on equality and nondiscrimination and ensuring a proper analysis of relevant data. This is crucial in enabling policymakers to take well-founded, informed decisions; furthermore, it is essential for the public discourse and awareness to have reliable information on current levels of discrimination in Member States. Since equality bodies are experts in the field of equality and non-discrimination, they are expected to be able to conduct sound in-depth analyses if provided with the necessary data[467].

Statistical data plays an important role also in litigation and, in particular, in cases of indirect discrimination[468] where it "operates a partial shift of the burden of proof that lightens the charge for the victim attributing to the State a presumption of violation"[469]. More specifically:

> Statistical data can play an important role in helping a claimant give rise to a presumption of discrimination. It is particularly useful in proving indirect discrimination, because in these situations, the rules or practices in question are neutral on the surface. Where this is case, it is necessary to focus on the effects of the rules or practices to show that they are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation. The production of statistical data works together with the shift of the burden of proof: where data

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[466] ibid 66.

[467] COMMISSION STAFF WORKING DOCUMENT Analytical document Accompanying the documents Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU (n 434) 43.

[468] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 22.

[469] Balboni (n 8) XXXVII.

> shows, for example, that women or disabled persons are particularly disadvantaged, it will be for the state to give a convincing alternative explanation of the figures[470]

The Commission believes equality bodies have a key role to play in the development of equality data and entrusts them with rights and obligations in this regard in Article 14. Under the proposals, equality bodies would have:

1) obligations to collect data on their own activities (notably these data should be disaggregated by grounds and fields of discrimination),
2) powers to conduct independent surveys concerning discrimination,
3) powers to access and process statistics collected by other public or private entities, and
4) possibly to make recommendations on which data is to be collected by other private or public entities;
5) possibility to play a coordination role in the collection of equality data by other public or private entities.

Reports and strategic planning

Equality bodies will be required, under Article 15, to plan and report on their work and:

- adopt a multi-annual programme setting out their priorities and prospective activities;
- produce and make available to the public an annual activity report;
- publish a report, with recommendations, at least every four years, on the state of equal treatment and discrimination, including potential structural issues, in their Member State.

Specific considerations with regards to the rights of LGBTIQ+ individuals

The proposals are very promising, in particular as regards their objective to create common minimum standards for equality bodies on their powers, leadership,

[470] European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). (n 4) 242.

independence, resources, accessibility and effectiveness. The provisions granting litigation powers to equality bodies, including in absence of an identified victim and in support or on behalf of one or more victims are very encouraging. In the specific case of LGBTIQ+ rights, as we've seen supra, there is extensive case-law on the need to balance their rights with the right to freedom of expression which may or may not have an identifiable victim (like the *Rete Lenford* ECJ ruling[471]).

The extension of their mandate to cover all grounds of discrimination and in the fields set out by the existing equality directives is also appreciated yet leaves some questions unaddressed specifically with regards to LGBTIQ+ rights.

Indeed, as seen *supra* (Chapter 1.1.3), the existing EU gender equality legal framework had anchored transgender equality within the binary concept of sex. This means that, under existing provisions, the protection of intersex individuals is unclear whereas non-binary individuals are excluded. Furthermore, existing provisions on gender identity have covered only individuals who intend to undergo or have undergone gender transition-related surgery(ies)[472]. These uncertainties are not currently clarified by the proposals, possibly leaving these individuals out of the scope of the proposals.

Interestingly, as seen *supra*, Article 5 introduces the obligation for equality bodies to adopt an intersectional approach in searching for the adequate communication tools and formats to use in their strategies. Furthermore, the proposed intersectional approach has to include both existing grounds of discrimination and an open list of new grounds that are currently not recognised by equality directives and that may hinder access to information. Namely, these include: economic status, literacy, residence status or lack of access to online tools. Furthermore, the proposals include a provision in paragraph (20) requiring equality bodies to be mindful, in their use of digital resources, against algorithmic discrimination.

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[471] *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford* (n 128).

[472] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 46.

Unfortunately these additional new grounds and intersectional approach are not included in other parts of the proposal nor recommended, for example, to be included in the equality bodies mandate or in the obligation to collect statistical data.

Negotiations on these directives will be interesting, especially given the difference in procedure due to their different legal basis.

Finally, as the proposals provide "minimum" standards, national transposition and application of the directives will be crucial to their success.

4.2 The legislative proposal on the mutual recognition of parenthood

4.2.1 Introduction

The European Commission presented the 7th of December 2022, as part of its 'Equality package', a proposal for a Council Regulation "on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood"[473] ('the proposal'). This proposal is part of the EU Strategy on the rights of the child[474] and the EU LGBTIQ Equality Strategy[475].

The proposal addresses the need to ensure the recognition of parenthood between Member States, since families increasingly find themselves in cross-border situations, for example if they have family members in another Member State, travel within the Union, move to another Member State to find a job or found a family, or buy property in another Member State[476].

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[473] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood 2022.

[474] European Commission, EU Strategy on the Rights of the Child 2021.

[475] European Commission Union of Equality: LGBTIQ Equality Strategy 2020-2025 (n 47).

[476] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 1.

As seen supra (Chapter III), thanks to the interpretation provided by the ECJ in several rulings[477], EU law requires Member States to recognise the marriage or parenthood of a child as established in another Member State for the purposes of the rights that the couple or the child derive from EU law, in particular under Union law on free movement.

However, EU law does not yet require Member States to recognise the parenthood of a child as established in another Member State for other crucial purposes such as maintenance or succession rights, the right of their parents to act on matters such as medical treatments or schooling.

These difficulties are hard to quantify for several reasons, including the fact that many families are likely deterred from exercising their right to free movement for fear that the parenthood of their children will not be recognised in another Member State for all purposes.

The proposal is purposely centred around the rights of the child and does not include provisions on the recognition of same-sex marriage or registered partnerships. The Commission hopes that by focusing on the rights of the estimated two million children currently facing a situation of 'limping parenthood' - instead of how they were conceived, the type of family they have or their nationality - the proposal will have more chances of being adopted[478]. Indeed, the objective of the proposal is to strengthen the protection of the fundamental rights and other rights of children in cross-border situations, including their right to an identity, to non-discrimination and to a private and family life, and to succession and maintenance rights in another Member State[479].

Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne (n 106); *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371); *Rzecznik Praw Obywatelskich v K.S. and Others* (n 373).

European Commission Audiovisual Service, 'Press Conference on the Equality Package Following the Weekly Meeting of the von Der Leyen Commission', *Complete press conference* (7 December 2022) <https://audiovisual.ec.europa.eu/en/video/I-234442> accessed 20 January 2023. European Parliament Multimedia Centre (n 114).

[479] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 2.

The proposal by the Commission, following existing EU international private law instruments (PIL) aimed at improving judicial cooperation in civil matters in the EU, lays down rules on international jurisdiction on parenthood and applicable law. Moreover, the Commission proposes the creation of a European Certificate of Parenthood that families can request and use to provide evidence of their parenthood in another Member State[480].

The Commission conducted extensive stakeholder consultations ahead of the preparation of the proposal. The outcome of several of the consultations and studies that have informed the preparation of the proposal are public and have been analysed for the purpose of this Chapter. They consist of the minutes of established an Expert Group on the Recognition of parenthood between Member States created by the Commission (the 'EC Expert Group'[481]), an external study commissioned by the Commission (the 'ICF Study'[482]) and the 'impact assessment'[483] published by the Commission along with the proposal.

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[480] ibid 4.

[481] 'Minutes of the 1st Meeting of the Expert Group on the Recognition of Parenthood between Member States (11 June 2021)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>; 'Minutes of the 2nd Meeting of the Expert Group on the Recognition of Parenthood between Member States (30 June 2021)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>; 'Minutes of the 3rd Meeting of the Expert Group on the Recognition of Parenthood between Member States (15 September 2021)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>; 'Minutes of the 4th Meeting of the Expert Group on the Recognition of Parenthood between Member States (14 October 2021)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>; 'Minutes of the 5th Meeting of the Expert Group on the Recognition of Parenthood between Member States (2 December 2021)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>; 'Minutes of the 6th Meeting of the Expert Group on the Recognition of Parenthood between Member States (9 February 2022)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>; 'Minutes of the 7th Meeting of the Expert Group on the Recognition of Parenthood between Member States (20 February 2022)' <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3765>.

[482] ICF S.A. (n 333).

[483] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions

4.2.2 Analysis of the proposal

Choice of legal basis

The legal basis chosen for the proposal is Article 81(3) TFEU[484]. As seen supra, Article 81 TFEU provides that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases relating to relationships between private persons, such as family law, property law and contract law. However, adopting measures with this legal basis has proven to be very difficult in the past, as paragraph 3 of Article 81 TFEU provides that the Council of Ministers has to act unanimously after consulting Parliament.

The Commission explained its choice of this legal basis for the proposal as this provision is *lex specialis* over Article 21 TFEU on the free movement of citizens[485] and that transposing the ECJ rulings into law would not only be less useful (the rulings are already binding for Member States and derive their interpretation directly from Treaty rights – Article 21 TFEU) but possibly even harmful, should negotiations with co-legislators lower the standards recognised by the Court[486].

Unanimity in the Council will be difficult to reach for two main reasons. Firstly, the hostility from a couple of Member States against same-sex couples has already blocked the adoption of several EU PIL Regulations[487]. Secondly, the political feasibility of this

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and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood 2022.

[484] Consolidated version of the Treaty on the Functioning of the European Union.

[485] 'Minutes of the 4th Meeting of the Expert Group on the Recognition of Parenthood between Member States (14 October 2021)' (n 481) 1.

[486] European Parliament Multimedia Centre (n 114).

[487] Andrea Bonomi, 'Les Règlements Européens Sur Les Régimes Matrimoniaux et Les Effets Patrimoniaux Des Partenariats Enregistrés', *L'accès aux droits de la personne et de la famille en Europe* (Bruylant 2022) 202.

legislative proposal was also raised by the ICF Study[488] and some Member States have expressed scepticism toward EU legislation on the matters covered by the proposal[489].

Should the unanimity requirement not be reached, Article 20 of the TEU and Title III of the TFEU provide the possibility for groups of Member States to establish *enhanced cooperation* between themselves. This procedure, which requires the participation of a minimum of nine EU Member States, allows them to adopt acts which shall bind only the participating Member States[490]. This procedure has already been used (as mentioned s*upra*) for several EU PIL Regulations in the fields of divorce[491], matrimonial property regimes[492] and property consequences of registered partnerships[493].

It would be regrettable that this proposal is not adopted unanimously and thus does not become part of the EU *acquis*. It must be noted, nevertheless, that in the unfortunate event the proposal is adopted within the framework of enhanced cooperation a majority of Member States have already stated they support EU legislation on the matters covered by

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[488] ICF S.A. (n 333) 81, 88, 205.

[489] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 42, 60–61; Silvia Ellena, 'EU Countries Split over Commission's Plan to Give Parents Cross-Border Rights' (*https://www.euractiv.com/section/non-discrimination/news/eu-countries-split-over-commissions-plan-to-give-parents-cross-border-rights/*, 7 February 2022) <https://www.euractiv.com/section/non-discrimination/news/eu-countries-split-over-commissions-plan-to-give-parents-cross-border-rights/> accessed 17 January 2023; OPENLY, 'How Is the EU Shaping LGBTQ+ Families' Rights?' (*OPENLY*, 8 December 2022) <https://www.openlynews.com/i/?id=cff66c1c-8001-4fca-96d1-ae3de0330242> accessed 17 January 2023; '"National Identity" Likely to Keep Clashing with Free Movement across the EU – EURACTIV.Com' <https://www.euractiv.com/section/economy-jobs/news/national-identity-likely-to-keep-clashing-with-free-movement-across-the-eu/> accessed 17 January 2023.

[490] Olivier Costa and Nathalie Brack, *How the EU Really Works* (Routledge 2016) 256–260.

[491] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation 2010 (OJ L).

[492] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes 2016 (OJ L).

[493] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships 2016 (OJ L).

the proposal and would hopefully opt-in[494]. Further to this argument, two thirds of Member States have already opted-in to existing PIL regulations: 18 Member States participate in enhanced cooperation on the Regulations on the rules applicable to matrimonial property regimes and property consequences of registered partnerships and 17 Member States on the Regulation on the area of the law applicable to divorce and legal separation.

Choice of instrument

The Commission chose to use a Regulation for this proposal due to its binding nature and wide scope:

> Adoption of uniform rules on international jurisdiction and applicable law for the establishment of parenthood in cross-border situations can only be achieved through a Regulation as only a Regulation ensures a fully consistent interpretation and application of the rules[495].

This choice of legal instrument is also in line with previous Union instruments on private international law.

The use of a non-binding instrument, such as a Recommendation, was also considered but let go since, according to the impact assessment:

> Unless the Recommendation were effectively implemented by all Member States within a reasonable timeframe, the heterogeneity of the rules concerning parenthood with cross-border element would persist and continue to cause problems in the future. If some but not all Member States implemented the Recommendation, this could result in partial increased coherence between national rules on the PIL aspects of parenthood and mitigate slightly the incidence of problems. […]. Even in a very optimistic scenario where the Recommendation were implemented by 50% of Member States, the positive impact of the Parenthood initiative would be unevenly realised

[494] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 61; ICF S.A. (n 333) 125.

[495] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 7.

> across the EU, and the situations of limping parenthood[…] and deterrence of families from exercising their right to free movement would continue in the EU[496].

Finally, a Regulation is directly applicable in all Member States and does not therefore have to be translated into national law: an aspect that would be essential should the proposal be adopted unanimously by the Council and crucial should it be adopted within the framework of enhanced cooperation.

Analysis of the contents of the proposal

The proposal consists of nine Chapters:

(i) subject matter, scope and definitions;
(ii) jurisdiction on parenthood matters in cross-border situations;
(iii) applicable law to the establishment of parenthood in cross-border situations;
(iv) recognition of court decisions and authentic instruments with binding legal effect issued in another Member State;
(v) acceptance of authentic instruments with no binding legal effect issued in another Member State;
(vi) the European Certificate of Parenthood;
(vii) digital communication;
(viii) delegated acts; and
(ix) general and final provisions.

Relationship with other provisions of EU law

Article 2 defines the relationship of the proposal with other provisions of EU law and provides that this proposal does not affect the other rights that a child derives from EU law, in particular the rights under Union law on free movement which include the right of Union citizens and their family members to move and reside freely within the Union such as rights related to scholarships, admission to education, reductions in public

[496] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 29.

transportation costs for large families, reduced student fares for public transport and reduced museum entrance fees, as well as the right to the recognition of name[497].

It's an important clarification bound to hopefully convince reluctant Member States to support this proposal: they are already required by EU law to recognise – for the purposes of freedom of movement – the entry, movement and residence of same-sex couples and their children in their territory. Furthermore, the Article recalls, for the purposes of the exercise of rights derived from Union law, proof of parenthood can be presented by any means: the court decisions, authentic instruments and European Certificate or parenthood described or created by the proposal are not necessary for this aim[498].

Finally, the proposal will not affect the application of the Regulation on Public Documents[499].

Scope

Article 3 defines the scope of the Regulation. The Article starts by listing what the Regulation does not apply to, including: the existence, validity or recognition of a marriage or a registered partnership, intercountry adoption, nationality.

Arguably one of the more confusing sections of the regulation, the Article then defines the territorial scope of the Regulation: it will only concern the recognition of parenthood between Member States[500]. The Article provides that:

[497] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 11.

[498] ibid 12.

[499] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 2016 (OJ L).

[500] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 28.

> This Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.

The EC Expert Group discussed several times what the territorial scope of the Regulation should be[501]. For instance, they discussed whether the proposal:

- should also cover parenthood documents issued in a Member State as regards children born in a third country but with the nationality of a Member State[502];
- should cover documents issued by the authority of a third country but subsequently recognised in a Member State[503];
- what to do in cases a birth through surrogacy under the national provisions of a non-EU State which is subsequently recognised in a Member State[504];

Currently, if one of the parents is a resident or a national of a Member State and the child is born abroad, registration is possible in almost all Member States[505] although the procedure varies greatly among Member States:

> In Italy, a birth certificate created abroad is transcribed, while in the Netherlands, the authorities issue a deed of registration attesting the foreign registration of birth. Some Member States, including Austria, require the child to be a citizen of the Member State for the registration. Austria and Germany also register children born abroad who are stateless, or a person of uncertain nationality, or a recognised refugee if they have habitual residence in the Member State. Cyprus

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[501] 'Minutes of the 1st Meeting of the Expert Group on the Recognition of Parenthood between Member States (11 June 2021)' (n 481) 4; 'Minutes of the 3rd Meeting of the Expert Group on the Recognition of Parenthood between Member States (15 September 2021)' (n 481) 2; 'Minutes of the 4th Meeting of the Expert Group on the Recognition of Parenthood between Member States (14 October 2021)' (n 481) 2; 'Minutes of the 6th Meeting of the Expert Group on the Recognition of Parenthood between Member States (9 February 2022)' (n 481) 2.

[502] 'Minutes of the 5th Meeting of the Expert Group on the Recognition of Parenthood between Member States (2 December 2021)' (n 481) 2.

[503]'Minutes of the 1st Meeting of the Expert Group on the Recognition of Parenthood between Member States (11 June 2021)' (n 481) 4.

[504] 'Minutes of the 3rd Meeting of the Expert Group on the Recognition of Parenthood between Member States (15 September 2021)' (n 481) 2; 'Minutes of the 5th Meeting of the Expert Group on the Recognition of Parenthood between Member States (2 December 2021)' (n 481) 2.

[505] ICF S.A. (n 333) 161.

> and Czechia maintain special registries for children born abroad. In France, registration is only possible by the French consulate abroad, where the consuls act in the capacity of civil registrars[506].

Commissioner Reynders provided some clarity during the presentation of the proposal:

> "[…] if there is [recognition] through an embassy or consulate in a third country, national recognition from a Member State or if there's a recognition in a Member State instead […] we will have to protect the rights of the child. We are working on one simple rule, if there is a recognition of rights in a Member State we must recognize it in the others."[507]

With regards to the recognition of children born via surrogacy arrangements,

> "to have the establishment of the parenthood you need to find a Member State having this [recognition of birth via surrogacy] in their national legislation such a possibility. So that's the first step: if you have such a possibility at the national level in the national territory or in an embassy at a consulate abroad it's the same. If there is an establishment of the parenthood by a Member State you have – with our proposal - the recognition by the other Member States"[508];

Furthermore,

> "It should be noted that the case law of ECtHR already requires the States to recognise the parenthood established abroad between a child born out of surrogacy and his or her biological parents and to provide for a mechanism for recognition of the parenthood between the child and the non-biological parent; for example through adoption[509];

The proposal also includes the recognition of the parenthood of a child adopted domestically in a Member State[510].

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[506] ibid.

[507] European Commission Audiovisual Service (n 478).

[508] European Parliament Multimedia Centre (n 114).

[509] ibid.

[510] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) para (21),(25),(26) Preamble.

Finally, the proposed Regulation would apply also to non-EU citizens as it is based on whether parenthood has been recognised by a Member State and not on the applicant's nationality[511].

Definitions

Article 4 lists a series of important definitions for the interpretation of the Regulation.

Of notable interest the fact that 'child' includes a person of any age, although the 'best interests of the child' and the right to be heard must be understood as referring to children under the age of 18 years as defined in the UNCRC.

'Establishment of parenthood' means the determination in law of the relationship between a child and each parent (including the establishment of parenthood following a claim contesting a parenthood established previously).

'Parenthood' means the parent-child relationship established in law. Interestingly, according to the explanatory memorandum, parenthood may be biological, genetic, by adoption or by operation of law[512]. The proposal covers also deceased children and children not yet born, whether to a single parent, a *de facto* couple, a married couple or a couple in a registered partnership[513]. The way the child was conceived or given birth to is irrelevant for the purposes of the proposal and therefore, children born via surrogacy agreements are covered by the proposal (see *supra*). The question of if and how the proposal should cover children born via surrogacy agreements was discussed on several occasions by the EC Experts group and analysed thoroughly also within the ICT study and impact assessment report. The EC Experts group and the Commission' impact

[511] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 67.

[512] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 13.

[513] ibid.

assessment acknowledged that surrogacy is a sensitive issue that raises ethical questions[514].

The proposal recalls in paragraph 18 of the preamble that:

> The European Court of Human Rights has interpreted Article 8 of the Convention as requiring all States within its jurisdiction to recognise the legal parent-child relationship established abroad between a child born out of surrogacy and the biological intended parent, and to provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended parent (for example through the adoption of the child) [see: for example, Mennesson v. France (Application no 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014) and Advisory Opinion P16-2018-001 (Request no. P16-2018-001, Council of Europe: European Court of Human Rights, 10 April 2019)].

Article 4 then defines broadly "Authentic instruments" including:

(i) documents establishing parenthood with binding legal effect, such as notarial deeds (for example, in adoption or where the child is not yet born), or administrative decisions (for example, after an acknowledgment of paternity), as well as

(ii) documents which do not establish parenthood with binding legal effect but which provide evidence of the parenthood established by other means (for example, an extract from a population or civil status register, a birth certificate or a parenthood certificate) or evidence of other facts (for example, a notarial act or an administrative document recording an acknowledgment of paternity or the giving of consent to the use of assisted reproductive technology)[515].

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[514] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 20; 'Minutes of the 3rd Meeting of the Expert Group on the Recognition of Parenthood between Member States (15 September 2021)' (n 481) 1.

[515] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 13.

Jurisdiction

Chapter II lays down uniform jurisdiction rules on the establishment of parenthood with a cross-border element in order to facilitate the recognition or acceptance of court decisions and authentic instruments on parenthood.

Interestingly, according to the impact assessment, cases where parenthood is established by a court decision are rare (they may cover for instance cases of domestic adoption or where parenthood has been disputed). Most cases of parenthood are established by operation of law (e.g. by birth and by presumption of parenthood of the spouse/partner of the mother)[516]. This is the main reason why the proposal includes not only court decisions (standard in EU PIL legislation) but the recognition of authentic instruments as well[517].

To avoid parallel proceedings in different Member States with possible conflicting decisions, Articles 6, 7 and 8 and 9 of the proposal provide for alternative grounds of jurisdiction to facilitate access to justice in a Member State - the key criteria being a court that is in the proximity of the child – as well as a *forum necessitatis* for very exceptional cases.

> The proposal provides for alternative grounds of jurisdiction to facilitate access to justice in a Member State. In order to ensure that children can access a court that is in their vicinity, jurisdiction grounds are based on their proximity to the child. Jurisdiction can thus lie alternatively with the Member State of habitual residence of the child, of the nationality of the child, of the habitual residence of the respondent (for example, the person in respect of whom the child claims parenthood), of the habitual residence of any one of the parents, of the nationality of any one of the parents or of the birth of the child. In line with the existing case law of the Court of Justice on the matter, habitual residence is established on the basis of all the circumstances specific to each individual case.
>
> Where jurisdiction cannot be established based on one of the general alternative jurisdiction grounds, the courts of the Member State where the child is present should have jurisdiction. This

[516] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 89.

[517] ibid 31.

> jurisdiction ground may in particular apply to refugee children and children internationally displaced. Where no court of a Member State has jurisdiction pursuant to the proposal, residual jurisdiction should be determined, in each Member State, by the laws of that Member State. Finally, in order to remedy situations of denial of justice, this proposal also provides for a forum necessitatis allowing a court of a Member State with which a case has a sufficient connection to rule on a parenthood matter which is closely connected with a third State. This can be done on an exceptional basis, such as where proceedings prove impossible in that third State, for example because of civil war, or where the child or another interested party cannot reasonably be expected to bring proceedings in that third State[518].

The proposal does not provide for party autonomy as regards jurisdiction (such as a choice of court or transfer of jurisdiction)[519].

Article 14 introduces possibility for the procedural *lis pendens* in cases where parenthood is brought before different courts in different Member States:

1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. In the cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the requesting court of the date when it was seised.
3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of the court first seised.

Article 15 recalls the right of children below the age of 18 years who are capable of forming their views to be provided with an opportunity to express these views in proceedings concerning parenthood they are subject to.

Applicable law

To provide for legal certainty and predictability the proposal establishes a hierarchical list of common rules to avoid conflicting decisions on parenthood. First and foremost, Article

[518] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 14.

[519] ibid 13.

16 underlines the *universal application* rule: any law designated as applicable by the proposal shall be applied whether or not it is the law of a Member State.

As per paragraph 1 of Article 17, the law applicable to the establishment of parenthood should be the law of the State of the habitual residence of the person giving birth at the time of birth. However, where the habitual residence of the person giving birth at the time of birth cannot be established (for example, in the case of a refugee or an internationally displaced mother), the law of the State of birth of the child should apply.

To avoid cases of limping parenthood, the Commission then adds an important safeguard in paragraph 2: where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, the competent authorities may apply one of two subsidiary alternative rules: either the law of the nationality of any one of the parents or the law of the State of birth of the child - to establish the parenthood as regards the second parent (typically the non-genetic parent in a same-sex couple).

The impact assessment explains that this possibility may be used by authorities with jurisdiction that consider the establishment of parenthood first in time but also by authorities with jurisdiction in a situation where the authorities of another Member State have already established parenthood as regards only one parent[520].

Another important safeguard is provided by Article 19: a subsequent change of the applicable law shall not affect the parenthood already established in a Member State.

Article 22 regards the possibility for competent authorities establishing parenthood in cross-border situations to disregard, in exceptional circumstances, certain provisions of a foreign law where applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of their Member State. The impact assessment specifies that public policy is a standard refusal ground included in EU's family-law instruments and could, for example, cater for situations involving child trafficking or where there has been no fair trial due to a breach of fundamental procedural rights[521]. The Article further

[520] ibid 15.

[521] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions

provides that this exception would not apply when contrary to the Charter and, in particular, Article 21 thereof, which prohibits discrimination (e.g. for the purpose of excluding a same-sex couple merely on the grounds that the parents are of the same sex).

Recognition of court decisions and authentic instruments establishing parenthood with binding legal effects

Chapter IV provides for rules on the recognition of court decisions and authentic instruments establishing parenthood with binding legal effects issued in another Member State. Preamble (65) underlines that authentic instruments with binding legal effect in the Member State of origin should be treated as equivalent to 'court decisions' for the purposes of the rules on recognition of this Regulation.

The Chapter applies to authentic instruments establishing parenthood that:

(a) have been formally drawn up or registered in a Member State assuming jurisdiction; and

(b) have binding legal effect in the Member State where they have been formally drawn up or registered.

They may be, for example, a notarial deed of adoption or an administrative decision establishing parenthood following an acknowledgment of paternity[522].

Articles 24 and 36 state that Court decisions and authentic instruments establishing parenthood with binding legal effect issued in a Member State should be recognised in another Member State without any special procedure being required.

Notably, the list of grounds for refusal of the recognition of parenthood is exhaustive and listed in Articles 31 and 39:

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and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 31.

[522] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) para (59) Preamble.

1. if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the child's interests. This ground is to be used exceptionally and under the same conditions highlighted in the description of Article 22 (see *supra*).
2. only for the recognition of a court decision: where it was given in default of appearance if the persons in default were not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable those persons to arrange for their defence unless it is determined that such persons have accepted the court decision unequivocally;
3. upon application by any person claiming that the court decision infringes his fatherhood or her motherhood over the child if it was given without such person having been given an opportunity to be heard;
4. if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in the Member State in which recognition is invoked;
5. if and to the extent that it is irreconcilable with a later court decision relating to parenthood given in another Member State provided that the later court decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.

Article 41 provides a *non-review as to substance* clause, stating that court decisions or authentic instruments establishing parenthood with binding legal effect in a Member State of origin, shall, "under no circumstance" be reviewed as to their substance. This same concept was proposed by the EC Experts Group which advocated that a review of the merits (*révision au fond*) of court decisions should be excluded:

> In the area of parenthood, the most important effect of a judgment would be res iudicata, such that parenthood established by final judgment in a Member State should be accepted in other Member States without it being possible to contest it on grounds that it is contrary to the domestic law of the recognising Member State.[523]

[523] 'Minutes of the 3rd Meeting of the Expert Group on the Recognition of Parenthood between Member States (15 September 2021)' (n 481) 2.

While this clause would undoubtably be a positive step for same-sex families residing in Member States that recognise their relationship, registered partnership or marriage and/or their parenthood the same might not be said of residents of countries where, for instance, restrictive presumptions of parenthood by birth and of the spouse/partner of the mother based on Roman-law principles might apply (see *infra*).

Indeed, as noted by the ICF Study: "While the recognition of the relationship between parents falls outside of the scope of this report" and, also, the Commission's proposal, "the existence of the relationship between the putative parents of the child could be relevant as an incidental question to determine whether a legal presumption of parenthood applies"[524].

[524] ICF S.A. (n 333) 22.

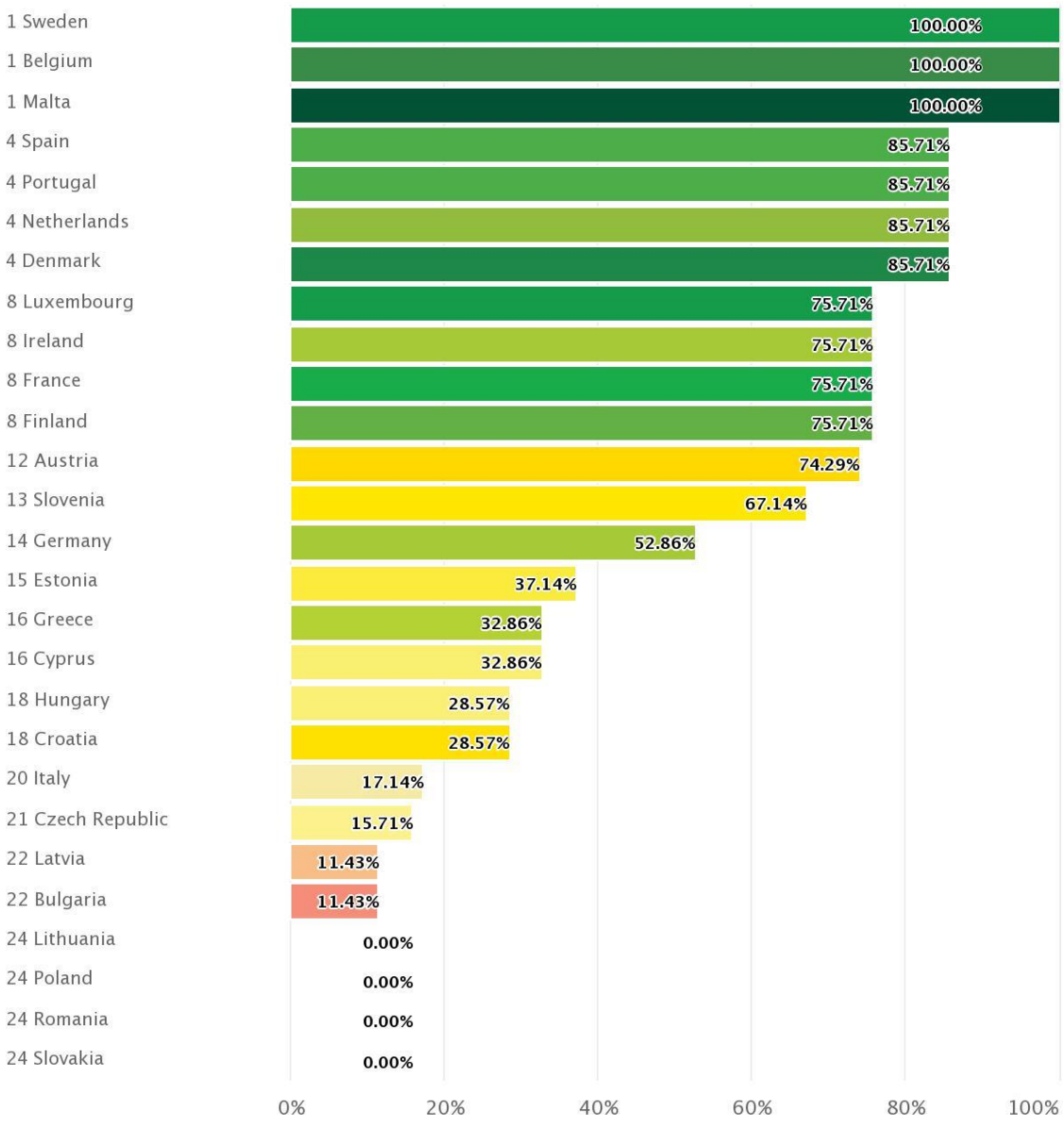

Figure 3: Country Ranking created by Rainbow Europe based on ILGA-Europe's 2022 rating of the EU Member States as regards the right for same-sex couples to have their relationship recognised and the right to form/create a family (e.g. via joint or second parent adoption, via medically assisted insemination). The colour assigned to each country gives an indication of where the countries are positioned on a scale between 0% (gross violations of human rights, discrimination) and 100% (respect of human rights, full equality).

Indeed, ILGA's 2022 Rainbow Europe map ('ILGA's Rainbow map')[525] shows a relatively high correlation between the right for same-sex couples to have their relationship recognised (whether as a cohabitating, registered or married couple) and the

[525] 'Rainbow Europe' <https://www.rainbow-europe.org/> accessed 23 January 2023.

right to form/create a family (e.g. via joint or second parent adoption, via medically assisted insemination).

The Rainbow Europe map does not include as an indicator birth via surrogacy and, based on information gathered by the impact assessment, its correlation level with the recognition of partnership is much lower, as surrogacy is currently legally possible only in four – currently three - Member States:

> Based on available information, only four Member States (Cyprus, Greece, Portugal and, to some extent, the Netherlands[…]) out of EU-26 have adopted rules governing in their national law altruistic (non-commercial) surrogacy (the legislation in Portugal would however appear to be currently suspended further to a decision of the Portuguese Constitutional Court[…]). Some other EU Member States do not regulate surrogacy neither specifically prohibiting it, nor specifically allowing it […]. However, even the four Member States that allow surrogacy restrict it by conditions and eligibility criteria. For instance, in Cyprus and Greece, surrogacy is only allowed with a prior authorization from a court and/or a specialised board and there are requirements concerning the residence of the surrogate or the intending parents in these Member States. Among the countries that do not expressly ban surrogacy, several figures have emerged as to the incidence of the surrogacy arrangements […][526].

In other words, same-sex couples residing in countries that rank high in "ILGA's Rainbow map" will likely benefit from the *non-review as to substance* clause for court decisions and authentic instruments with binding legal effects, which they could then require Member States with a low ranking to recognise.

Unfortunately, the opposite applies for families residing in countries that place low in 'ILGA's Rainbow map'. Indeed, Member States that rely on a conservative application of the roman-law principles "*pater est quem nuptiae demonstrant*[527]" and "*mater semper*

[526] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 73.

[527] Roman-law principle according to which: "The father is he whom marriage indicates": in other words, children born in wedlock are presumed to be the legitimate children of the husband and wife.

certa est"[528] would be able to refuse parenthood to one or both parents. Currently, according to the ICF Studies, most Member States apply the "*pater est quem nuptiae demonstrant"* principle[529] whereas 15 Member States apply the "*mater semper certa est*" principle[530].

It is difficult to assess how to interpret the *non-review as to substance* clause when applied together with the above roman law principles or conflict with the rule enshrined in Article 17 paragraph 2. Indeed, as seen *supra,* according to that Article, where the law applicable results in the establishment of parenthood as regards only one parent other subsidiary laws should apply[531] to establish parenthood as regards the second parent. This means that, in these cases, parenthood as regards each parent could have to be established by the authorities of different Member States, should be recognised in all other Member States[532], thus disapplying the *non-review as to substance* clause as provided by Article 41?

A different interpretation of the conflict between these articles could lead to a paradoxical situation.

For example, as analysed *supra* (Chapter 3.2.1) in the *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* ECJ case[533], the couple luckily resided in Spain where their relationship and family ties to their child was recognised: should the proposal be adopted as is, Bulgarian authorities would have had to recognise parenthood to both parents. However, hypothetically, had the family resided and given birth in Bulgaria, domestic authorities could create a situation of limping parenthood where the legal parenthood by the second

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[528] Roman-law principle according to which: "The mother is always certain", creating the presumption that the mother is the person that gives birth to the child.

[529] ICF S.A. (n 333) 151.

[530] ibid 152.

[531] Namely, the law of the State of nationality of either parent or the law of the State of birth of the child.

[532] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) para (52) Preamble.

[533] *VMA v Stolichna obshtina, rayon „Pancharevo"* (n 371).

mother would not be recognised in Bulgaria but, oddly, should be recognised in all other Member States.

The situation would be even more complicated in cases of birth via surrogacy for Member States that apply presumptions of parenthood by birth and of the spouse/partner of the mother based on Roman-law principles.

Indeed, in the commented ECtHR *S.-H v. Poland* case (see Chapter 3.2.2), domestic authorities had applied the "*pater est quem nuptiae demonstrant* " and "*mater semper certa est*" principle thus recognising as parents of the children the surrogate mother and her husband – instead of their biological father and his partner[534].

Moreover, most Member States ban surrogacy and, according to the Commission's impact assessment for the proposal, those that do not regulate surrogacy neither specifically prohibiting it nor specifically allowing it still enshrine the "mater semper certa est" principle in their substantive law[535]. In other words, should intending parents or children born via surrogacy agreements not find their parenthood recognised in their country of residence (which is currently the risk in all but three Member States), their parenthood would not be recognised as well in the rest of the EU due to *the non-review as to substance* clause.

In theory, according to the preamble of the proposal, Member States have – following ECtHR case-law – a positive obligation provide a mechanism in law to recognise parenthood ties between children born via surrogacy and intended parents:

> Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('European Convention of Human Rights') lays down the right to respect for private and family life, while Article 1 of Protocol No. 12 to the said Convention provides that the enjoyment of any right set forth by law must be secured without discrimination on any ground, including birth. The European Court of Human Rights has interpreted Article 8 of the Convention as requiring all States within its jurisdiction to recognise the legal parent-child relationship

[534] *S.-H. v. Poland* (n 387).

[535] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 73.

> established abroad between a child born out of surrogacy and the biological intended parent, and to provide for a mechanism for the recognition in law of the parent-child relationship with the non-biological intended parent (for example through the adoption of the child) […][536].

Nevertheless, the author has doubts as to how whether Member States would apply these rules in practice, especially in light of the recent ECtHR's rulings *Valdís Fjölnisdóttir and Others v. Iceland*[537] and *S. -H v. Poland*[538] (see Chapter 3.2.2).

As mentioned supra, in the 2021 *Valdís Fjölnisdóttir and Others v. Iceland* ruling[539], while the ECtHR recognized the family life between a same-sex couple and their non-biological child born abroad via surrogacy, it found no violation in the State's refusal to formally register them as his parents, considering a fair balance had been struck between the applicants' right to respect for family life and the general interests which the State had sought to protect by the ban on surrogacy[540].

Similarly, also in 2021, the ECtHR found in the previously commented *S. -H v. Poland* that the Polish authorities' refusal to recognise the legal parent-child relationship with the applicants' biological father and the ensuing refusal to confirm the acquisition of Polish citizenship by descent did not attain a level of seriousness nor was carried out in a manner causing prejudice to the personal enjoyment of the right to respect for the family's private and/or family life (see Chapter 3.2.2).

Finally, as the proposal does not include provisions to explicitly protect the parenthood of families with non-binary, transgender or intersex parents it is likely that the same possible situations of conflict analysed *supra* (between Article 17 paragraph 2 and the *non-review as to substance* clause applied together with the roman law principles on motherhood/fatherhood) might arise. According to ILGA's Rainbow map, only four

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[536] ibid (18) Preamble.

[537] *Valdís Fjölnisdóttir and Others v. Iceland* (n 338).

[538] *S.-H. v. Poland* (n 387).

[539] *Valdís Fjölnisdóttir and Others v. Iceland* (n 338).

[540] ibid 75.

Member States (Belgium, the Netherlands, Slovenia and Sweden) fully grant recognition of "trans parenthood", defined as:

> Parent's legal gender identity is recognized in the documentation of kinship (e.g. birth certificate of child respects name, gender marker, gendered denomination "mother"/ "father" (where applicable) according to the parent's recognised gender identity)
>
> Regulations regarding recognition of parenthood is aligned with available gender options where more than 2 gender markers are available, e.g. "mother" and "father" are not the only available options; all parents are recorded as "parent" etc[541].

To a lesser extent, according to the ICF Study, in 17 Member States, a transgender parent is acknowledged in accordance with their gender identity as legally recognised in the Member State where the parenthood was established. However, as the study notes, in several of these Member States there is no clear regulation (e.g. in Czechia, it is presumed that "in case of absence of sex reassignment, the parenthood of a trans parent would not be recognised in accordance with their gender identity as legally recognised in the Member State where the parenthood was established")[542].

Authentic instruments with no binding legal effect

Chapter V provides for the acceptance of authentic instruments which do not establish parenthood with binding legal effect in the Member State of origin but which have evidentiary effects in that Member State. According to the proposal, depending on the national law, such an authentic instrument can be, for example:

> a birth certificate or a parenthood certificate providing evidence of the parenthood established in the Member State of origin (whether the parenthood has been established by operation of law or by an act of a competent authority, such as a court decision, a notarial deed, an administrative decision or registration)[543].

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[541] 'Rainbow Europe Website' <https://www.rainbow-europe.org/about> accessed 24 January 2023.

[542] ICF S.A. (n 333) 176–177.

[543] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) para (59) Preamble.

The evidentiary effects should refer to the prior establishment of parenthood by other means or to other facts, for example:

> […] authentic instruments providing evidence of parenthood already established can be, for example, a birth certificate, a parenthood certificate or an extract from the civil register on birth. Authentic instruments providing evidence of other facts can be, for example, a notarial or administrative document recording an acknowledgment of paternity, a notarial or administrative document recording the consent of a mother or of a child to the establishment of parenthood, a notarial or administrative document recording the consent of a spouse to the use of assisted reproductive technology, or a notarial or administrative document recording a possession of state[544].

According to Article 45 these authentic instruments with no binding legal effect in the Member State of origin shall have the same evidentiary effects in another Member State as in the Member State of origin or the most comparable effects. The Article provides an exception to their acceptance on grounds of public policy in the Member State where they are presented under the same restrictive conditions explained supra for Articles 22, 31 and 39.

European Certificate of Parenthood

Chapter VI provides for the creation of an optional European Certificate of Parenthood ('the ECP') designed to facilitate the recognition of parenthood within the Union. According to Article 46, the Certificate must be issued in the Member State in which parenthood was established following the rules of the proposal and can be used throughout the European Union.

Article 52 provides that the ECP should be presumed to demonstrate accurately the elements established under the applicable law to the establishment of parenthood.

According to Article 53 - similarly to the provisions on the recognition of court decisions and authentic instruments with binding legal effect - the Certificate shall produce its effects in all Member States without any special procedure being required.

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[544] ibid (68) Preamble.

While families are under no obligation to request an ECP, no authority or person presented with a copy of the Certificate issued in another Member State would be entitled to request that a court decision or an authentic instrument be presented instead of the Certificate[545].

Finally, the Certificate form would be available in all Union languages - reducing the need for translations – and its validity would not be limited in time (given the stability of parenthood status in most cases)[546].

Specific considerations with regards to the rights of LGBTIQ+ individuals

The proposal does not include explicit clauses aimed at protecting families with non-binary, transgender or intersex parents, an omission lamented by leading LGBTIQ+ organisations[547]:

> The focus is largely on ensuring same-gender parents of a child or parents of adopted children, regardless of nationality, are recognised as such across Member States. It does not address the issue of trans parents having their legal genders recognised on kinship documents to enable easy travel across borders[548].

Nevertheless, a series of provisions are welcome as they would facilitate their recognition of parenthood.

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[545] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 17; Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) art 53.

[546] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 17.

[547] 'LGBTI Organisations Welcome EU Parental Recognition Proposal' (7 December 2022) <https://ilga-europe.org/press-release/lgbti-organisations-welcome-eu-parental-recognition-proposal/> accessed 17 January 2023; 'EU Commission Proposals on Equality Fail Trans People' (*TGEU*, 8 December 2022) <https://tgeu.org/eu-commission-proposals-on-equality-fail-trans-people/> accessed 17 January 2023.

[548] 'EU Commission Proposals on Equality Fail Trans People' (n 547).

Firstly, the proposal introduces a horizontal requirement for specific attestations, annexed to the regulation to be presented by parties when requiring the cross-border recognition of their parenthood[549]. Following the advice of Transgender Europe[550] and the ICF Study[551] the Commission has intentionally provided gender-neutral wording to these attestations[552] where parents do not have to disclose their own gender/sex and they can mark their child's sex as 'Unspecified'.

The same gender-neutral markers are used in the ECP. This is possibly the most interesting provision that could have a positive impact on the rights of non-binary, transgender and intersex parents.

The main advantage for families to request the European Certificate of Parenthood is that it is specifically designed for use in another Member State and would reduce the administrative burden of the recognition procedures and translation costs for all families[553] with its validity not being limited in time. Indeed, in contrast to national certificates of birth of parenthood, a Certificate is issued always through the same procedure as laid down in the proposal, in a uniform standard form, and with the same contents and effects throughout the Union. Furthermore, as seen *supra*, the Certificate is presumed to demonstrate accurately the elements established under the applicable law designated by the proposal and does not need to be transposed into a national document before it can have access to the relevant register in a Member State.

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[549] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) art 26 (1), 37, 45.

[550] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 483) 36.

[551] ICF S.A. (n 333) 86.

[552] European Parliament Multimedia Centre (n 114).

[553] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) 9.

This would allow families to apply for this Certificate only once - in the Member State in which parenthood was established - without the need to disclose their components' sex or gender - and be able to move within the territory of the Union without the risk of being outed or questioned on their family composition and rights.

Indeed, further to this argument, the ICF Study underlines that currently according to all Member States' civil registrars having replied to their survey, a parenthood certificate includes the sex/gender of the child and, for most respondents, the sex/gender of the parents as well[554].

Finally, while the proposal does not apply to the "existence, validity or recognition of a marriage or of a relationship deemed by the law applicable to such relationship to have comparable effects, such as a registered partnership"[555] the Commission has hinted at[556] the possibility to publish Guidelines on how Member States should interpret EU freedom of movement legislation with regards to same-sex couples in light of the *Coman* ECJ ruling[557] (see *supra*).

[554] ICF S.A. (n 333) 119.

[555] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473) art 3 (2) a.

[556] European Parliament Multimedia Centre (n 114).

[557] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (n 106).

Conclusions and recommendations

This research work underlines, like several academics[558], the undeniable judicial-law making role played by the ECtHR and ECJ in the development of the principles of equality, non-discrimination and the right to freedom of movement.

With regards to LGBTIQ+ rights, the research period covered by this research (November 2019 to January 2023) is no exception, with several landmark rulings interpreting in a progressive manner rights in the socio-economic sphere (employment) and with regards to freedom of movement. Nevertheless, several aspects of these rights remain unclear and the ECtHR seems to have adopted a more cautious approach in a couple of recent rulings (notably in relation to discrimination in access to goods and services and the national recognition of families whose children were born via surrogacy arrangements). Even so, the impact of these Courts has mainly been positive as regards to the recognition of LGBTIQ+ rights for the past years, an assessment not to be taken for granted against the continuous political, xenophobic trans-homophobic populism spreading throughout the European Union.

Pending and ongoing cases show that we can expect in the coming years further jurisprudential developments which, coupled with the recent legislative proposals by the European Commission, demonstrate the ongoing topicality of the issue in European law and the author's renewed interest in upcoming developments.

The research shows that there are several "blind spots" that EU legislators and European Courts could address going forward, underlined below.

Existing grounds and fields of discrimination

The author notably believes that legal protection specifically aimed the "TIQ+" individuals part of the "LGBTIQ+" are much overdue. During the research period, very

[558] 'I principi di uguaglianza e non discriminazione, una prospettiva di diritto comparato' (n 17) 52; Barbera (n 10) 75–76; Danisi, 'Contextualising Non-Discrimination: Towards a New Approach for Sexual Minorities Under the ECHR' (n 166) 200; Barbera and Guariso (n 26) 1, 19; Zaccaroni (n 8) 51; Catalano (n 384) 267–268.

little jurisprudence (and even less legal) developments were aimed expressly at the protection of transgender, non-binary, intersex or queer+ individuals. Discrimination on **grounds of gender identity, gender expression, and sex characteristics** should be explicitly recognised in anti-discrimination law[559] and analysed in depth by the ECJ and ECtHR.

With regards to **fields of discrimination** - acknowledging that this research could not cover the rights relating to life, dignity and body integrity – the author believes much more work is needed in the socio-economic sphere where most legal and case-law developments concern employment. Clarity and protection is much needed with regards to other aspects of the socio-economic sphere, especially with regards to access to goods and services, access to healthcare and social security and education. Algorithmic and AI discrimination are bound to have an impact on all fields of discrimination including the 'socio-economic sphere' (e.g. pre-selection of candidates for employment opportunities[560], workforce management[561], decisions by public bodies on social benefits[562], online bias and exclusion with regards to access to goods and services etc. etc.)[563].

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[559] Ganty and Sanchez (n 9) 66.

[560] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 48; Dolores Morondo Taramundi, 'Le Sfide Della Discriminazione Algoritmica' (2022) 1 GENIUS 22, 22 <http://www.geniusreview.eu/wp-content/uploads/2023/01/genius-2022-01.pdf>.

[561] Nicola Lettieri, 'La Discriminazione Nell'era Delle Macchine Intelligenti. Modelli Possibili Di Analisi, Critica e Tutela' (2022) 1 GENIUS 10, 12, 19–21 <http://www.geniusreview.eu/wp-content/uploads/2023/01/genius-2022-01.pdf>.

[562] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 48; Lettieri (n 561) 12; Taramundi (n 560) 22–23, 25.

[563] See, for a comprehensive overview: Maria Giulia Bernardini and Orsetta Giolo, 'L'algoritmo Alla Prova Del Caso Concreto: Stereotipi, Serializzazione, Discriminazione' (2022) 1 GENIUS 6 <http://www.geniusreview.eu/wp-content/uploads/2023/01/genius-2022-01.pdf>; Lettieri (n 561); Taramundi (n 560); Stefano Pietropaoli, 'Il Dado e Il Cubo. Innocenza Degli Algoritmi e Umane Discriminazioni' (2022) 1 GENIUS 33 <http://www.geniusreview.eu/wp-content/uploads/2023/01/genius-2022-01.pdf>; Serena Vantin, 'Alcune Osservazioni Su Normatività e Concetto Di Diritto Tra Intelligenza Artificiale e Algoritmizzazione Del Mondo' (2022) 1 GENIUS 45 <http://www.geniusreview.eu/wp-content/uploads/2023/01/genius-2022-01.pdf>.

With regards to freedom of movement, the author appreciates the mostly positive case-law developments that intersect the rights of third country migrants and EU citizens with regards to the definition of family and the right to family unity. The recent ECtHR and ECJ jurisprudence on the recognition of cross-border same-sex couples and families has also been mostly positive. Nevertheless, the ongoing conservative approach of national and EU policies on the rights to third country nationals and international protection seekers (the latter outside the scope of this research) may lead to spill over adverse effects on LGBTIQ+ migrants and their families as well. Key developments are expected in the coming years on the need for Member States to recognise same-sex couples and families due to the Commission's legislative proposal[564] and pending and ongoing Court cases on the subject.

Pressing developments with regards to grounds of discrimination

"Categories of discrimination are socially and historically determined and, therefore, mobile"[565].

Anti-discrimination law is bound to be ever changing and evolving. Experts within the academic, NGO and institutional field are working on how to best adapt to grounds of discrimination that have either existed for some time but are just being discovered (e.g. socio-economic disadvantage, applying a "social-contextual approach"[566]) or that could expand with new technologies (e.g. Artificial Intelligence and algorithmic discrimination) or evolve following social and historic events and developments (e.g. exacerbated inequalities due to the Covid-19 pandemic[567]).

The way anti-discrimination law itself is created, assessed and applied in practice are also under consideration with the development of the concepts of "immutability",

[564] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (n 473).

[565] Barbera (n 10) 7.

[566] Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale* (n 11) 459–561.

[567] Ganty and Sanchez (n 9) 31–32, 55, 58–59; *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 44.

"intersectionality", and the need to include an "open list of grounds" in both national and international legal frameworks.

The author believes that these developments, summarised below, show important paths for EU legislators and EU judges alike to move forward.

The "**immutability**" of a ground of discrimination has historically been one of the building blocks of anti-discrimination law and case-law: protection had to be afforded to individuals due to elements of their identity they could not control and for which they were treated unfairly[568]. Nevertheless, as seen also throughout this research, discourse on the concept of immutability has raised questions as to what was 'immutable' enough to be considered a ground (e.g. health status, socio-economic status), whether a person could be asked to conceal that ground (e.g. religious symbols or same-sex relationships) or whether immutability is really a required factor for discriminating actions to take place (e.g. digital literacy, health status, physical appearance[569]).

For instance the ECHR, being "a living instrument which […] must be interpreted in the light of present-day conditions"[570], has been deemed by the ECtHR to include the protection of cases dealing with 'other grounds' of discrimination such as: immigration status, status relayed to employment, having served a prison sentence[571].

Barbera and Guariso (n 26) 16.[568] Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Bloomsbury Publishing 2017) 54–59; Holning Lau, *Sexual Orientation and Gender Identity Discrimination* (Brill 2018) 23.

[569] See further: Roberta Dameno, 'Il Corpo è Lo Specchio Dell'anima? La Stigmatizzazione e La Criminalizzazione Delle Persone "Grasse" Sulla Base Del Loro Aspetto Fisico è Anche Una Questione Di Genere?' (2021) 2 GENIUS 108 <http://www.geniusreview.eu/wp-content/uploads/2021/06/genius-2020-02.pdf>.

[570] *Tyrer v the United Kingdom* [1978] European Court of Human Rights (ECtHR) Application no. 5856/72 [31].

[571] 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n 8) 42–45.

A 2021 EQUINET report[572] thoroughly analyses possible **expansions of grounds of protection** to be protected by CoE, EU and national law as well as the possibility to include an 'open-ended clause' of discrimination grounds in these legal frameworks.

The report finds that, although there is great diversity among domestic anti-discrimination laws, in general "European states have adopted lists of protected grounds which go (far) beyond the list of grounds enshrined in EU law"[573].

Therefore the report, building on existing domestic provisions and stakeholder consultations, recommends expanding the list of protected grounds to include:

- socio-economic status[574]:

  "socio-economically underprivileged people are also subjected to stereotyping, prejudice, stigma, and discrimination because of their socio-economically precarious situation, whether it is because of their reliance on social or housing assistance, their lack of education, their neighbourhood, their diploma from a school mainly attended by low-income students, the way they look and dress, their economic vulnerability, their lack of school materials"[575];

- health status[576]:

  "In most countries, and following the [ECJ]'s interpretation, long-term chronic illness (including AIDS, cancer, etc.) is therefore interpreted as coming under the ground of disability.[…] However, this protection might not apply in certain cases where health problems fall outside of the narrow notion of long-term chronic illness and where the ground of health status is not explicitly recognised in addition to disability,[…] or where the ground of health status covers only present and future health status but not past health status"[577];

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[572] Ganty and Sanchez (n 9).

[573] ibid 21.

[574] Eighteen European countries already enshrine grounds related to socio-economic status such as: social status, property, economic vulnerability, social origin, social standing, economic situation, profession, part time employment; ibid 14.

[575] ibid 30.

[576] Currently eleven European countries recognise this ground

[577] Ganty and Sanchez (n 9) 56.

- gender identity, gender expression, sex characteristics (see *supra* and definition in Glossary);
- genetic heritage (i.e. "real or perceived genetic conditions, predispositions, or risk factors related to health and disease traits or to ancestry")[578];
- physical appearance or physical characteristics (e.g. visible tattoos, being considered overweight or underweight)[579];
- additional or complementary grounds related to racial or ethnic origin (e.g. criteria such as place of birth excluding from receiving a bank loan)[580];
- non-EU nationality[581]

Several of these grounds (including socio-economic and health status) already intersect with currently legally recognised grounds of discrimination, including the discrimination of LGBTIQ+ individuals[582]. For instance, the FRA has found that groups experiencing some of the highest rates of discrimination (i.e. respondents of African or Roma descent) also tend to have high rates of material deprivation[583].

Further to expanding existing grounds of discrimination, the EQUINET report advocates for Member States to introduce in their domestic law an "**open-ended list" of protected characteristics** in antidiscrimination law. As seen in Chapter I, both Article 14 of the ECHR and Article 21 of the Charter provide an open list of grounds but are severely limited due to the ancillary nature of the first and the limits of scope of the second.

[578] ibid 65.

[579] ibid 67.

[580] ibid 67–68.

[581] ibid.

[582] European Union Agency for Fundamental Rights. (n 56) 35.

[583] *Equality in the EU: 20 Years on from the Initial Implementation of the Equality Directives. FRA Opinion 1/2021* (n 51) 43.

The report provides a detailed definition of what could constitute a ground recognised under an open-ended clause. A "ground of discrimination" should possess the following qualities:

> 1) An objectively identifiable characteristic: the characteristic should be identifiable in order to avoid the cases of personal dislike or favouritism, for instance.
>
> 2) The characteristic might be real, but it can also simply be perceived or "based on an assumption about another person, which may or may not be factually correct",[…] such as someone who is discriminated against because they are perceived as poor based on the way they dress, while they do not actually experience a situation of poverty.
>
> 3) The characteristics should be shared by other people. A narrow reference to a group must be avoided, as people are sometimes discriminated against without a particular group being identifiable. For instance, the limitations of a group-based approach can be noticed in the migratory context, where we observe a "multiplication of difference" due to the proliferation of legal statuses carrying various "packages of rights".[…] Even persons who hold the "same" status may have different experiences depending on the state, region, city, and moment they find themselves in.
>
> 4) The social prejudice and stigma are the core tenet of this definition, since they put the emphasis of the disadvantage(s) attached to the characteristic, enabling a social process of disempowerment. […]
>
> 5) The role of social, political, or institutional practices: This last dimension captures the lived experience of people to which this characteristic is attached, and replaces a premeditated set of "identity" factors with an investigation of the social processes behind. Moreover, it rejects the innate or immutable requirement, which should not be a condition to qualify a ground as such, as many characteristics are void from innate or immutable qualities. This is also in line with ECtHR case law, which has confirmed that discrimination can occur on the basis of grounds which are not an inherent or immutable personal characteristic[584].

These 'qualities' identified by the report build on several concepts developed by the studied jurisprudence of the ECtHR and ECJ (see Chapter 2.3) and, although aimed at domestic legal frameworks, should serve as inspiration for future EU legislation and case-law on the subject.

[584] Ganty and Sanchez (n 9) 76–77.

Furthermore, an open list of clauses would "make it possible to find intersectional discrimination when it is not explicitly prohibited, or multiple discrimination when some of the grounds at stake are not explicitly enshrined"[585].

As seen *supra*, EU case-law is still at embryonal stages as regards to recognising cases of **multiple and intersectional discrimination**. However, cautious steps have been taken by the Commission after having vouched to implement its LGBTIQ strategy "*using intersectionality as a cross-cutting principle".* While its approach may seem a little shy, its 2022 legislative proposals do – albeit without 'naming names' – protect situations where multiple and intersectional discrimination come into play. The proposal on mutual recognition of parenthood enshrines several clauses protecting – individually and taken together – families against discrimination on grounds of sexual orientation, birth, nationality and - to a limited extent - gender identity, gender expression and sex characteristics. The proposals on minimum standards for equality bodies also recognises new grounds of discrimination to be taken into account in an intersectional manner - although for a limited scope of activities (finding adequate communication tools and using digital tools).

There is still a long way to go for us to be "*United in diversity*", yet - cautiously but surely - multiple discrimination and intersectionality is starting to play a stronger role in the protection of individuals across the Union.

[585] ibid 81.

List of legal texts

CoE instruments

European Convention on Human Rights (ECHR) 1950 [Treaty No.005]

EU instruments

COMMISSION STAFF WORKING DOCUMENT Analytical document Accompanying the documents Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC and Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU 2022

COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood 2022

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A Union of Equality: EU Roma strategic framework for equality, inclusion and participation 2020

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Union of equality : EU anti-racism action plan 2020-2025 2020

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Union of Equality: Gender Equality Strategy 2020-2025 2020

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030) 2021

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030 2021

Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security 1978

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000

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

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

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

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 2004

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

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 2008

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

European Commission, Report on the implementation of Directive 2003/86/EC on the right to family reunification 2019

——, Union of Equality: LGBTIQ Equality Strategy 2020-2025 2020

——, EU Strategy on the Rights of the Child 2021

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} 2008

Proposal for a COUNCIL DIRECTIVE on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC T_15

Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood 2022

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal

opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU 2022

Consolidated version of the Treaty on the Functioning of the European Union 2020

Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes 2016 (OJ L)

Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships 2016 (OJ L)

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation 2010 (OJ L)

Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 2016 (OJ L)

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union 2011 (OJ L)

Treaty establishing the European Coal and Steel Community 1951

Treaty on European Union 1993 (OJ C)

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