

Against discrimination, against ideology

European perspective

Response of the Ordo Iuris Institute
to the European Commission's LGBTIQ
Equality Strategy 2020-2025

ed.: Anna Kubacka, Karolina Pawłowska, Tymoteusz Zych



REPORTS OF ORDO IURIS INSTITUTE

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Contents

I. Initial remarks	9
II. Main premises	11
III. Discrimination against persons with homosexual inclinations and sexual identity disorders in the European Union in the light of the latest FRA surveys	13
1. Extensive surveys on discrimination against persons with homosexual inclinations and sexual identity disorders in the European Union.	13
2. Discrimination or culture?	14
3. Daily life: how tolerant Polish society is	19
4. Labour market: feelings vs. objective indicators.	24
5. Access to services offered by the State: healthcare.	27
6. European culture as the guarantor of well-being regardless of personal attributes.	37
IV. The principles of equality and non-discrimination in EU law and Polish law	39
1. Initial remarks	39
2. The principles of equality and non-discrimination in EU law	39
3. The principles of proportionality and subsidiarity in the European Union law. The EU is not authorised to interfere in the family law of Member States	43
V. Criticism of selected proposals made in the Strategy	45
1. The first pillar: 'Combating discrimination against LGBTIQ people'	45
1.1. The proposal to introduce the concept of 'gender identity' to the European Union's anti-discrimination policies.	47

1.2. Proposed adoption of so-called anti-discrimination directive in the European Union.....	48
1.3. Doubts concerning implementation of 'Diversity Charters' in offices and workplaces.....	50
1.4. The proposal of preferential financing of organisations that promote LGBTI.....	53
2. Objections to some of the proposals made in the Strategy's 2 nd pillar – 'Ensuring LGBTIQ people's safety'	54
3. Objections concerning the proposals made in the 3 rd pillar of the Strategy	58
3.1. Comments on Directive 2004/38/EC – no obligation to transcribe 'same-sex marriage'	58
3.2. Notes on the Judgment of the Court of Justice of the European Union of 5 June 2018 (C-673/16)	61
3.3. The issues of EU powers in matters related to substantive family law	63
3.4. Attempt to impose recognition of same-sex couples' parenthood	63
3.4.1. Draft regulation	63
3.4.2. Consequences of adoption of the solutions proposed	64
3.4.3. The ability to object.....	66
3.5. Legislative procedure in matters of family law	66
3.6. Legal orders of EU Member States regarding transcription of foreign marriage certificates of same-sex persons and adoption of children by homosexual couples	67
VI. Summary	75
References.....	77
Biographies of authors and editors.....	85

I. Initial remarks

On 12 November 2020, the European Commission (hereinafter: the Commission) announced the adoption of the first European Union LGBTIQ Equality Strategy (hereinafter: the Strategy)¹. Never before had the Commission taken a stance on these matters through an official document. Even though the Commission's Strategy is non-binding, it sets the direction for the Commission's policy and is relevant to the interpretation of current legislation².

The Commission's Strategy consists of four main pillars concerning different aspects of life of persons with homosexual inclinations and sexual identity disorders. Some of the proposals made in this report are unquestionable, as they arise directly from universal social principles and human rights. They include, among other things, a call to combat discrimination in the workplace, limit non-vital 'surgery' on children who manifest gender identity disorders, or to combat violence and aggression against sexually diverse people. A separate question is whether it is necessary to create a special strategy solely dedicated to the equality of individuals who identify themselves with LGBT+ groups instead of a strategy which addresses a broader spectrum of discriminatory issues beyond sexual orientation.

However, the Strategy tries to introduce new concepts and categories of law that are not justifiable by the applicable norms and for which there is no consensus among EU Member States. These attempts are also a manifestation of unauthorised attempts to exceed the EU's powers formulated in the Treaties and to violate the principle of proportionality and subsidiarity. In addition, it constitutes a direct attack against Polish constitutional governance and autonomy. It is particularly outrageous that the Commission's Strategy includes false information that has been disseminated in the public domain by radical activists that supposedly there are "LGBT-free zones" in Europe (implicitly in Poland)³.

According to the latest studies published by the European Union Agency for Fundamental Rights (hereinafter: "the FRA")⁴, the Commission's model of combating discrimination is not effective.

1 European Commission, *Union of Equality: LGBTIQ Equality Strategy 2020-2025*, https://ec.europa.eu/info/sites/info/files/lgbtiq_strategy_2020-2025_en.pdf, (access: 24 November 2020). In this publication, the abbreviations: LGBTIQ, used in the Strategy, and LGBTI, used in studies of the EU Agency for Fundamental Rights, are replaced with the following abbreviation that conventionally combines the above two abbreviations: LGBT+. The abbreviation stands for lesbian, gay, bisexual, transgender, intersex and queer persons.

2 Cf. Judgment of the Court of Justice of the European Union of 13 December 1989, C-322/88, *Grimaldi v Fonds des maladies professionnelles* (hereinafter: *Grimaldi*); M. Kenig-Witkowska, *Prawo Instytucjonalne UE* [Institutional law of the EU], Warszawa 2015, pp. 335-340.

3 European Commission, *Union of Equality...*, p. 13.

4 FRA's LGBTI survey dataset now available, <https://fra.europa.eu/en/news/2020/fras-lgbti-survey-dataset-now-available>, (access: 6 July 2021).

In countries that have implemented anti-discriminatory policies founded on thorough reconstruction of family law and interference in the freedom of speech and economic activity, the scale of discrimination experienced by persons with homosexual inclinations or gender identity disorders is significantly higher than in countries that have refrained from such actions, like Poland or Hungary.

According to declarative data from an FRA survey, sexual minorities experience certain cultural limitations that make them feel that some of the intimate behaviours they display in public places may be perceived as scandalous, which in itself is not discrimination or intolerance. Yet, discrimination in key social environments, such as in schools, at work or in healthcare institutions, is much more rare in Poland than in many other EU Member States and remains below the EU average. For example, the unemployment level among persons who identify themselves as LGBTIQ is only 3% in Poland, compared to 6% in Denmark or France and 8% in Italy and Finland. Discrimination of school children in Poland is also below the EU average. In Poland, 39% of respondents were harassed at school due to their LGBTIQ identification, compared to 50% in Belgium and 57% in the UK. In terms of access to healthcare, only 4% of respondents in Poland declared that due to their doctors' negative reaction to differences in sexual identification, they were forced to change their specialists. In Germany the rate was 2 percentage points higher and in France – 5 percentage points higher.

This report analyses the latest FRA surveys based on feedback from nearly 140,000 respondents. Its subsequent parts discuss – from a number of perspectives – the most controversial concepts and proposals [stipulated in the Commission's Strategy]. At first, the report focuses on the analysis of existing provisions of international law governing equality before the law and the fight against discrimination. Subsequently, it examines the principles of proportionality and subsidiarity. Having these principles in mind, the focus of the report then shifts to the review of relevant case law and legal doctrine which are applicable to the respective pillars of the Strategy. Finally, the authors point out the most objectionable proposals laid down in the Strategy.

II. Main premises

The points below briefly present main objections to the vision of actions for LGBTIQ equality currently promoted by the Commission. These objections are discussed at greater length further on in the report:

01 **The Commission's model of combating discrimination against persons with homosexual inclinations and sexual identity disorders is not effective.** According to the latest FRA surveys, discrimination in key social environments, such as in schools, at work or in healthcare institutions, is much more rare in Poland than in many other EU Member States and remains below the EU average. This means that in countries with a model of combating discrimination through interference in basic family structures, education, freedom of speech, and economic activity, persons with homosexual inclinations or sexual identity disorders much more often declare being harassed at school (50% of respondents in Belgium and 57% in the UK compared to 39% in Poland), having limited access to healthcare (9% of respondents in France, 6% in Germany and only 4% in Poland), and having problems with finding work (the unemployment rate among respondents was 3% in Poland, compared to 6% in Denmark and France and 8% in Italy and Finland).

02 The understanding of 'equality' and 'discrimination', currently promoted by EU institutions, in particular by the Commission, frequently diverges from both the legislation in force and the established local and international case law and practice of the courts. It should be noted, in particular, that **it is an established principle in case law and doctrine to not treat similar situations differently nor different situations similarly.**

03 Some of the proposed actions in support of misconceived 'equality' and 'discrimination' prevention are in **stark contrast to the principles of proportionality and equality, on which the European Union is founded.** This mainly concerns interference in the family law and civic freedoms (freedom of speech and economic freedom) of Member States.

04 The actions declared by the Commission in the Strategy, intended to make the European Union adopt the **controversial anti-discrimination directive**⁵ are considerably questionable. **It should be noted that for many years, the directive has been met with strong resistance from Member States, non-government organisations (NGOs), and entrepreneurs.** The obstinate efforts to adopt this document as a legally binding instrument, despite its incoherence with binding international treaties and the opposition of numerous Member States, should be considered as entirely unauthorised.

⁵ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (hereinafter: anti-discrimination directive) COM (2008) 426 of 2 July 2008.

The Strategy contains concepts, in particular such as **gender identity, transgenderism, and non-binary people** that are the subject of many controversies and **have never been accepted in any binding international treaty**. It is also worrying that – contrary to existing EU publications – the word *trans* has not even once been extended in the Strategy to *transsexual* or *transgender* individuals. This gives rise to a justified suspicion that the intention to manipulate the concept of gender is concealed at the terminological level. The document is based on the assumption that gender may be determined on the basis of subjective feelings, which means that a person can declare what gender they want to be. Growing opposition in Member States against the introduction of such constructs into the international language is expressed in the resolutions passed by the parliaments of Slovakia and Hungary. In the former this is manifested in the opposition to adoption of the gender-based Istanbul Convention, and in the latter, in alignment with the judgment of the Bulgarian Constitutional Tribunal concluding that the approach to human sexuality adopted in the Convention violates the Bulgarian Constitution.

Moreover, the proposal to enable transcribing vital records (of marriage or adoption) of individuals who are in an institutionalised single-sex union in Member States that do not recognise such institutions are contrary to the laws of other Member States (including Poland).

Particularly questionable is the proposal to interpret the Directive on the free movement of persons in such a way as to enable recognition of the institutions mentioned above in the entire European Union⁶. This is an unauthorised interference in the family law of Member States. In practice, the point is to ensure matrimonial privileges for single-sex unions in States that do not envisage such relationships, while making the impression that those privileges are ‘human rights’. It should be noted that existing international legislation not only does not provide for any special privileges for persons with homosexual inclinations as opposed to the rest of the population. On the contrary, it guarantees special protection of the natural family and its autonomy.

Declarations of increased financing for organisations that promote the LGBTIQ ideology made in the Strategy are also objectionable. It is alarming that circles which promote particular ideologies and impose these ideologies under the pretence of a battle against discrimination are preferentially treated, and this should never take place in an official EU institution.

The Strategy also proposes to introduce a new category of crime – an EU crime, ‘hate speech’ – which raises serious concerns. **According to documents which the Commission used as reference in its new Strategy, the broad interpretation of ‘hate speech’ by EU officials may result in a violation of freedom of religion and speech.** This is evidenced in particular by the fact that the Commission’s source documents mention attempts to influence the teachings of religious leaders in order to fight against the existence of alleged ‘homophobic’ agenda.

⁶ 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, OJ. L 158, 30/04/2004 P. 0077 – 0123.

III. Discrimination against persons with homosexual inclinations and sexual identity disorders in the European Union in the light of the latest FRA surveys

1. Extensive surveys on discrimination against persons with homosexual inclinations and sexual identity disorders in the European Union

In 2019, the FRA conducted an EU-wide survey on the experiences of 'LGBTI persons' (hereinafter LGBTI)⁷ related to discrimination, hate crimes, as well as on the challenges and negative experiences faced by them in their daily lives. Apart from EU citizens, the survey for the first time included people from the UK, Macedonia, and Serbia. The report presenting the findings of the survey is entitled *A long way to go for LGBTI equality*⁸. The authors' general observations in the report is that the attitude towards sexual minorities in the European Union had improved since the previous survey in 2012.

7 Cf. footnote no. 1.

8 FRA, *A long way to go for LGBTI equality*, <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>, (access: 18 December 2020).

On 15 December 2020, the FRA published the findings of the survey based on feedback from nearly 140,000 respondents. This chapter focuses on the most important findings. Due to the brief period between the release of data by the FRA and this publication, it was not possible to present the entire scope of the examined issues. Their analysis will be included in a separate report.

The survey was conducted online from May to July 2019. In order to reach persons who identify as LGBTI, a network of LGBTI social contacts and social media were used and companies delivering statistical tools and methods (Agilis SA) and marketing and consulting services tailored to the LGBTI community (Homoevolution) were outsourced. In all the countries where the survey was conducted, social organisations, including organisations representing the LGBTI movement, were also engaged. The authors of the survey admit that the survey base does not fulfil the criteria of a random sample. Nonetheless, given the way the survey was conducted, the risk that the results of the survey differ from the actual views and experiences of sexual minorities is low.

The questionnaire used in the survey had been consulted with the Commission. Full anonymity of the respondents was ensured. The authors of the survey assumed that LGBTI persons could be hard to identify and reach using traditional methods. For this reason, they decided to use the online tool, which ensured more anonymity, made it possible for respondents to answer the questions at their convenience, and reduced the communication barrier since the survey was available in all the national languages of the respondents.

The numbers of the respondents from the respective countries differed, which means that the research sample was not equally distributed among respective EU states. The countries with the largest ratios in the survey group were Spain (14%), Germany (12%), Poland (10%), France (10%) and the UK (9%).

The questionnaire was answered by persons who identify themselves as '*lesbian*', '*gay*', '*bisexual*', '*transsexual*' and '*intersex*'. In terms of social and demographic variables, the respondents were mostly young – the average age was 29. 82% were younger than 40. Only 4% were older than 55 at the time of the survey. Almost half of the respondents had higher education, and almost half lived in big cities.

The questions concerned a broad spectrum of problems, grouped into 7 thematic categories (the numbers between brackets represent the number of questions asked in the respective categories): daily life and living openly (29), discrimination (26), violence and harassment (39), social attitudes and government reactions (6), questions to trans respondents (8), questions to 'intersex' respondents (12), and socio-demographic variables (10).

2. Discrimination or culture?

Amongst countries of the European Union that are generally considered to be the most intolerant of people identifying as "LGBTI" one can certainly mention Poland and Hungary, which are accused of discriminating against this group on basis of so-called "right-wing fanaticism". The presence of such an opinion in LGBTI circles, as well as more broadly in circles with left-wing

political affiliations, is confirmed by regularly created rankings of tolerance and discrimination. A good example of such practice is the “Rainbow Index”, a tolerance ranking of 49 countries prepared by ILGA Europe in May 2020. Its goal was to assess in what ways the laws and regulations in a given country affect the lives of LGBTI people, assigning them an appropriate equality index expressed in percentages: 100% means ‘respect for human rights and full equality’, while 0% is associated with ‘gross violations human rights and discrimination’. In this ranking Poland received a score of 15.84% – the lowest among all European Union countries – and was placed 42nd in the ranking. Equally low scores were reached also by Latvia (17.48%), Romania (19.17%), Bulgaria (19.74%), Italy (22.53%), Lithuania (23.35%), the Czech Republic (26.3 %), Slovakia (30.08%) and Hungary (32.82%). The countries of Western Europe are naturally in the top positions – they include, among others, Belgium (73.24%), Luxembourg (72.95%), France (68.52%), Denmark (67.86%), Great Britain (66.15%).

However, the FRA (European Union Agency for Fundamental Rights) survey analyzed in this report shows that common opinions about discrimination are wrong and do not overlap with actual discrimination. It turns out that in countries commonly regarded as intolerant persons identifying as LGBTI are less likely to experience real discrimination than in countries recognized as the most tolerant and progressive. In this context, the low position of the Czech Republic (which is one of the best-performing countries in the FRA survey) in the Rainbow Index is particularly surprising.

The first of the 7 thematic categories of the FRA survey was *‘daily life and living openly’*. The questions in this category (29 in total) concern, in particular, being able to openly demonstrate one’s sexual orientation or identity – the fact that one identifies oneself as an LGBTI person – both in private settings (at home, with friends) and at work or in other public settings.

When the respondents were asked if they avoid holding hands in public with a same-sex partner for fear of being assaulted, 58% from Poland said they ‘always’ avoid it and 25% that they ‘often’ avoid it. The Hungarian respondents declared avoiding holding hands in public ‘always’ in 46% of cases and ‘often’ in 26%. Similar answers were registered in Latvia (respectively 50% ‘always’ and 25% ‘often’), Lithuania (44% and 29%) and Slovakia (50% and 27%). The average for the European Union (EU-28) for these two responses was 30% and 31%, respectively. Interestingly, countries that scored above the EU average included France, where 38% respondents said they ‘always’ avoid holding hands and 34% ‘often’ avoid holding hands (**Figure 1**).

Similar data is reported for the question about readiness to express oneself as an LGBTI person, openness to identify oneself as an LGBTI person (**Figure 2**) and openness in the workplace (**Figure 3**). Again – Polish respondents much more rarely declare to be very open than the respondents in the other States (EU-28) on average. This concerns openly expressing oneself towards colleagues as well as towards family, friends and strangers, e.g. customers or medical staff. Poles are less often open about identifying themselves as LGBTI persons in their workplace (10%) but are relatively open towards selected colleagues (54%). Openness about sexual identity or orientation is exhibited the most in respondents from Denmark, Finland, Sweden, Luxembourg, and Germany.

Figure 1. Avoiding holding hands in public with a same-sex partner for fear of being assaulted (% of respondents from the respective States).

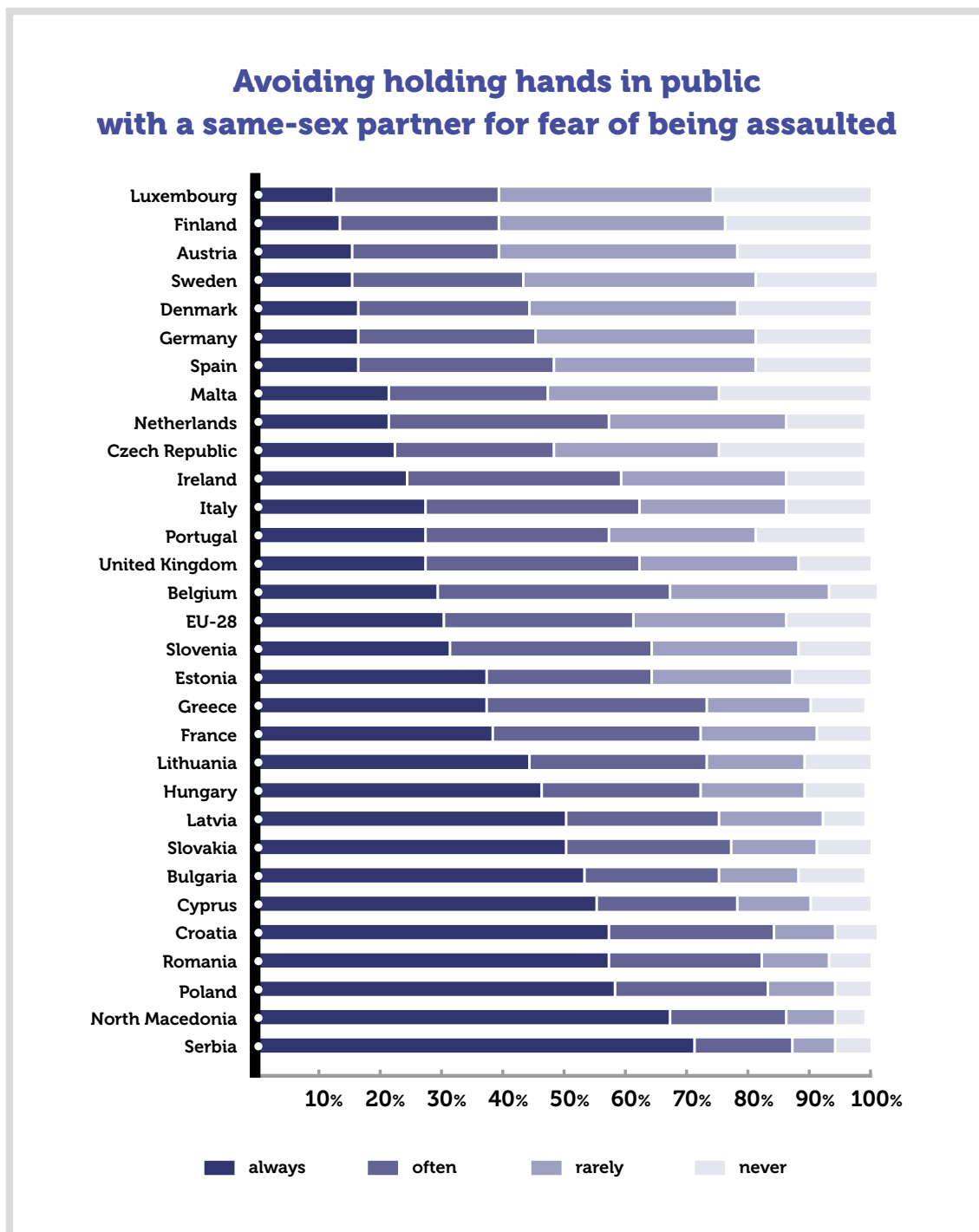


Figure 2. Overall readiness to be open about being an LGBT+ person (% of respondent from the respective States).

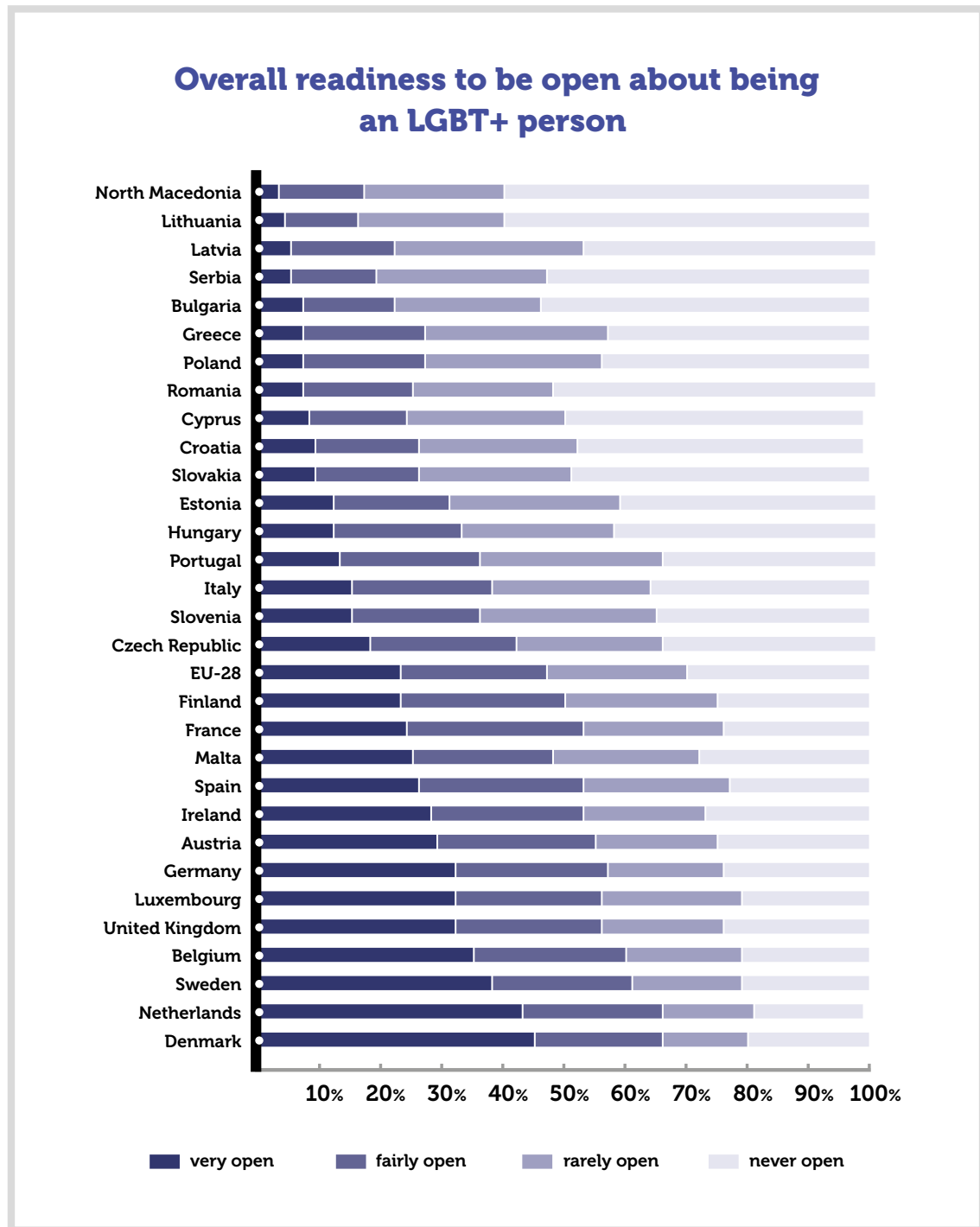
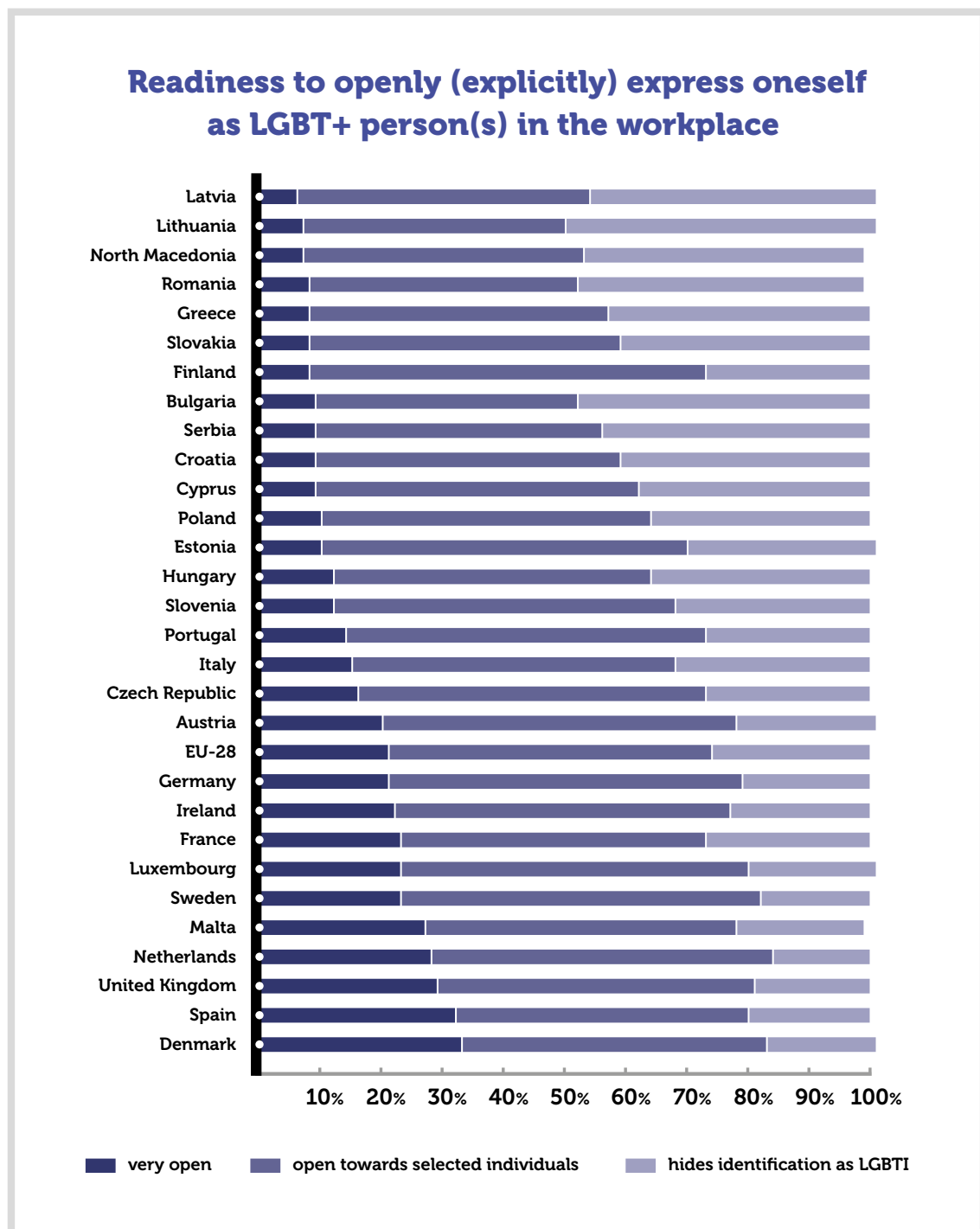


Figure 3. Readiness to openly (explicitly) express oneself as LGBT+ person(s) in the workplace.



For the purpose of a better understanding of the survey, it is worth noting what the FRA means by openness and avoiding being open. It is by no means a good indicator of the well-being of the representatives of the surveyed group or of the discrimination they experience.

The **concept of openness** the FRA uses in the questionnaire for the most part **means expressing oneself as an LGBT+ person in public, in a way that is easy to notice for others**. Other than that, strangers or casual acquaintances (e.g. customers, shop assistants, passers-by) would have no idea of the respondent's sexual orientation. This kind of 'openness' that involves imposing oneself and one's views in an interaction with a stranger shows a lack of manners and social awareness in public spaces. Following this rule of public life influences the social behavior in countries commonly deemed intolerant, such as Poland. **The general reluctance of Polish society to indiscretion in public settings is manifested, among other things, in the CBOS survey *Reactions to discourtesy in everyday life of 2004*⁹, in which 79% respondents declared feeling offended when 'someone speaks openly about their private, intimate matters in front of strangers' and 50% of respondents – when 'a couple kiss and hug in a public place'.** The reluctance to public 'openness' may be the effect of being taught to respect certain norms in public settings.

Meanwhile, considering the question of openly expressing oneself as LGBT+ with persons that one meets regularly, such as family, friends or colleagues, it should be noted that even if a respondent avoids informing them about being LGBT+ for fear of their reaction (if, for example, their relationship is not very close) then, first, the reaction usually involves reluctance rather than aggression and, second, what the respondent fears is an imagined threat, one that is created by the media and often has nothing to do with reality.

3. Daily life: how tolerant Polish society is

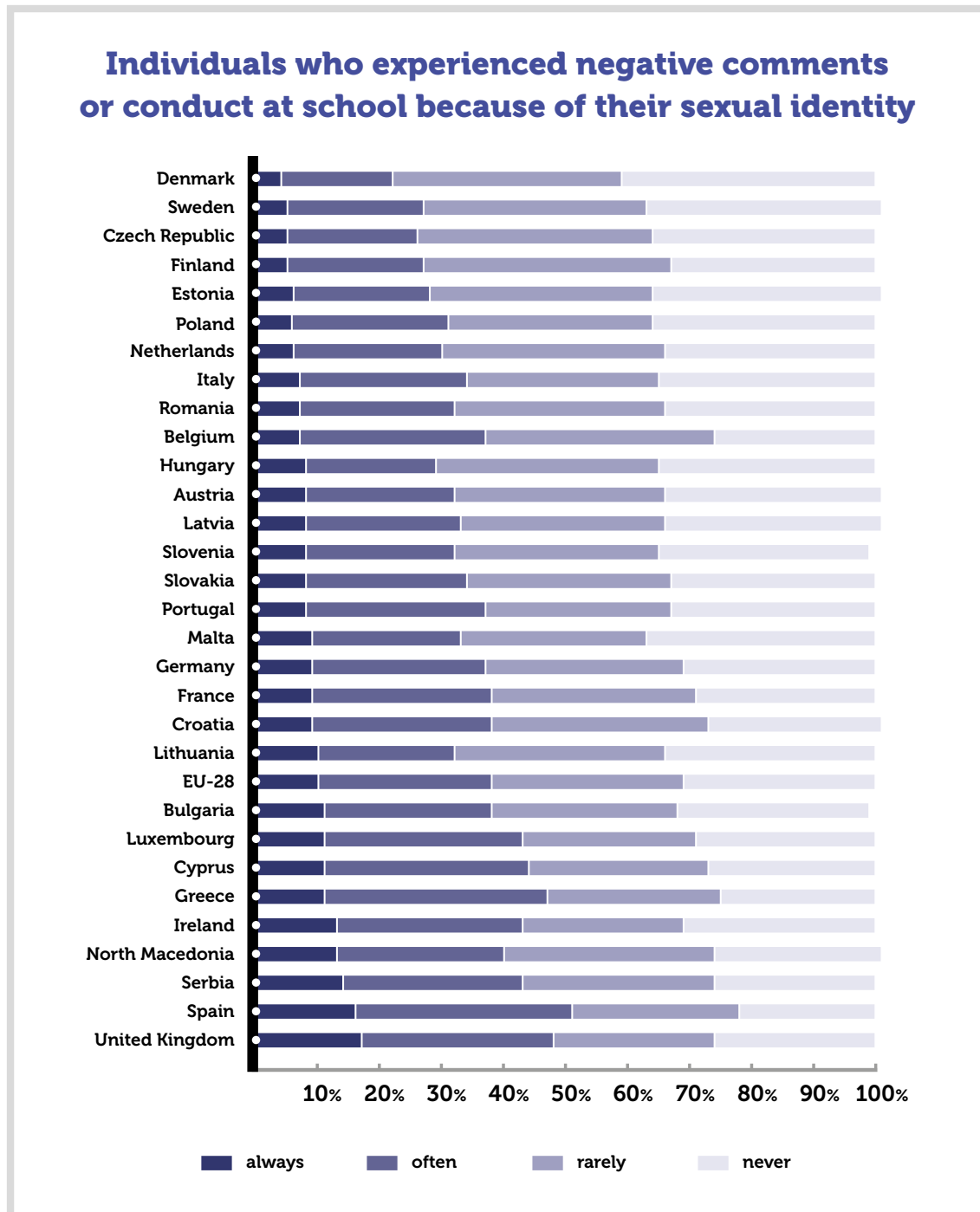
The statistics present an entirely different picture when brought from the level of emotional states to verification of actual experiences. Thus specific and detailed issues will provide a much more effective measure. Using questions which concern precisely defined events enables avoiding respondents' free interpretation and allows at least partial elimination of the emotional factor.

One of the issues that more reliably verify the respondents' experiences is the way they were treated as LGBT+ at school. The responses clearly show that **in Poland harassment and bullying because of being LGBT+ is much more rare than in most European States**. Asked if they experienced negative comments or a negative attitude at school because of their sexual identity (**Figure 4**), only 6% of Polish respondents said 'always' and 25% said 'often' (which together gives 31%). This means that Poland is near the bottom of the list of European countries in terms of the severity of negative attitudes towards LGBT+ pupils, far below the EU average (EU-28) which was 10% for 'always' and 28% for 'often' (summing up to 38%). Results were similar in Hungary (8% and 21%) and Latvia (8% and 25%). Meanwhile in France, the respective ratios were 9% (respondents who 'always' experience negative comments or conduct) and 29% (respondents who 'often' have such experiences), and in the UK – 17% ('always') and 31% ('often').

⁹ CBOS, *Reakcje na brak kultury w życiu codziennym. Komunikat z badań* [Reactions to the lack of culture in everyday life. Research report], BS/112/2004, Warszawa 2004, https://www.cbos.pl/SPISKOM.POL/2004/K_112_04.PDF, (access: 18 December 2020).

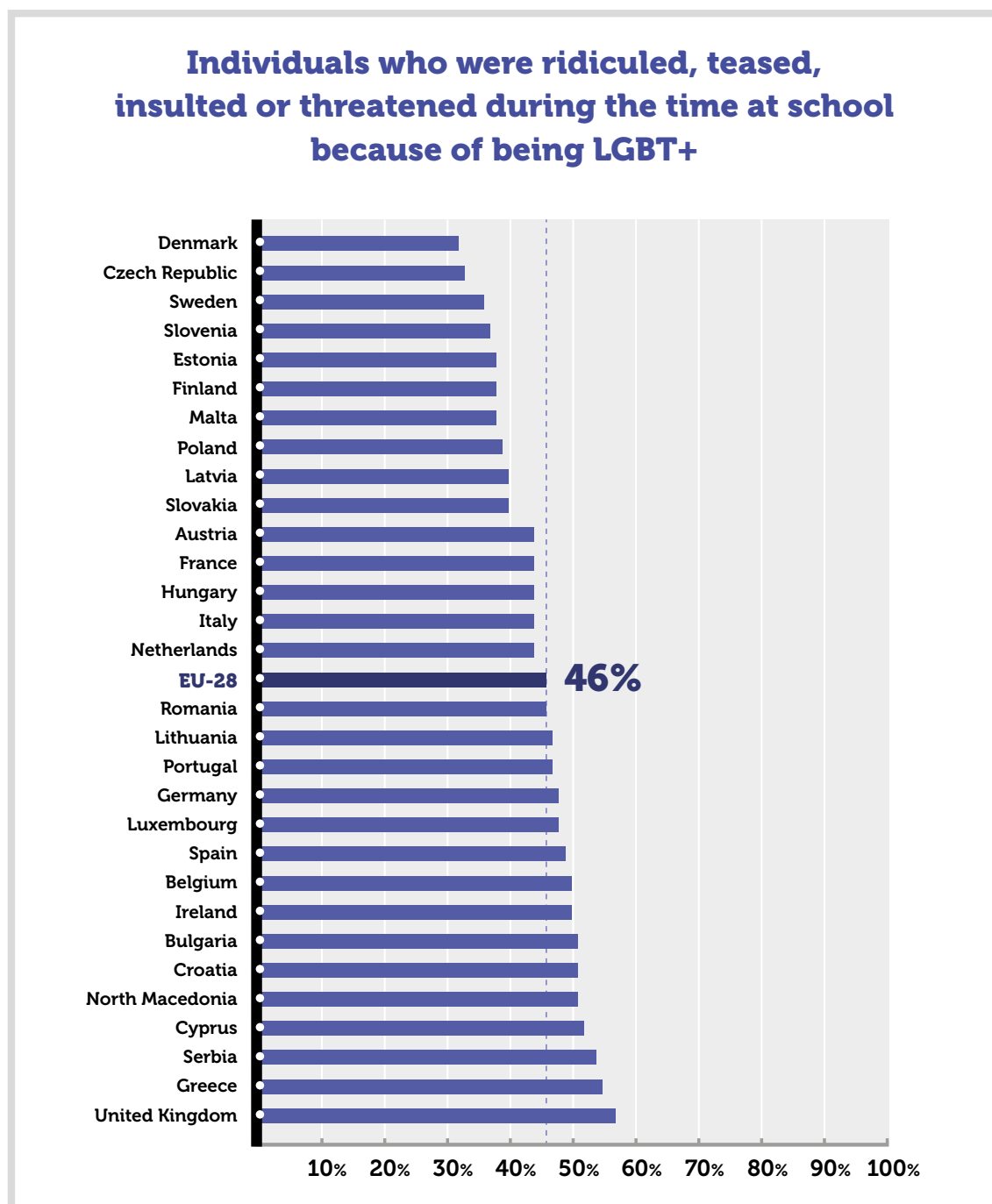
At the same time, the previously mentioned states from Eastern and Central Europe are characterized with highest percentages of respondents who have never experienced such conduct. The countries with the largest percentages of respondents (36%) who have never had such experiences included Poland (36% – only 4 States scored higher), Latvia (35%), Hungary (35%), Italy (35%) and Lithuania (34%), compared to 26% in the UK and Belgium, and only 22% in Spain.

Figure 4. Individuals who experienced negative comments or conduct at school because of their sexual identity (% of respondents in respective States).



Responses to a similar question about having ever been ridiculed, teased, insulted or threatened at school because of being LGBT+ are analogous (**Figure 5**). Poland is again one of the States where such negative phenomena are the rarest – only 39% of Polish respondents admitted to having experienced them, compared to the EU (EU-28) average of 46%. Results below average were also noted in Latvia (44%) and Hungary (44%). Such conduct is the most frequent at schools in the UK (57%), and it is also very frequent in Germany (48%), Ireland (50%) and Belgium (50%).

Figure 5. Individuals who were ridiculed, teased, insulted or threatened during the time at school because of being LGBT+ (% of respondents in respective States).



When asked in the 'violence and bullying' category about the experience of physical or sexual attacks in the last 5 years, 15% of Polish LGBT+ respondents said they had such experiences (Figure 6). The EU average (EU-28) of 11% was also exceeded by France (14%), Belgium (14%) and Germany (13%). Interestingly, results on the level of EU average were reached not only by Great Britain, Netherlands, Ireland and Austria, but also by Hungary. In Sweden, 10% of the respondents admitted to having been attacked and Danish result of 8%, which was the third lowest, was found also in Italy, Spain and Czech Republic.

Figure 6. Individuals who were physically or sexually attacked in the last 5 years, also because of identification as LGBT+ (% of respondents in respective States).

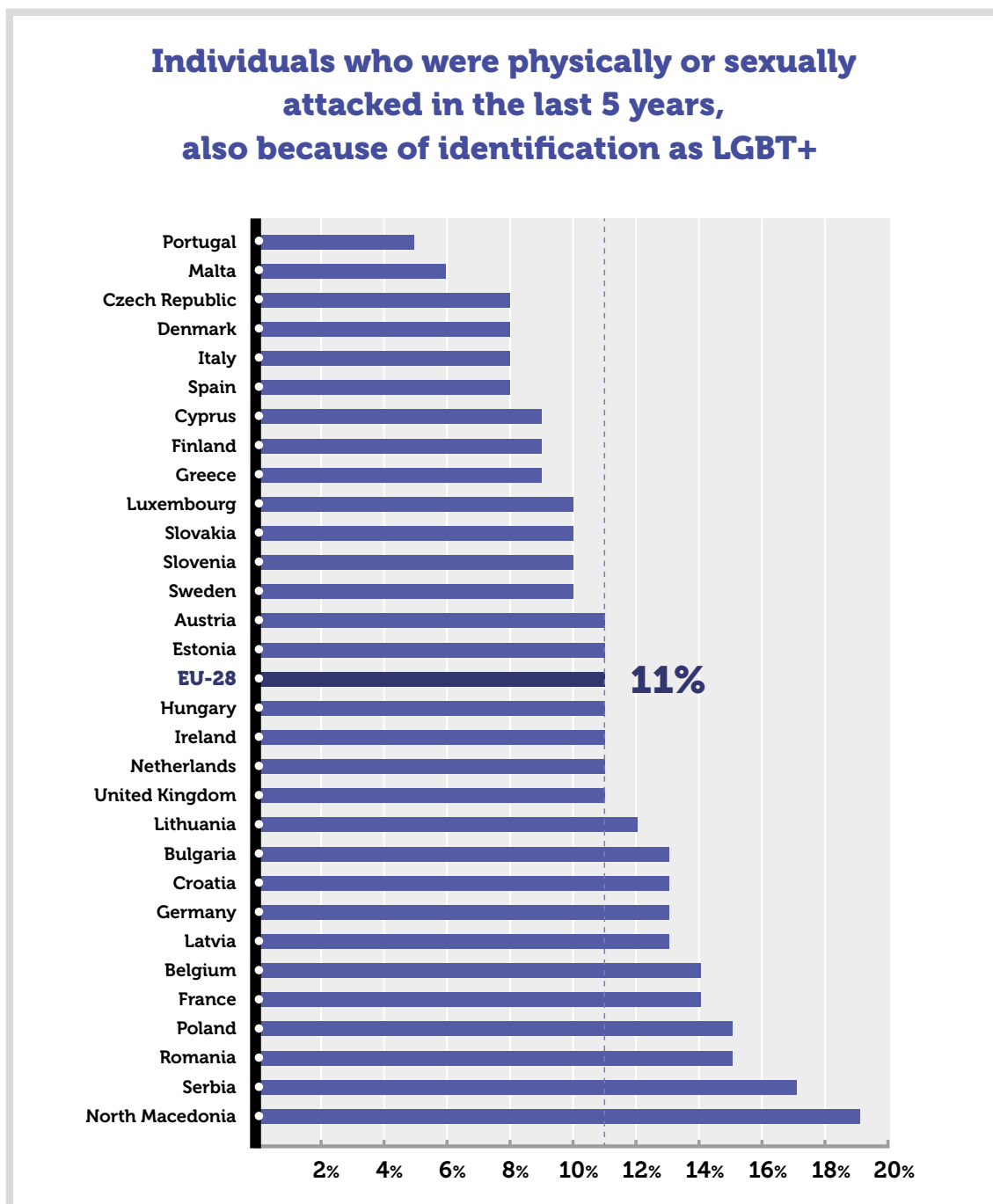
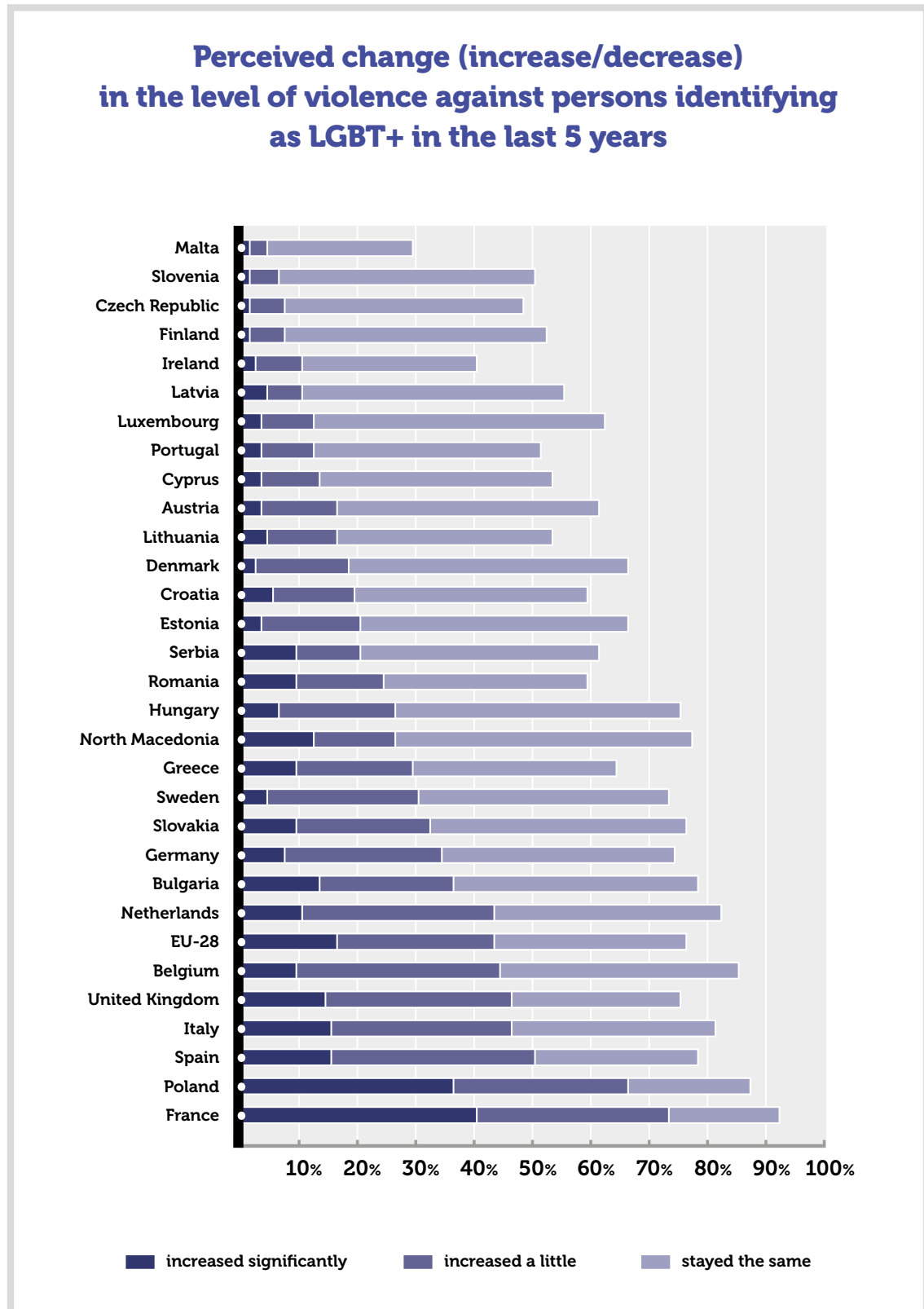


Figure 7. Perceived change (increase/decrease) in the level of violence against persons identifying as LGBT+ in the last 5 years (% of respondents in respective States).



The same as is the case with openness in everyday life, feedback concerning discrimination and aggression is not a meaningful indicator of the situation and well-being of the respondents. Most of the categories that the FRA uses are very general and elusive and concern the feelings of an individual, and the choice of responses may be determined by the respondent's character, sensitivity and emotions. Questions about discrimination, avoiding openness, harassment or fear of attack may be interpreted very broadly. The same applies to aggression, which is not defined in any way, posing the risk of misinterpretation – which is manifested, for example, by the fact that specific questions about the number of aggressive events list, among other things, insulting comments or hostile glances. It is also very easy to misinterpret the causes of an event – very often it is impossible to unequivocally determine whether the actual cause is sexual orientation or identity, or perhaps something completely different. It should also be noted that risky sexual behaviour, substance abuse and frequenting night clubs of dubious reputation, which are all relatively frequent in sexual subcultures^{10,11} increase the chances of falling victim to violence.

On the other hand, the responses to another question from the same category, concerning the increase in the level of violence against LGBT+ persons in the last 5 years, show that the largest perceived increase took place in France and Poland. According to 36% of Polish respondents, the level of violence in Poland increased significantly during this time and, according to 30% – it 'increased a little'. This result was exceeded by France, where 40% of the respondents thought violence increased significantly and 33% that it increased a little. At the same time it's worth mentioning that the percentages of 'increased significantly' and 'increased a little' answers were relatively low in Hungary (6% and 20%), Latvia (4% and 6%) and Lithuania (4% and 12%). These results are significantly lower than the perceived decrease in violence declared by Swedish (4% and 26% respectively) or German (7% and 27%) respondents.

4. Labour market: feelings vs. objective indicators

As far as the category of questions concerning professional life is concerned, the feedback is again inconsistent – the responses to general questions concerning discrimination experienced by LGBT+ persons in the respective Member States suggest that Poland is far above the European Union average, where LGBT+ persons feel very discriminated against. Nonetheless, feedback from Polish respondents to questions concerning specific forms of discrimination suggests that the opposite is the case with discrimination of LGBT+ persons in Poland (their responses rank Poland significantly below the EU average). The feedback indicates far fewer forms of discrimination than respondents from other countries. It seems that the inconsistency may be the effect of the respondents' preconception of resentment – irrespective of their actual experiences – which resulted in self-contradictory responses in the questionnaire.

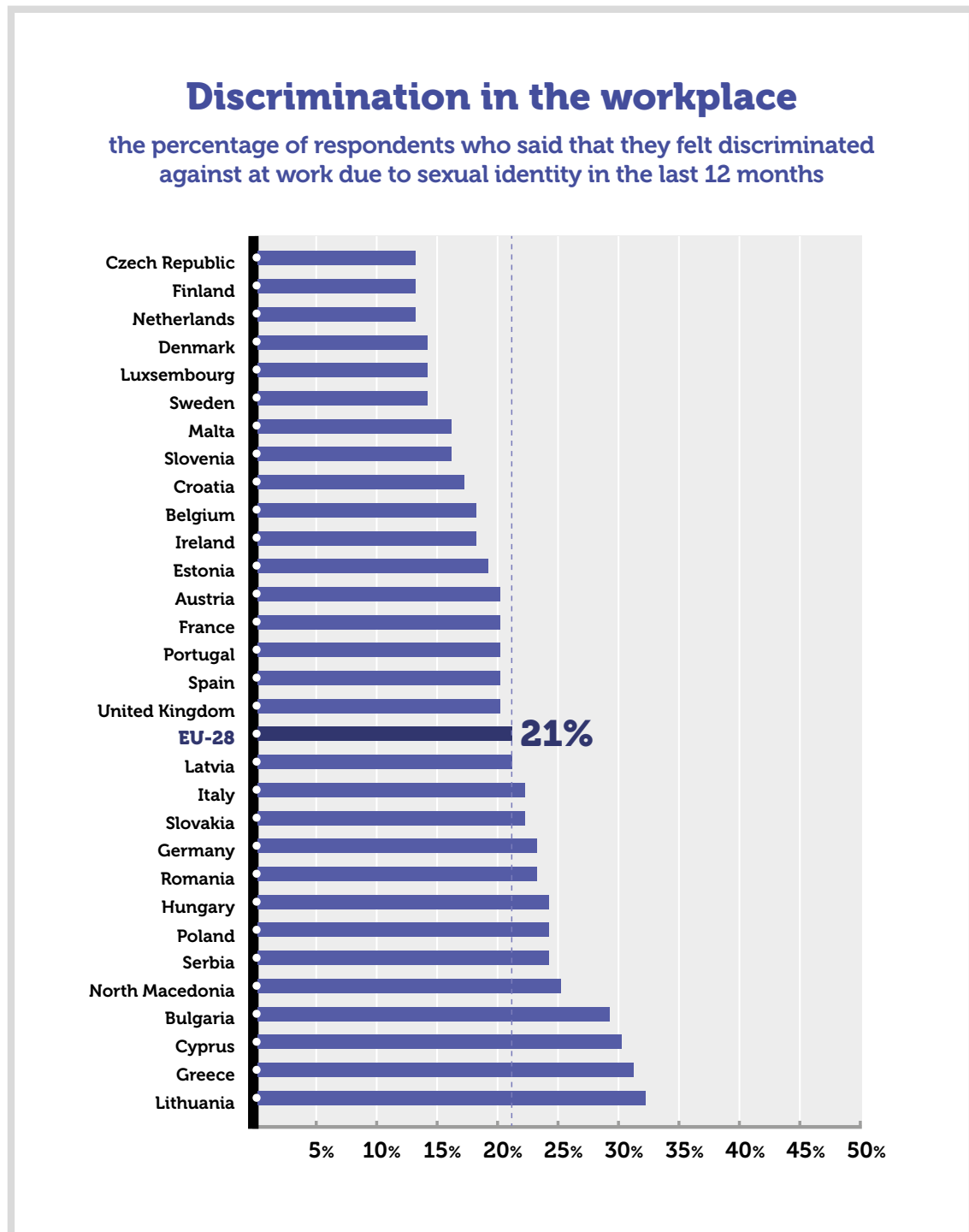
24% of both Polish and Hungarian respondents said they felt discriminated against in their workplace in the last 12 months because of their sexual identity. The result is slightly above the EU

10 A. Bourne et al., "Chemsex" and harm reduction need among gay men in South London, "International Journal of Drug Policy", 26(12), 2015, pp. 1171-1176.

11 P. Flowers, C. Marriott, G. Hart, "The bars, the bogs, and the bushes: the impact of locale on sexual cultures", "Culture, Health & Sexuality", 2(1), 2000, pp. 69-86.

(EU-28) average, which was 21% (**Figure 8**). It is worth noting that Germany was also at a very similar level, above the EU average – the percentage of LGBT+ people who consider themselves discriminated against at work was 23%. The fewest respondents – 13% – declared having felt discriminated at work in Czech Republic.

Figure 8. Discrimination in the workplace – the percentage of respondents who said that they felt discriminated against at work due to sexual identity in the last 12 months.

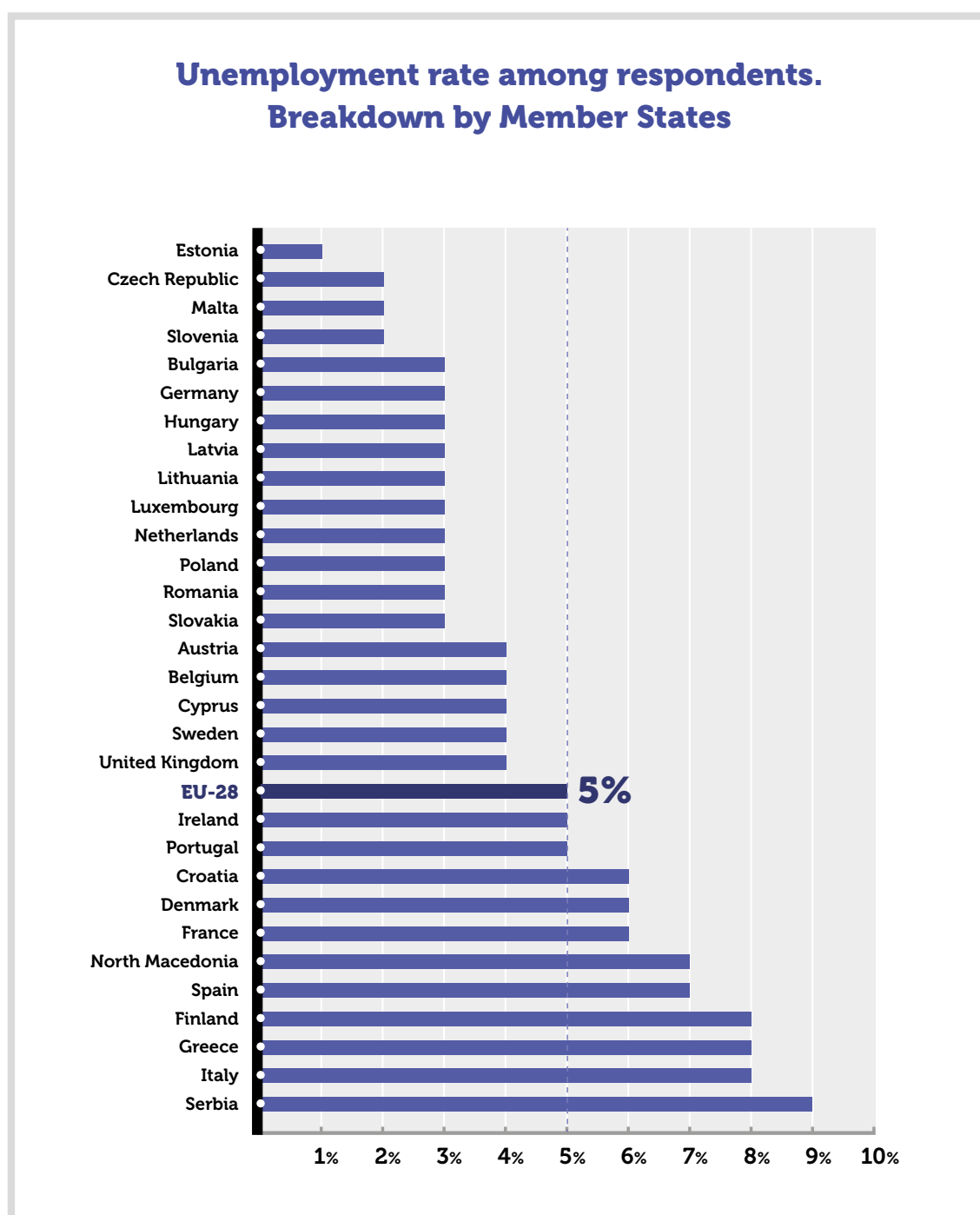


Moreover, respondents from Poland and Hungary declare that they encounter more discrimination when seeking employment than respondents in some Western States. In Poland, 11% of respondents said they felt discriminated against when seeking employment – the same as in Germany and Spain. In Hungary it was as much as 14%. The ratio was lower in France (8%), the UK (9%), Belgium (7%), the Netherlands (6%), Sweden (5%) and Denmark (5%). Meanwhile, studies on the unemployment rate of LGBT+ persons suggest that it is the same as the unemployment rate in Poland.

However, the indicator that may help verify the well-being and discrimination in the context of the labour market is, firstly, the level of unemployment declared by respondents.

For this reason it's worth analysing the questions about employment status also included answers regarding professional status. The respondents could choose from the following options: self-employment, student/pupil, retired, unable to work due to health problems and other (e.g. volunteer, housekeeping, compulsory military service). Assuming that an unemployed person is, from definition, looking for and willing to work but not working, and considering the other options to answer this particular question in the survey, the respondents who are unemployed are actively looking for employment. **The very low unemployment rate among people identifying as LGBT+ in Poland – only 3%** – suggests that they are not actually discriminated against by being excluded from job recruitment processes which, if it was the case, would limit their level of employment. The same level of unemployment was declared by Hungarian respondents and was even lower in Czech Republic, where only 2% of respondents declared being unemployed. Meanwhile, in States where respondents declared a lower level of discrimination than in Poland, their unemployment rate is higher – 6% in France and Denmark, 4% in Sweden, Belgium and the UK. It seems then that the fact that the respondents feel discriminated against when looking for job – which would suggest they are not hired because of their being sexual identity – is not reflected in the unemployment rate, i.e. in the percentage of persons who have great difficulty in finding employment.

Figure 9. Unemployment rate among respondents. Breakdown by Member States.

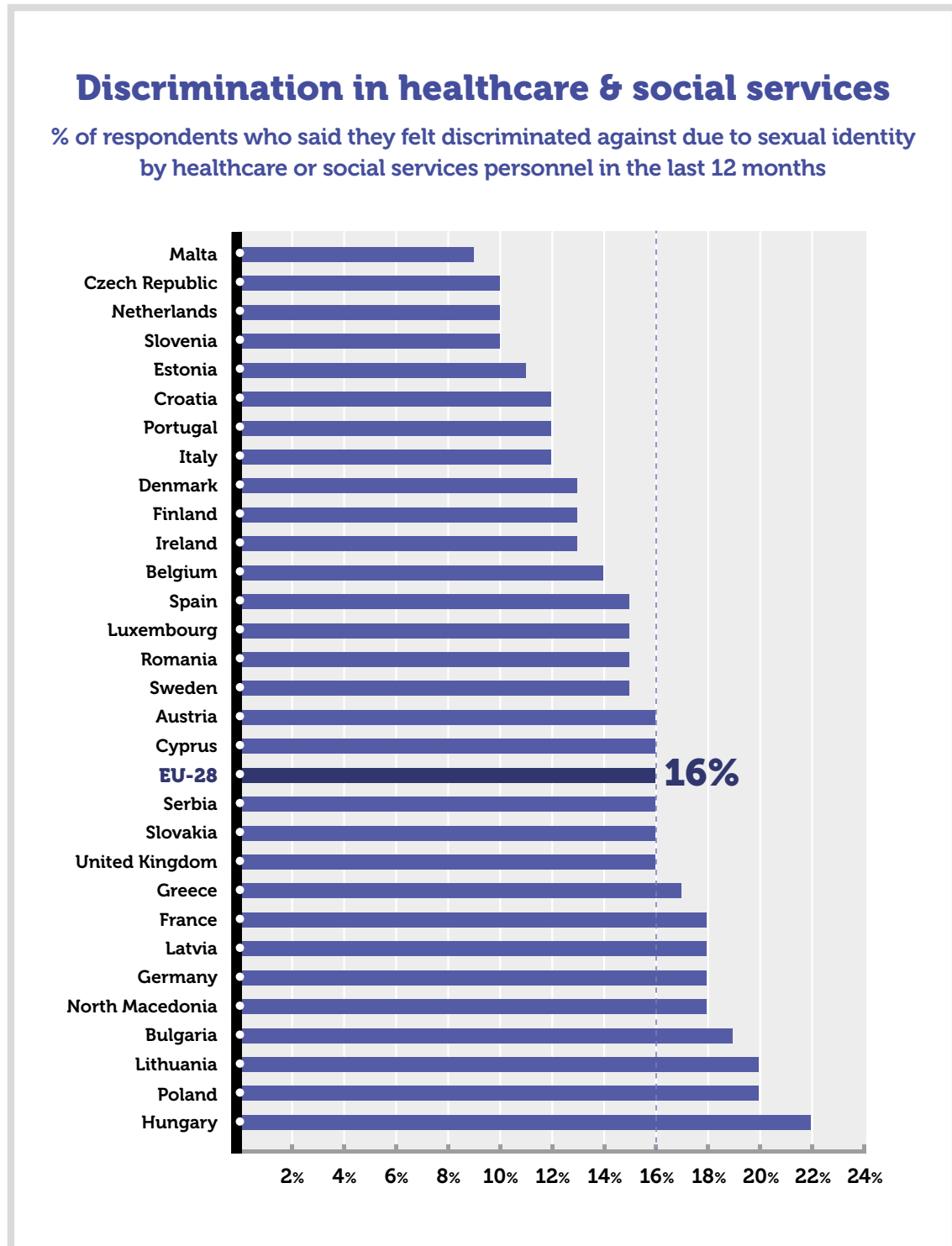


5. Access to services offered by the State: healthcare

One fifth of Polish and Lithuanian respondents and 22% of respondents from Hungary declared they encountered discrimination in healthcare and social services – these were the highest percentages

in the European Union. They claimed that in the last 12 months they felt discriminated against by healthcare or social services personnel (receptionists, nurses or doctors, social workers, etc.) due to sexual identity (Figure 10). It's worth adding, that apart from Poland and Hungary, the EU (EU-28) average of 16% for this question was also exceeded by Germany and France (18% in both cases).

Figure 10. Discrimination in healthcare and social services – % of respondents who said they felt discriminated against due to sexual identity by healthcare or social services personnel in the last 12 months.



The statistics look completely different when we move down from the level of feelings to the level of real experiences. A much more relevant indicator is a specific and exhaustively described issue. By specifically defining an event to which a question refers, it is possible to avoid its subjective interpretation by a respondent and also, to some extent, to eliminate the emotional factor.

One of the issues in the FRA survey that leaves little room for interpretation is that of specific forms of discrimination in access to healthcare. Analysis of the responses *de facto* verifies and refutes the conclusion that could be drawn from the responses to the previous general question of the experience of discrimination in healthcare.

The most important in the series of questions in this category concerns actual difficulties in gaining access to healthcare because of sexual identity. **Only 2% of both Polish and Hungarian respondents said that they had experienced difficulties in gaining access to healthcare due to their sexual identity (Figure 11).** This result is not only negligible, but it is also below those seen in most Western States – in France, the Netherlands, and Denmark, 3% of the respondents gave a positive answer, in Germany – 4%, in Sweden – 5%, and in the UK and Ireland – as much as 6%. Difficulties were declared least often by respondents from Lithuania – only 1% of them gave positive answers. The result identical to that of Poland and Hungary, which was 2%, was also found in Czech Republic, Italy and Slovakia.

In Poland and Hungary 5% of respondents had forgone treatment for fear of discrimination or intolerant reactions (which is not real discrimination) on the grounds of sexual identity – the same as in Sweden and Denmark. In France, Ireland and the UK, 6% of respondents had forgone treatment for that reason, in Germany and Luxembourg – 7% and in Finland – as much as 9% (**Figure 12**).

Figure 11. Specific difficulties in gaining access to healthcare experienced on the grounds of identification as LGBT+: **difficulties in gaining access to healthcare services** (% of respondents in respective States).

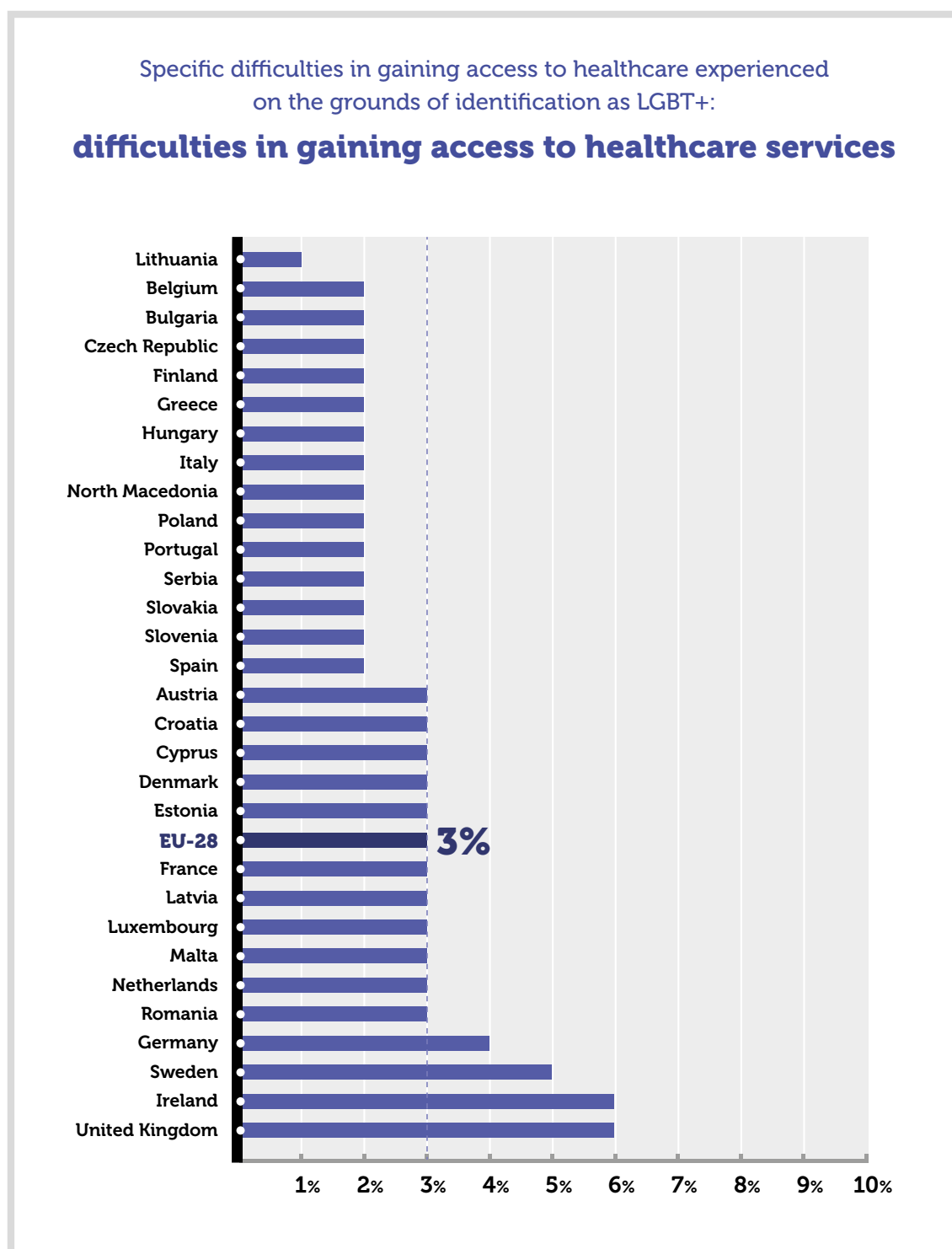
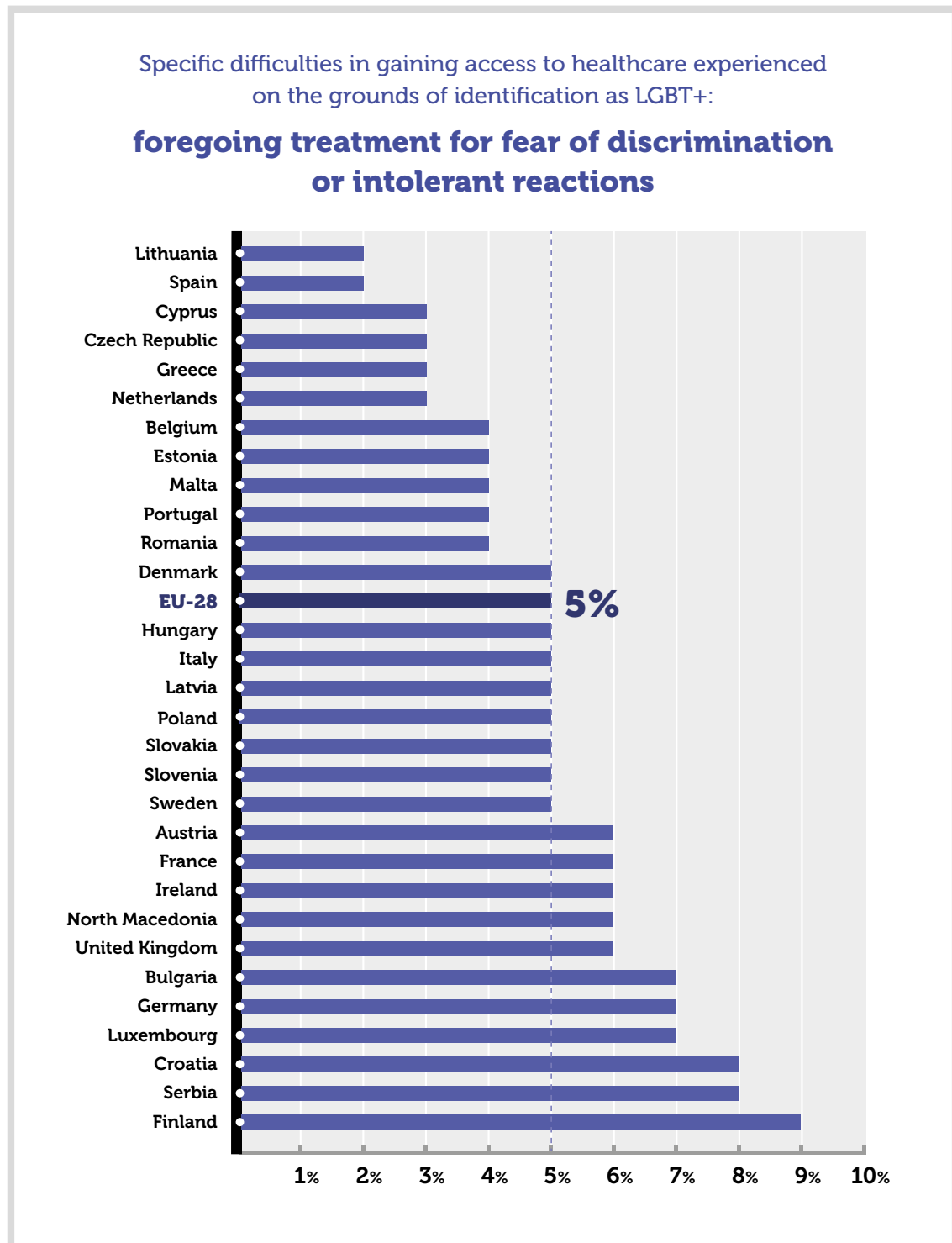


Figure 12. Specific difficulties in gaining access to healthcare experienced on the grounds of identification as LGBT+: **foregoing treatment for fear of discrimination or intolerant reactions** (% of respondents in respective States). Percentage of respondents who forewent... for fear of...



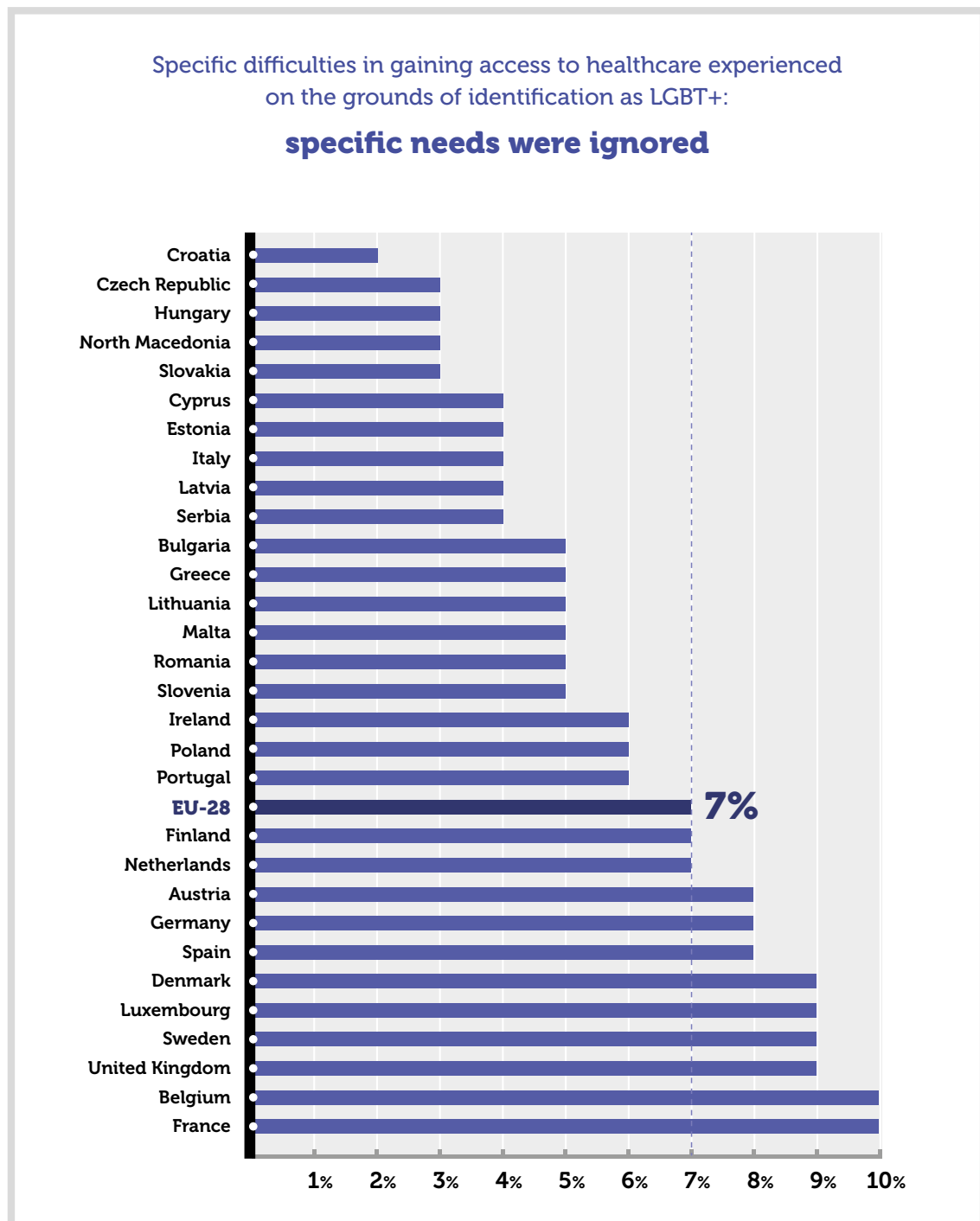
Another difficulty experienced by respondents was having to change general practitioners or other specialists due to their negative reaction to the patient's sexual identity (**Figure 13**). In Poland and Hungary this problem was reported by 4% of the respondents, compared to the EU average of 5%. In Sweden, the ratio was 5%, and the score was higher in Germany (6%), Belgium (7%), Luxembourg (7%), and France (9%). The lowest percent of respondents – 2% – declared a need to change general practitioners or other specialists in Czech Republic, Lithuania, Slovakia, Croatia and Estonia.

Figure 13. Specific difficulties in gaining access to healthcare experienced on the grounds of identification as LGBT+: **having to change general practitioners or other specialists due to their negative reaction** (% of respondents in respective States).



6% of the Polish respondents declared that their specific needs related to their sexual identity were ignored by the medical personnel. In Hungary and Czech Republic it was only 3%, in Latvia and Italy – 4%, and in Lithuania – 5%. The same claim was made by 7% of the respondents from Finland and the Netherlands, 8% from Austria, Germany and Spain, 9% from Denmark, Luxembourg, Sweden, and the UK, and 10% from Belgium and France (**Figure 14**).

Figure 14. Specific difficulties in gaining access to healthcare experienced on the grounds of identification as LGBT+: **specific needs were ignored** (% of respondents in respective States).



Other difficulties with access to healthcare suggested in the survey questionnaire that the respondents could indicate include being forced to undergo a certain medical or psychological test (**Figure 15**) and inappropriate, negative comments (**Figure 16**). 3% of the Polish respondents answered yes to the former question and 13% – to the latter question. The two ratios are much below the respective scores in most Member States in Western Europe. Having heard inappropriate comments from healthcare personnel was also declared by 19% of the respondents from Sweden, 20% from France, 17% from Belgium and 16% from Finland, Luxembourg and UK.

Also in this case numerous countries which tend to score low in many rankings of tolerance had better results than above mentioned western european countries. In Hungary 2% and 10% of respondents, respectively, declared having been forced to undergo a certain medical or psychological test and having heard inappropriate, negative comments. In Lithuania it was respectively 3% and 10%, in Latvia 3% and 13%, and in Italy – 2% and 12%.

Importantly, **as much as 71% of Polish respondents, 70% of respondents from Hungary and Latvia, 73% from Lithuania and 72% from Italy stated they had not experienced any of the above difficulties**, while the EU average was 69%. Czech Republic had highest proportion of respondents who had not experienced any difficulties, with the percentage of 76%. In Sweden, 65% of respondents declared lack of such difficulties, and in France – only 63%.

Thus, despite a relatively high percentage of respondents from Poland who claim to feel discriminated against by healthcare personnel – as much as 20% (the second highest score in Europe) – when comparing this to the specific experiences of respondents from the respective States, it is evident that LGBT+ persons who live in Western Europe report far more difficulties in gaining access to healthcare and far more discriminatory conduct.

Figure 15. Specific difficulties in gaining access to healthcare experienced on the grounds of identification as LGBT+: **being forced to undergo a certain medical or psychological test** (% of respondents in respective States).

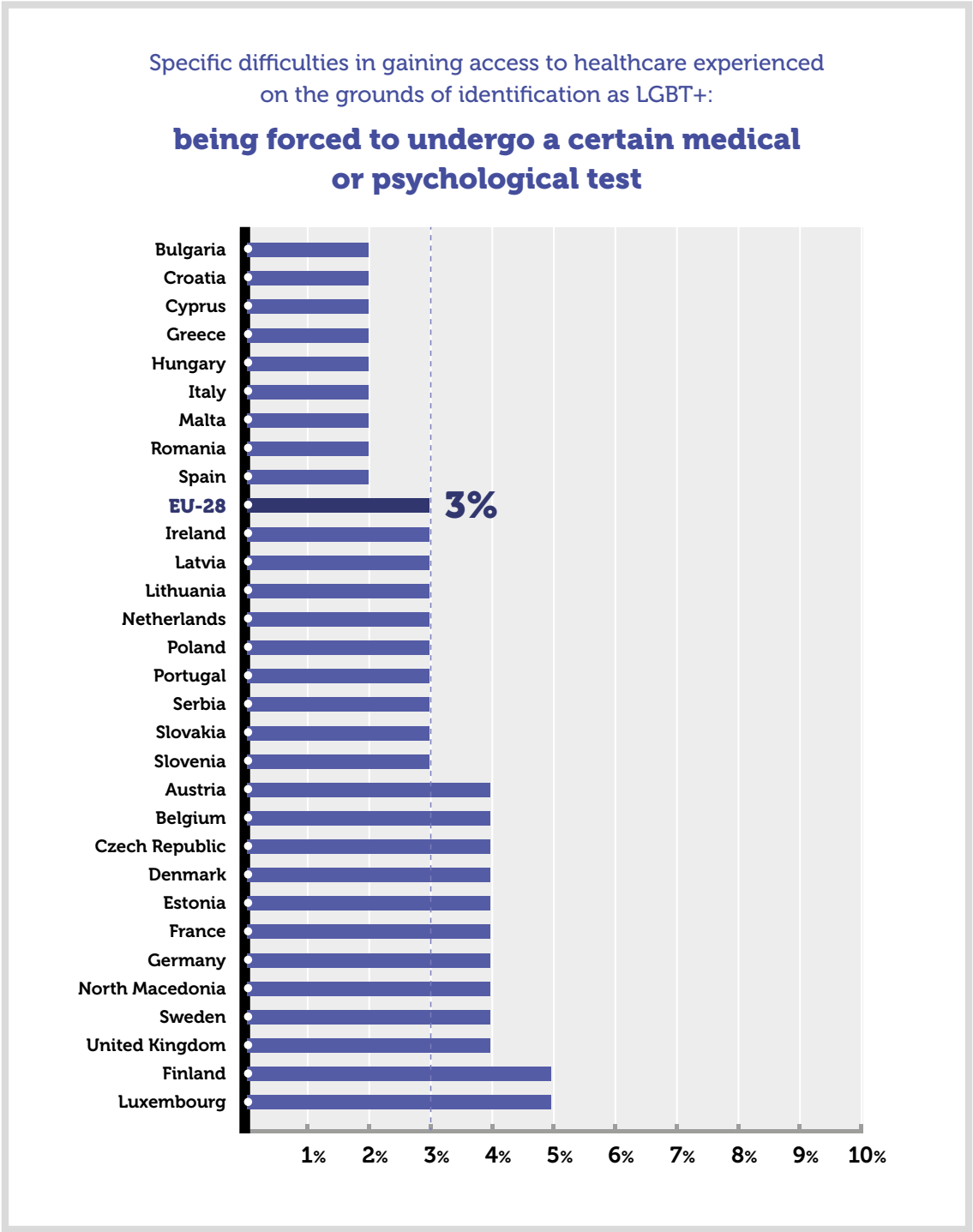
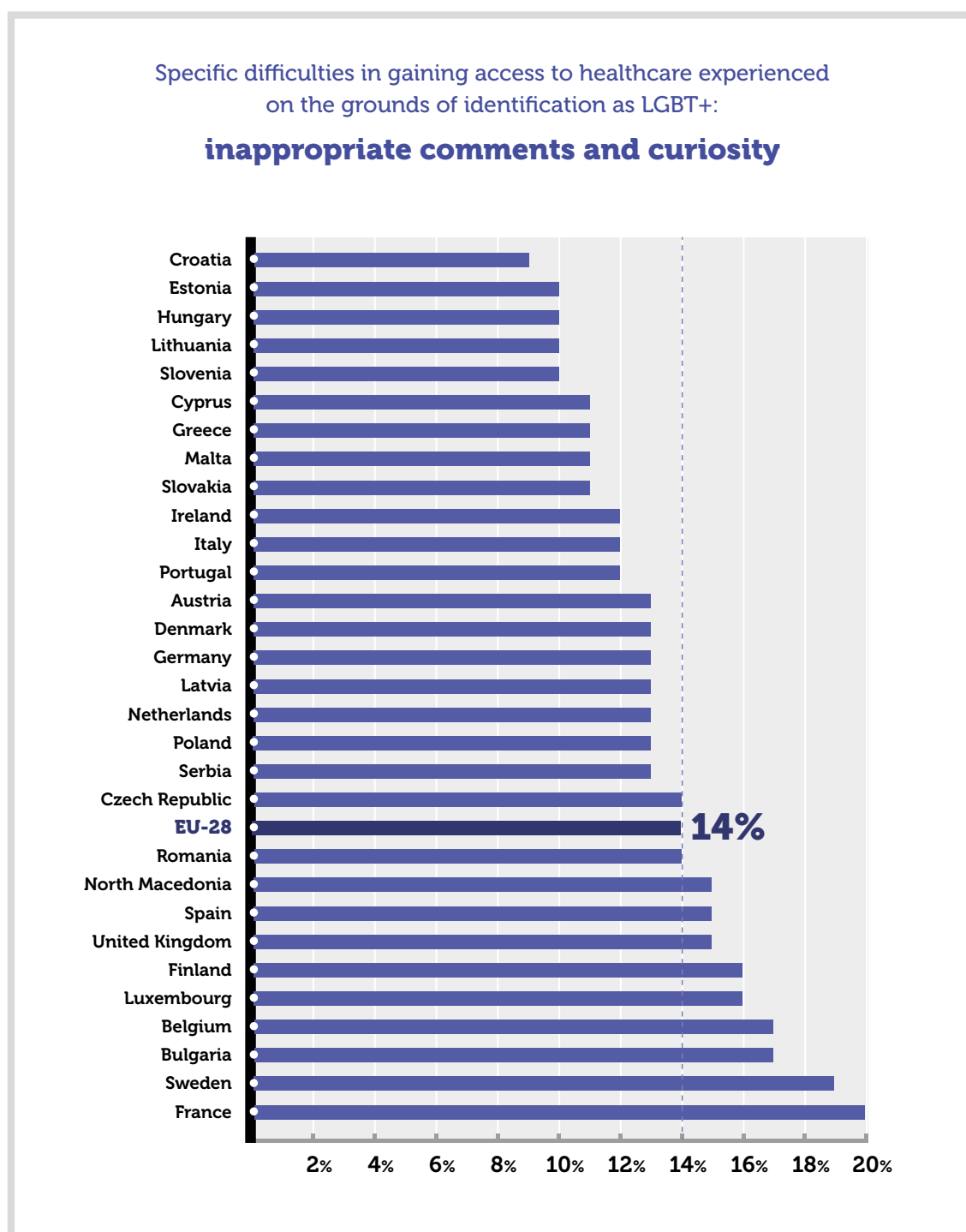


Figure 16. Specific difficulties in gaining access to healthcare experienced on the grounds of identification as LGBT+: **inappropriate comments and curiosity** (% of respondents in respective States).



6. European culture as the guarantor of well-being regardless of personal attributes

To sum up, based on the survey data, Poland is one of the countries that give the greatest sense of security to persons who belong to sexual minorities, including those who identify themselves with the LGBT+ movement, compared to other European States. According to declarative data from the FRA survey, sexual minorities experience certain cultural limitations that make them rightly feel that some of the intimate behaviours they display in public places may be perceived as offensive. However, discrimination at school, work, or in healthcare institutions is much more rare in Poland than in many other EU Member States and remains below the EU average.

The respondents' age structure suggests that the 'LGBT+' category is a *strictly* subcultural phenomenon with the attributes of a social movement that is not authorised to claim the right to represent respective social categories, such as homosexual women or men. If the average age of the respondents is below 30, more than 80% of them are younger than 40, and only 4% are older than 55, then – if they constituted a representative sample – it would mean that representatives of different groups, artificially classified on the basis of sexual preferences, as a rule do not reach old age. Even though – given their lifestyle – it may be a more frequent situation among them than in the general population, such a large disproportion in age is extremely improbable. It can only result from the fact that the LGBT+ movement does not represent any sexual minorities at all, but constitutes a subculture and – as in every subculture – encompasses largely the young population.

The impact of this factor is visible in the responses presented above. The respondents mention negative feelings related to discrimination more frequently in countries that are typically considered to be more conservative. This is not the case, however, when the survey questions concern specific dimensions of potential discrimination. It seems then that respondents answer some of the questions in line with the paradigm of their social movement.

Looking at the results, it is clear that one cannot substantially claim that the reconstruction of family law and the introduction of other ideological instruments effectively limit discrimination.

IV. The principles of equality and non-discrimination in EU law and Polish law

1. Initial remarks

The concept of equality of all before the law arises directly from the dignity of every human being and, as such, it is inherent and fundamental to the human rights protection system. Yet, equality is not the same as sameness and a number of various differences – both legal and factual – is not only compliant with human rights protection standards but it is in fact necessary. This assumption is elaborated on in the legislation of both the European Union and the Republic of Poland. The actions intended to ensure equal treatment of LGBT+ persons, which the Commission proposes in its Strategy, must take into account the guarantees of equal treatment provided for in international and national laws. Even though the Strategy, unlike the documents on which it is based¹², does not directly request for matrimonial privileges for persons of the same sex, its proposals to recognise same-sex unions legalised abroad raise major doubts. The consequence would be that – even though the local law does not make it possible to recognise such solutions – they would *de facto* exist, annihilating the constitutional guarantees of protecting the identity of marriage as a union between a man and a woman. Meanwhile, the principle of equal treatment does not in any way lead to the obligation of Member States to make single-sex unions legal or to grant them with matrimonial privileges.

2. The principles of equality and non-discrimination in EU law

The principles of equality and non-discrimination constitute general principles of the Community law. They stem from the constitutional traditions of European States and from the universal system of human rights (in particular, from the European Charter of Fundamental Rights and from the

12 European Commission, *Advancing LGBTI equality in the EU: from 2020 and beyond. Conference Report*, 11 December 2019, p. 9, https://ec.europa.eu/info/files/conference-report-advancing-lgbti-equality-eu-2020-and-beyond_en, (access: 20 December 2020).

European Convention on the Protection of Human Rights and Fundamental Freedoms). They have been described and guaranteed in EU Treaties and in the Charter of Fundamental Rights of the European Union, which comprise EU primary legislation. They constitute values and goals as well as fundamental rights of the EU.

The most important provisions governing the principles of equality and non-discrimination in EU primary legislation include:

1. Article 2 of the Treaty on European Union¹³ (hereinafter: TEU), which reads: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, 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.'
2. Article 9 of the TEU, which reads: '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. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'
3. Article 8 of the Treaty on the Functioning of the European Union¹⁴ (hereinafter: TFEU), which reads: 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.'
4. Article 10 of the TFEU, which reads: '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.'
5. Article 19 of the TFEU, which reads:
 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.'
6. Article 20 of the Charter of Fundamental Rights of the European Union¹⁵ (hereinafter: the Charter), which reads: 'Everyone is equal before the law.'

13 Treaty on European Union (consolidated version 2016), OJ C 202 of 7 June 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT>, (access: 7 July 2020).

14 Treaty on the Functioning of the European Union (consolidated version 2016), OJ C 202 of 7.6.2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT>, (access: 7 July 2020).

15 Charter of Fundamental Rights of the European Union, OJ C 202 of 7.6.2016, pp. 391-407, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016P/TXT>, (access: 7 July 2020).

7. Article 21(1) of the Charter, which reads: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'
8. Article 21(1) of the Charter, which reads: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

Although EU law does not uniformly define 'equality', according to the literature, the context and systematics of Article 2 of the TEU suggest that the EU 'equality' means a classical guarantee of the equality of citizens before the law¹⁶. The Court of Justice of the European Union repeatedly commented on that matter, stating, for example, that '**The general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.**'¹⁷ This means that persons in similar factual situations should be, in the light of the law, treated similarly and in different situations – differently. According to Article 9 of the TEU, the principle of equality is implemented in particular in relations between individuals and EU institutions and bodies and that all EU citizens – regardless of their nationality – should be treated in the same way.

The wording of Articles 8 and 10 of the TFEU suggests that implementation of the principle of equality and combating discrimination are among the most important goals of the European Union, and that they should be taken into consideration when determining all EU policies and decisions. Aside from these considerations, it is worth mentioning that the EU 'equality' also applies to relations between Member States and in relation to the Union, meaning equality of the States. Consequently, the EU legal system cannot contain any differences depending on the nature of membership, economic power, geographic region or history¹⁸.

According to Article 20 of the Charter, the principle of equality is a fundamental right that is vested both in natural persons and in legal persons, as well as in other organisational units. The general principle of equality is intended to ensure equal legal and factual treatment of persons **who are in a similar situation**¹⁹. Comparable situations cannot be treated arbitrarily, i.e. differently **without an objective reason**, whereas incomparable situations cannot be treated identically without an objective reason²⁰. At least two groups are needed for comparison, which both have major similarities and minor differences. A comparison must be based on objective circumstances and it requires a common point of reference. For example, group A receives a business permit and group B does

16 M. Hilf, F. Schorkopf, comments on Article 2, [in:] *Das Recht der Europäischen Union*, eds E. Grabitz, M. Hilf, M. Nettesheim, München 2020, BeckOnline, marginal nr. 31.

17 Judgment of the Court of Justice of the European Union of 16 December 2008, C-127/07, *Societe Arcelor Atlantique et Lorraine and Others v Premier ministre and Others*, point 23.

18 Cf. M. Hilf, F. Schorkopf, op. cit., marginal nr. 33.

19 S. Hölscheidt, comments on Article 20, [in:] *Charta der Grundrechte der Europäischen Union*, eds J. Meyer, S. Hölscheidt, Baden-Baden 2019, BeckOnline.

20 J. Bergmann, *Ausländerrecht*, eds J. Bergmann, K. Dienelt, München 2020, BeckOnline.

not. If there are sufficiently significant differences between the two groups, the principle of equality has not been violated²¹.

Article 21 of the Charter presents the principle of equality before the law in a negative context, i.e. as a prohibition of discrimination on the grounds of certain specific attributes that cannot be changed or which would be hard for people to change²². It is necessary to pay attention to the relationship between Article 19 TFEU and Article 21(1) of the Charter. Article 19 grants the EU the power to pass legislative acts to combat certain forms of discrimination, which are exhaustively listed in this Article. Such legislative acts may cover actions taken by the authorities of Member States (as well as relations between private individuals) in every area **within the limits of European Union powers**. On the other hand, Article 21(1) does not impose a general prohibition of discrimination in those areas²³. **It should be noted that according to Article 9 of the Charter, which reads: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws', Member States have the sole authority to regulate matters falling under the family law and the institution of marriage.**



Article 21(1) of the Charter provides for a prohibition of discrimination on the grounds of sexual orientation. This provision is an expression of tolerance of human sexual behaviour, arising from the right to self-determination and protection of private life. However, it is not a basis to introduce the institution of so-called homosexual marriages²⁴.

To sum up, the principle of equality is extremely vital in EU legislation and it is one of the most important values of the European Union that determines the direction of its activities as well as the rights of individuals. However, one should bear in mind the actual meaning of that principle, assuming

21 S. Hölscheidt, comments on Article 20, [in:] *Charta der Grundrechte...*, marginal nr. 22.

22 J. Bergmann, comments on Article 21, [in:] *Ausländerrecht*, op. cit., marginal nr. 1.

23 Ibid., marginal nr. 1-2.

24 Cf. S. Hölscheidt, comments on Article 21, [in:] *Charta der Grundrechte...*, marginal nr. 42.

equal treatment of people in a similar factual and legal situation, unless there is objective reason not to. Moreover, EU attempts at compliance with this principle are limited by the powers granted by Member States in specific fields and by the principles of proportionality and subsidiarity. With regard to the postulates to introduce into EU Member States the so-called homosexual marriages or other types of registered same-sex unions as an element of combating discrimination, it must be noted that they are basically groundless for two reasons. Firstly, homosexual persons are not in a factual situation comparable to heterosexual persons. Secondly, shaping substantive family law falls under the exclusive authority of EU Member States. **Thus, there are no legal grounds to accuse countries that do not recognise formal single-sex unions of discrimination against persons with other sexual preferences, or to propose that the European Union should impose relevant laws.**

3. The principles of proportionality and subsidiarity in the European Union law. The EU is not authorised to interfere in the family law of Member States

Among the fundamental principles of the European Union are the principles of proportionality and subsidiarity. Pursuant to Article 5(3) TEU, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. This provision – expressing the principle of subsidiarity – has existed in the primary legislation of the European Union since the Maastricht Treaty. Moreover, according to Article 5(4) of that Treaty, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

Both principles are applied in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. That document, attached as Annex no. 2 to the TEU, first requires that each institution ensures respect for the principles of subsidiarity and proportionality (Article 1). These requirements are closely linked with the EU legislative procedure. Pursuant to Article 5 of the said Protocol, draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality.

The principles of subsidiarity and proportionality have been frequently referred to in the case law of the Court of Justice of the European Union (CJEU). In accordance with the case law of the CJEU, in order to verify whether a certain law is proportional, the following three questions should be answered: are the measures this law proposes in order to achieve a certain goal proportional to its weight? Are these measures necessary to achieve the goal? Are these measures not beyond what is reasonable and necessary to achieve the goal?²⁵.

Hence, EU bodies have no right to take unnecessary imperative actions, and at the same time are responsible for always choosing the means least interfering in the scope of freedom of individuals

²⁵ Judgment of the Court (First Chamber) of 23 February 1983. *Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, Case 66/82; Judgment of the Court (Second Chamber) of 17 May 1984. *Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten*, Case 15/83.

and Member States. Therefore, under no circumstances can European Union bodies assume authority in matters that have not been clearly granted to them by Member States. These include matters of family law – including the legal regulations governing marriage or adoptive parenting. Thus, the European Union's lack of authority to determine the family laws of Member States arises directly out of the principles of proportionality and subsidiarity. These principles are discussed in detail in the Treaties and in the Charter. Pursuant to Article 9 of the Charter, Member States have the complete autonomy to regulate issues concerning marriage and family law²⁶. The literature emphasises the fact that substantive family law remains beyond the authority of the European Union²⁷. In 2018, the Commission²⁸ expressly commented on the lack of EU powers in the field of family law.

In this context, it should also be noted that ECJ case law had formulated those principles before they were codified in the Treaties. The doctrine also indicates that their positivisation reflected the Member States' effort to avoid excessive activism of the bodies²⁹. It must be borne in mind, in this context, that the EU may only act within the limits of the powers conferred upon it by EU Member States in the Treaties to attain the objectives provided therein. Powers not conferred upon the EU in the Treaties remain with the EU Member States (Article 5(2) of the TEU).

Even though strategies issued by the Commission are not binding laws, they certainly cause certain effects in practical functioning of the EU law. As has already been noted, they firstly set the direction for interpreting EU laws, especially EU directives³⁰. **For this reason, any attempts to pressure a State into creating possibilities to legalise same-sex unions or to grant such unions with matrimonial privileges are against the law. One such attempt is the Strategy's proposal to interpret EU law in such a way as to oblige Member States to recognise same-sex unions concluded abroad.**

26 Article 9 of the Charter of Fundamental Rights of the European Union: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws.'

27 This view is also shared in the literature – cf. J. Pawliczak, *Zarejestrowany związek partnerski a małżeństwo* [Registered partnership and marriage], Warszawa 2014.

28 Answer given by Ms Jourová on behalf of the European Commission, question reference: E-003990/2018, https://www.europarl.europa.eu/doceo/document/E-8-2018-003990-ASW_EN.html, (access: 19 December 2020).

29 J. Maliszewska-Nienartowicz, *Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym* [Development of the principle of proportionality in European Community law], „Studia Europejskie”, 1, 2006, p. 66.

30 Cf. Grimaldi; M. Kenig-Witkowska, op. cit., pp. 335-340.

V. Criticism of selected proposals made in the Strategy

The main part of this document is an analysis of those of the proposals made in the Strategy that raise the most doubts in the context of international and EU law as well as the Polish legal system. The first part of this document, presenting the fundamental provisions of EU law regarding, for example, equality, discrimination, as well as the principles of proportionality and subsidiarity, served as an introduction to a detailed discussion of the most controversial – in the context of these provisions – proposals of the Strategy. Both the literal wording of these provisions, the established doctrine, and relevant case law that have developed over the years on their basis make it clear that some of the solutions proposed by the Commission in its Strategy are unauthorised.

1. The first pillar: ‘Combating discrimination against LGBTIQ people’

The first pillar of the document issued by the Commission is supposed to concern general actions to combat discrimination against people of different sexual orientation in various aspects of their life, specifically in their workplaces. Apart from proposals that are a natural consequence of the above-mentioned principles of equality and non-discrimination, the Strategy also suggests actions that exceed the existing international law and the principles of proportionality and subsidiarity.

It should be noted at first that **Polish law already ensures an equal level of protection to all citizens, regardless of their sexual orientation or gender identity**. This protection is granted in the Constitution, which stipulates that everyone has the right to life (Article 38), personal freedom (Article 41), protection of privacy and family life (Article 47), freedom of expression (Article 54(1)), freedom of assembly (Article 57), freedom of association (Article 58(1)) and right to asylum (Article 37(1)).



Polish law already ensures an equal level of protection to all citizens, regardless of their sexual orientation or gender identity:



Article 38: The Republic of Poland shall ensure the legal protection of the life of every human being.



Article 41(1): Personal inviolability and security shall be ensured to everyone. (...)



Article 47: Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation (...)



Article 54(1): The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.



Article 57: The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. (...)



Article 58(1): The freedom of association shall be guaranteed to everyone.



Article 37(1): Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution.



Thus, from the perspective of the Polish legal order, **there are no reasons for Polish law to grant preferential protection to persons on the grounds identified in the report.** EU law, which is founded on the principles of equality and non-discrimination of all citizens, is equally unequivocal on these matters, as has already been demonstrated in the previous part of this paper.

1.1. The proposal to introduce the concept of 'gender identity' to the European Union's anti-discrimination policies

One of the Commission's strategic goals for the next few years is to 'support Member States in stepping up their exchanges of best practice on legal protection against discrimination on the grounds of sexual orientation, *gender identity/expression* and sex characteristics in various areas'³¹. The Commission also vouches to 'improve the use of *gender-inclusive* language in all communication'. It will also invite other EU institutions to do the same³². The Commission also undertakes to 'support the fostering of best practice exchanges between Member States and experts on ensuring safe and inclusive education for all children, young people and adults'. A new expert group will develop proposals addressing not only such unquestionable issues as bullying and sexual harassment but also gender stereotypes in education³³. The Horizon programme will also support *gender studies*³⁴.

The concept of *gender* has, as has been proven a number of times, an ideological character and stems directly from radical feminism and Marxist dialectic³⁵. Meanwhile, the concept of *gender identity*, which is a direct consequence of the assumption of the constructivist nature of gender, assumes that femininity and masculinity result only from the subjective feelings of a given person.

While some Member States have added sex attributes as grounds for discrimination to their local regulations governing equality, other use a broad interpretation of 'sex'. Similar grounds of gender expression are present in anti-discrimination legislation only in a handful of Member States. Considering the fact that Poland was among the States that – in compliance with the law – explicitly refused to include 'gender identity' in its legislation (which took place, as noted above, in 2010), there is a reasonable concern that the enigmatic declarations will lead to the intimidation of Polish authorities and inadmissible pressure to adopt legislation that cannot be reconciled with the constitutional principle of the dichotomous division of the society into two sexes.

It should be noted that the concept of *gender identity* is not provided for in binding international legal instruments. The only exception is the controversial **Istanbul Convention**³⁶, which 11 Member States of the Council of Europe, some of them also being EU Member States, refused to ratify³⁷. In Poland, its application is limited to the provisions of substantive law. When it ratified the Convention in 2015, Poland explicitly declared that its provisions must be interpreted in accordance with the Polish

31 European Commission, *Union of Equality...*, p. 8.

32 Ibid., p. 10.

33 Ibid., p. 10.

34 Ibid., p. 10.

35 Cf. H. Bradley, *Płeć* [Gender], tr. E. Chomicka, Warszawa 2008, p. 142.; R.P. Tong, *Mysł feministyczna. Wprowadzenie* [Feminist Thought. A more comprehensive introduction], tr. M. Jaros, Warszawa 2002, pp. 86, 106.

36 Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on 11 May 2011 (OJ 2015, item 961).

37 Armenia, Bulgaria, Czech Republic, Liechtenstein, Lithuania, Latvia, Moldova, Slovakia, Ukraine, Hungary, United Kingdom. It should be noted that on 29 March 2019, the Slovakian Parliament, by a vast majority of 101 out of 132 deputies, passed a declaration calling on the Government to reject the ratification of the Istanbul Convention (Uznesenia schôdze NR SR: <https://www.nrsr.sk/web/Default.aspx?sid=schodze/uznesenie&MasterID=11415>, access: 1 February 2021), and on 25 February 2020, by a majority of 95 out of 107 deputies, the Parliament rejected the motion to ratify the Istanbul Convention (Uznesenia schôdze NR SR: <https://www.nrsr.sk/web/Default.aspx?sid=schodze/uznesenie&MasterID=12080>, access: 1 February 2021). On 5 May 2020, the Hungarian Parliament, by a majority of 115 out of 153 deputies, passed a declaration refusing to ratify the Convention (P/10393, A gyermekek és nők védelmének fontosságáról, valamint az Isztambuli Egyezményhez való csatlakozás elutasításáról: https://www.parlament.hu/internet/cplsql/ogy_irom.irom_adat?p_ckl=41&p_izon=10393, access: 1 February 2021). The two States determined that the Convention did not conform with the existing laws and fundamental values.

Constitution³⁸. Moreover, there is increasing talk that the Polish Government might withdraw from the Convention³⁹. On 30 July 2020, the Prime Minister of Poland submitted a motion to the Constitutional Tribunal to verify the Convention's compliance with the Constitution of the Republic of Poland⁴⁰.

Moreover, on 27 July 2018, the Constitutional Tribunal of Bulgaria declared, by a majority of 8 out of 12 judges, that the Istanbul Convention, which the Republic of Bulgaria had signed on 21 April 2016, was not compliant with the Constitution of Bulgaria. The judges based their arguments on the controversial new definitions of gender and sex: 'The Convention distinguishes between the biological and social dimensions of the sex and denounces the gender duality of the humankind. According to Article 3(c), the concept of «gender»/«genre» becomes fundamental and decisive for the understanding of other concepts used in the Convention, which are defined on the basis of the denotation of «gender». [...] Understanding «gender» as a social construct makes the category of biological sex relative. Should the society lose its ability to distinguish between man and woman, combating violence against women remains only a formal, but impracticable duty.'⁴¹

Thus, using the controversial term of *gender identity*, which is not validated by any binding international laws, and, in particular, efforts to promote 'best practices' in this respect are unsubstantiated.

It is also worrying that – unlike even in the existing EU publications – the word *trans* has not even once been extended in the Strategy to *transsexual* or *transgender*, specifically that, in its second footnote, the abbreviation symbolised by the letter 'T' (in the LGBT acronym), is defined in disregard of its disorder-related origin, and is from then on seen through the discretionary prism of 'non-binary' persons (*whose gender identity and/or expression does not correspond to the sex they were assigned at birth [trans, non-binary]*). This gives rise to a justified suspicion that the intention to manipulate the concept of gender is concealed at the terminological level. The document is based on the assumption that gender may be determined on the basis of subjective feelings, which means that a person should be able to declare what gender they want to be.

1.2. Proposed adoption of so-called anti-discrimination directive in the European Union

The Strategy calls to step up actions to adopt an anti-discrimination directive in the European Union⁴² (Proposal for a Council Directive on implementing the principle of equal treatment between persons

38 The full wording of the objections made by Poland in association with the ratification of the Istanbul Convention is available online: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?module=declarations-by-treaty&numSte=210&codeNature=0>, (access: 9 July 2021).

39 "Genderowy belkot". Wiceminister sprawiedliwości: Wypowiemy konwencję stambulską ['Gender babble'. Vice Minister of Justice: We will withdraw from the Istanbul Convention], <https://www.tvp.info/48047409/genderowy-belkot-wiceminister-sprawiedliwosci-wypowiemy-konwencje-stambulska>, (access: 20 May 2020).

40 Motion of the Prime Minister to the Constitutional Tribunal to verify compliance of the Istanbul Convention with the Constitution of the Republic of Poland, case K 11/20, <https://trybunal.gov.pl/sprawy-w-trybunale/art/konwencja-rady-europy-o-zapobieganiu-i-zwalczaniu-przemocy-wobec-kobiet-i-przemocy-domowej>, (access: 21 December 2020).

41 Judgment no. 13 of 27 July 2018 (Official Journal of the Republic of Bulgaria no. 65 of 7 August 2018), <https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=129022>, (access: 21 December 2020).

42 European Commission, *Union of Equality...*, p. 8.

irrespective of religion or belief, disability, age or sexual orientation [COM (2008) 426]. According to the authors of the document, the purpose of adopting the directive would be to expand the EU anti-discrimination legislation and to increase the Commission's authority in the area of monitoring and controlling its implementation by the respective Member States.

The proposal for an anti-discrimination Directive has triggered a lot of controversy in the international forum for a number of years – States like Germany and the Netherlands as well as numerous NGOs and associations of entrepreneurs have protested against its adoption⁴³. The Proposal for a Directive contains a number of provisions that significantly limit the freedom of contract and the freedom of economic activity. The Proposal significantly expands the application of the principles of anti-discrimination law to include relations between private individuals, also between entrepreneurs and the users of their services. In particular, this extension would provide protection against discrimination based on 'sexual orientation' and 'religion and belief'⁴⁴ – concepts that are hard to define.



The Proposal for a Directive contains a number of provisions that significantly limit the freedom of contract and the freedom of economic activity:



expands the application of the principles of anti-discrimination law to include relations between private individuals



introduces the concept of discrimination based on 'sexual orientation' and 'religion and belief', concepts that are hard to define



creates a very broad and vague definition of harassment and discrimination



introduces the structure of the "reverse burden of proof", which may lead to an increase in the initiation of unjustified proceedings

Numerous countries such as Germany, the Netherlands, NGOs and business associations protested against the project.

43 Open Letter to Claude Juncker against continued work on the Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [COM (2008) 426], 2 December 2014.

44 Proposal for a Council Directive..., article 1.

Doubts are also raised by the provisions of the directive concerning the creation of a broad definition of harassment⁴⁵ and discrimination⁴⁶. The fact that the Directive contains terms that cannot be precisely defined on the basis of their casual meaning and the vagueness of the proposed definitions, which may be subject to liberal interpretation, raises concerns regarding compliance with the fundamental principle of legal certainty being one of the fundamental aspects of the principle of the democratic rule of law.

The proposal to shift the burden of proof⁴⁷ to the respondent will result in an increased number of unjustified cases. Such provision would introduce the principle of alleged guilt of an entrepreneur accused of discrimination. The respondent will have to prove that no discrimination has taken place. Also, the proposed participation of non-governmental organisations in anti-discrimination cases⁴⁸ as representatives of the respondent may lead to the development of a pathological practice of specialist institutions filing unsubstantiated lawsuits in the hope of being awarded the costs of legal representation. The principles regarding liability for damages are also unclear and raise concerns⁴⁹. They would impose liability regardless of fault, which would result in strict liability for discrimination that would generate risk for entrepreneurs at a level that is impossible to estimate.

Former anti-discrimination directives were liberally interpreted by the Court of Justice of the European Union. Thus, it can be expected that the proposed directive would also be liberally interpreted. The procedure of amending or revoking the Directive is equally dangerous. Because the procedure of its adoption requires the unanimity of all Member States, any amendments thereto would also require the acceptance of the entire Council of the European Union which, in practice, is very difficult to achieve. Moreover, the provisions of the Proposal for a Directive fall outside the scope of Article 19 of the Treaty on the Functioning of the European Union (TFEU), which is the basis for the EU's anti-discrimination policies, and neither do they comply with the principles of subsidiarity and proportionality (Articles 4 and 5 of the TFEU).

1.3. Doubts concerning implementation of 'Diversity Charters' in offices and workplaces

One of the Strategy's proposals for anti-discrimination policies is to implement so-called Diversity Charters in companies and public offices⁵⁰. The Commission already promotes diversity management through the EU Platform of Diversity Charters. Its signatories have adopted diversity and inclusion policies, established internal LGBT+ networks, provided training for their employees, celebrated the International Day Against Homophobia, Transphobia and Biphobia (IDAHOT) and participated in national 'Pride' events. The Commission declares it will continue to foster the creation of national

⁴⁵ Ibid., article 2(3).

⁴⁶ Ibid., article 2(2).

⁴⁷ Ibid., article 8(1).

⁴⁸ Ibid., article 12.

⁴⁹ Ibid., article 14.

⁵⁰ European Commission, *Union of Equality...*, p. 9.

diversity charters and engage in specific efforts to promote LGBT+ equality through dedicated action in the framework of the EU Platform of Diversity Charters⁵¹.

The actual goal of implementing Diversity Charters is to grant certain privileges to persons who identify themselves with the LGBT+ subculture. This, in turn, poses a real threat of discrimination against those who do not share such views and the implementation of mechanisms that violate EU and national laws.

As a reference point, we may suggest what already happens in the United States, namely that – under the pretext of promoting ‘diversity’ – persons representing different views are excluded from the debate. For example, in 2011, University of California-Davis determined that discrimination based on religion may only concern individuals who do not profess a religion that is dominant in a given culture, and that dominant religion was considered to be Christianity⁵². The University eventually backed out of that decision after receiving a petition signed by 25 students and publicised by circles protecting the freedom of conscience⁵³. In 2016, the town of East Lansing, Michigan, USA banned the family-run business Country Mill Farms from the Farmer’s Market, in which it had regularly participated since 2010. The ban came after the owners of Country Mill Farms said on Facebook that based on their religious beliefs, they believe that marriage is the union of one man and one woman⁵⁴. In both cases, representatives of public institutions (university, town) actually committed discrimination, trying to ban from the public debate persons who did not fit the a priori ideological model of supposed ‘diversity’.

It should be noted that pursuant to Council 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 (OJ L 373/37 of 21 December 2004), ‘All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person’s sex, this Directive should not prejudice the individual’s freedom to choose a contractual partner.’ Article 3(2) of the Directive explicitly stipulates that ‘This Directive does not prejudice the individual’s freedom to choose a contractual partner, as long as an individual’s choice of contractual partner is not based on that person’s sex’. Meanwhile, Article 1 of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2 December 2000) also makes clear the purpose of this Directive, which is to ‘lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation’.

51 Ibid., p. 9.

52 ‘The loss of power and privilege to those who do not practice the dominant culture’s religion. In the United States, this is institutionalized oppressions toward those who are not Christian.’ (Alliance Defending Freedom, *UC Davis’s Discriminatory Non-Discrimination Policy*, <https://adflegal.org/blog/uc-daviss-discriminatory-non-discrimination-policy>, access: 21 December 2020).

53 T. Starnes, *University to Change Policy Defining Religious Discrimination as Oppression by Christians*, <https://www.foxnews.com/us/university-to-change-policy-defining-religious-discrimination-as-oppression-by-christians>, (access: 21 December 2020).

54 M. Mayer, *When “Diversity” Does Not Include Bible-Believing Christians*, <https://adflegal.org/blog/when-diversity-does-not-include-bible-believing-christians>, (access: 21 December 2020).

The catalogue of prerequisites is finite, which means it cannot be expanded other than by amendment of legal regulations by the legislator, such as by potential implementation of Diversity Charters.

Unfortunately, the 'Charter' initiative involves imposing an ideological glossary of terms disregarding domestic laws. For example, the Polish version of the Charter, developed in 2011 together with LGBT organizations and activists, such as Campaign Against Homophobia, the Feminoteka Foundation and Polish Society of Anti-discrimination Law, represented by Krzysztof Śmiszek⁵⁵, forces the signatory to use the terminology of the LGBT movement – 'psychosexual orientation and gender identity'. Thus, the actual goal of the initiative is to grant certain privileges to individuals who identify themselves as members of the LGBTIQ movement. Meanwhile, Article 5(3) of the Polish 'equality' Act, following the above-mentioned provisions of the Directives of 2000 and 2004, stipulates that anti-discrimination provisions do not apply to the freedom to choose a contractual partner, as long as an individual's choice of contractual partner is not based on that person's sex, race, ethnicity or nationality. The catalogue of prerequisites is finite, which means it cannot be expanded otherwise than by amendment of legal regulations by the legislator, such as by possible implementation of 'Charters'.

It should be noted that such solutions are contrary both to the principle of ideological impartiality of public authorities and the principles of fair competition, equal treatment of contractors, proportionality and transparency. Imposing an obligation to provide services violates the freedom of economic activity – which means the freedom to choose both contractors and the type of services offered. **Undoubtedly, an obligation to preferentially treat contractors of specific sexual orientation or ideology stands in sharp contrast to the freedom of economic activity.**

Meanwhile, in accordance with Article 7(1) of the Polish Public Procurement Law, the contracting authority prepares and conducts contract award procedures in a manner ensuring fair competition and equal treatment of contractors as well as in accordance with the principles of proportionality and transparency. The same assumptions are reflected in the statutory provisions of the other Member States. If – as a consequence of signing the 'Charters' – 'anti-discrimination clauses' were to be expressed in an ideological manner, the principle of equal treatment would be violated with respect to entrepreneurs refusing to accept them.

The introduction of such clauses – the same as, for example, the proposal to collaborate with 'rainbow employee networks' – would lead to preferential treatment of entrepreneurs identifying themselves with or promoting a specific ideology by public authorities. This, in turn, would mean discrimination of those entrepreneurs and employers who do not share such beliefs. This would be inadmissible – also from the perspective of legal regulations governing public expenditure – differentiation of economic operators on the basis of their beliefs.

The obligation to apply those 'clauses' – in complete disregard for the political and economic principles of the respective states – would cause the market to develop an unlawfully privileged circle of economic operators due to their support for selected political and ideological claims.

⁵⁵ Historia Karty Różnorodności [The history of the Diversity Charter], <http://odpowiedzialnybiznes.pl/historia-karty-roznorodnosci>, (access: 24 November 2020).

1.4. The proposal of preferential financing of organisations that promote LGBTI

One of the Strategy's proposals is to increase funding for non-governmental organisations that promote the LGBTIQ ideology⁵⁶. In the final report on the achievement of goals, the 'List of actions to advance LGBTI Equality', the Commission said that allocating substantial funds for European LGBTI organisations (such as ILGA) and awarding grants to projects aimed at ensuring 'progress in LGBTI equality' were a success.⁵⁷ Also, one of the most important criteria of evaluating whether Member States have 'progressed' in the opinion of the European Commission is whether a Member State financially supported one of the main CSOs⁵⁸ in the country to combat the discrimination of sexual minorities people in 2019⁵⁹.

Meanwhile, the principles of equality before the law and of non-discrimination put into question the legality of the financial activities of the European Union when it allocates substantial amounts to non-governmental organisations with a strictly defined profile, i.e. ones that specifically promote the LGBTI community.

This means preferential treatment of certain social groups as opposed to other groups that may be equally exposed to discrimination (e.g. followers of a particular religion). The European Commission did not offer any explanation for different treatment of other non-governmental organisations and social projects, e.g. research comparing the levels of discrimination against various social circles in specific countries. Moreover in practice, it is difficult to justify the thesis of pan-European systemic discrimination of LGBT people by government bodies and through Member State regulations. After all, both the national and EU legal systems contain legal instruments that protect individuals against discrimination, who find themselves in a similar factual and legal situation because of their particular characteristics.

It should also be noted that the demands made by LGBTI organisations are often markedly ideological (such as introduction of so-called single-sex marriages) and are neither backed either by societies nor governments of the Member States. Thus, allocation of a part of the common EU budget to preferentially treated organisations that make such controversial demands may be against the will of at least some of the Member States and contrary to the EU's principles of solidarity and subsidiarity.

To sum up, preferential financing of social organisations that focus on promoting a single, particular social group (LGBTI) and its demands violates the principle of equality and non-discrimination as well as of subsidiarity and solidarity between Member States.

⁵⁶ European Commission, *Union of Equality...*, pp. 10-11.

⁵⁷ European Commission, *List of actions by the Commission to advance LGBTI equality*. Final Report 2015-2019, p. 13, https://ec.europa.eu/info/sites/default/files/report_list_of_actions_2015-19.pdf, (access: 29 July 2021).

⁵⁸ CSO – Civil society organisation.

⁵⁹ European Commission, *List of actions...*, p. 15.

2. Objections to some of the proposals made in the Strategy's 2nd pillar – 'Ensuring LGBTIQ people's safety'

The second pillar of the Strategy discusses issues related to ensuring the safety of persons who identify themselves with the LGBTIQ subculture. According to the Commission, they are particularly exposed to violence and hate crimes. Studies on the scale of this phenomenon in Europe are discussed in more detail further on in this report. In passing, however, it is worth noting that the thesis about the particular intensity of these phenomena towards sexual minorities is formulated in a somewhat exaggerated manner. Although every such incident is utterly condemnable and requires the reaction of law enforcement authorities, if it constitutes a criminal offence, it should be noted that there are groups who are affected by violence and hate crimes to a much greater extent. This includes, in particular, persons with disabilities or members of racial, ethnic, or religious minorities⁶⁰.

As part of 'promoting a safe environment' in the 2020-2025 period, **the Commission will promote 'support services' for persons associated with the LGBTIQ movement, including 'safe houses'**. The Commission also intends to promote 'integrated and targeted support to victims with special needs' (LGBTIQ). The authors of the Strategy propose an EU-wide communication campaign to facilitate the exchange of good practices such as the **setting up of 'rainbow desks' at local police stations**.

It should be noted that the Strategy condemns 'surgery and medical intervention on intersex infants and adolescents without their personal and fully informed consent' (intersex genital mutilation), forced abortion and sterilisation as 'harmful practices'. Unfortunately, the Strategy also condemns **medicalisation of persons suffering from transsexual sexual identity disorders or even the offering of conversion therapy to persons with homosexual inclinations** as equally harmful.

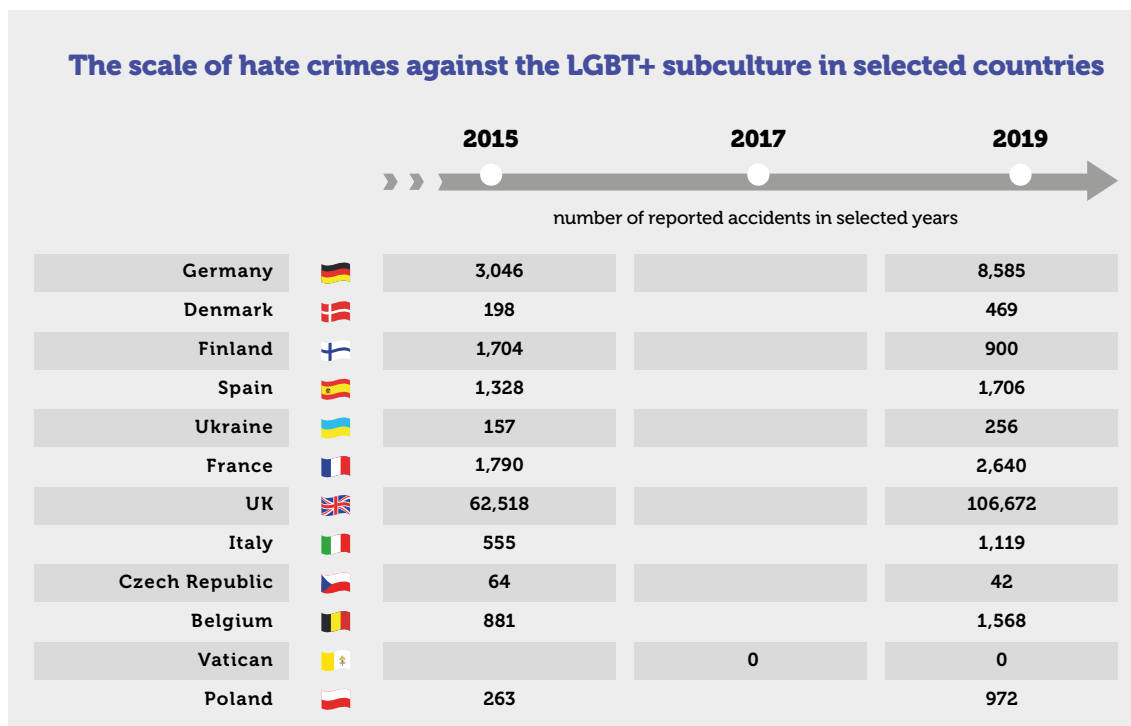
The Commission will also strive to make the Council adopt in 2021 legal regulations criminalising 'hate speech' and 'anti-LGBTIQ hate crimes' as 'EU crimes' on the level of the European Union pursuant to Article 83 of the Treaty on the Functioning of the European Union. The reference point for this will be the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. In early 2021, the European Commission launched an initiative to expand the list of EU crimes to include hate speech and hate crime. From February 23 to April 20, 2021, there was a time during which – as part of consultations limited to "targeted consultations of stakeholders – rather than an open public consultation"⁶¹, there was a feedback period with the possibility of submitting comments to the "roadmap" presented by the Commission. Adoption by the Commissions is planned for the fourth quarter of 2021. However, it should be noted that, pursuant to Article 83(1) sentence 4 of the TFEU, a decision of the Council needs to be unanimous.

Even though Poland is persistently presented as a State particularly unfriendly to people who identify themselves with the LGBT+ subculture, it must be noted that the scale of hate crimes against them is similar to the overall indicators for Europe.

⁶⁰ Cf. United Nations, Department of Economic and Social Affairs Disability, *Factsheet on Persons with Disabilities*, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html>, (access: 20 December 2020).

⁶¹ European Commission, *Roadmap: Extension of the list of EU crimes to hate speech and hate crime*, Ares(2021)1431474, p.3, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12872-Hate-speech-&-hate-crime-inclusion-on-list-of-EU-crimes_en, (access: 10 september 2020).

Data of the Organization for Security and Co-operation in Europe (OSCE) concerning the scale of hate crimes can serve as a proof⁶²: in Germany, 3,046 incidents were reported in 2015 and 8,585 in 2019; in Denmark, 198 incidents were reported in 2015 and 469 in 2019; in Finland – 1,704 incidents in 2015 and 900 in 2019; in Spain – 1,328 incidents in 2015 and 1,706 in 2019; in Ukraine – 157 in 2015 and 256 in 2019; in France – 1,790 in 2015 and 2,640 in 2019; in the UK – 62,518 in 2015 and 106,672 in 2019; in Italy – 555 in 2015 and 1,119 in 2019; in Czech Republic – 64 in 2015 and 42 in 2019; in Belgium – 881 in 2015 and 1,568 in 2019; in the Vatican 0 incidents between 2017 and 2019; in Poland – 263 incidents in 2015 and 972 in 2019 (the selection of States is random).



The allegation that there supposedly exist 'LGBT-free zones' in Europe (implicitly – in Poland) should also be strongly condemned. The introduction to this pillar of the Strategy even ends with the following statement: 'LGBTIQ-free zones are humanity free zones, and they have no place in our Union!'⁶³ It should be emphasised that the only declarations made by local governments in Poland in this matter related to freedom from 'LGBT ideology'. The difference between 'free from LGBT ideology' and 'free from LGBT' is a crucial one – declarations concerning the latter were purposefully not undertaken by any of the Polish local governments. These measures do not involve discrimination of persons who belong to or identify themselves with the movement, but rather distancing oneself from the ideology they promote (regarding matrimonial privileges, adopting children, arbitrary interpretation of gender, promiscuous lifestyle and promoting permissive sex education).

However, the aspect of this particular pillar of the Strategy that raises substantial doubts is the repeated use of the term 'hate speech' by its authors. The subsequent paragraphs of this report

62 OSCE, 2019 Hate Crime Data: Frequently Asked Questions, <https://hatecrime.osce.org>, (access: 16 December 2020).

63 European Commission, *Union of Equality...*, p. 13.

will discuss the matter, enumerating specific doubts as to the nature of this concept, its doctrinal evolution and current use in the international forum.

'Hate speech' is not a legal concept and it does not exist in the international legal system. Initially, it referred to public statements encouraging violence against an individual or a group on the basis of a particular personal trait, such as race, religion or sex. Such statements, the same as other calls for violence (regardless of reasons) conveying threats or promoting totalitarian ideologies, were rightly recognised in the case law of the Court in Strasbourg as abuse of the freedom of speech⁶⁴.

However, in recent years the term 'hate speech' has gradually extended to include not only calls for violence or threats, but also anything which is said that may cause psychological discomfort in the target audience. Numerous non-binding definitions created by international committees have led to the establishment of highly arbitrary and subjective criteria. For example, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on 'hate speech' defines it as 'all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination, and hostility against minorities, migrants, and people of immigrant origin'.

Analysed in this way, the concept of 'hate speech' means ... 'hate speech'. The above definition is based on a logical *idem per idem* error, which means defining a term by means of the same term or its synonym. It is a tautology, it is analogous to the following statement: 'logic is a science of thinking in accordance with the laws of logic'. Such a definition is full of unclear and imprecise expressions. Apart from the term 'hate', the question is how to interpret the other broad terms it contains, such as 'intolerance', 'ethnocentrism', 'discrimination', or 'hostility'.

The above comments are anything but purely theoretical. In fact, the vagueness of the term leaves room for discretionary, particular, and subjective interpretations, putting the public debate manifestly at risk. By allowing far-reaching discretion in determining what 'hate speech' is, it consequently enables excluding from the public debate certain ideas, opinions and views that, although perfectly justified in a pluralistic and democratic society, are opposed by certain interest groups. The following cases may serve as an example of this hazard:

- In the United Kingdom, a candidate for the European Parliament was arrested at a rally for quoting Winston Churchill;
- In the Netherlands, a Member of the Parliament was arrested for asking a question at a political rally;
- In Denmark, a Member of the Parliament and three other public figures were convicted for criticising some of the elements of Islam;

⁶⁴ Such case law is discussed by A. Buyse, *Prohibition of the Abuse of Rights*, [in:] *Theory and Practice of the European Convention on Human Rights*, eds. P. van Dijk et al., Cambridge-Antwerp-Portland 2018, pp. 1090-1092.

- In Austria, a citizen's post on Facebook criticising a public officer was recognised as 'hate speech' and was removed from the platform.

Meanwhile, LGBTIQ organisations attempt to classify some opinions that are a perfectly rightful voice in the public debate as 'homophobic hate speech'. According to LGBTIQ activists, it is 'homophobic hate speech', among others,

- 'to consider the political demands of LGBTIQ as illegitimate'⁶⁵;
- to think that there is no discrimination against gays and lesbians;
- to believe that homosexual persons act indecently and live in sin⁶⁶.

The idea of combating 'hate speech', legitimised by the common disapproval of hatred, **involves, without any precision, many more behaviours than those which the advocates of improving the public debate culture want to counteract. In fact, the culture is degraded by the far-reaching discretion in instrumentally naming certain behaviours (forms of expression) as 'hate speech' and banning them from the public debate.**

An important proof, in the context of this analysis, that these concepts are also very broadly interpreted in the EU forum are fragments of a report from the High level Conference on Advancing LGBTIQ equality in the EU. It says that more attention should be given to actors such as political and religious leaders, who should continue to be encouraged to remove hate speech. Condemnation of the homosexual lifestyle by religious leaders is explicitly given as an example of homophobic hate speech⁶⁷. Pervasive manipulation of the public debate, freedom of speech and freedom of religion cannot be justified by the 'psychological well-being' of any social group.

In this context, we must not overlook the fact that it is standard for Member States to have well-rooted regulations that every person who is the target of **offensive, vulgar or aggressive behaviour or calls to violence may have recourse to. The possibility of pursuing one's rights exists both in the civil way (protection of personal rights) and in criminal proceedings. Criminal regulations prohibit, among others, defamation, insult, threat or violation of the bodily inviolability. Introducing sensitivity training courses for police officers may escalate the practice of extremely broad interpretation of existing regulations, leading to the actual harassment of individuals who express (keeping to the standards of the public debate) opinions contrary to the views of LGBTIQ organisations.**

Although the Strategy is supposed to be implemented by EU institutions, it is appropriate to recall that, even though many OECD Member States have legal regulations that more or less govern hate speech, there is no unilater consensus as to its penalisation⁶⁸.

65 M. Winiewski et al., *Mowa nienawiści, mowa pogardy. Raport z badania przemocy werbalnej wobec grup mniejszościowych* [Hate speech, contempt. Report on the study of verbal violence against minority groups] Warszawa 2017.

66 Kampania Przeciw Homofobii, *Raport o homofobicznej mowie nienawiści w Polsce* [Report on homophobic hate speech in Poland], Warszawa 2009.

67 European Commission, *Advancing...*, p. 5.

68 OSCE, Office for Democratic Institutions and Human Rights (ODIHR), *Prosecuting Hate Crimes*, 2014, <https://www.osce.org/odihr/prosecutorsguide>, (access: 29 July 2021).

In the context of the European Commission's initiative, it should be pointed out that notions of hate speech and hate crime do not satisfy the conditions set forth in Article 83(1) TFEU which would allow amendment of the treaty involving the addition of those offences to the list of EU crimes.

Hate speech is not a particularly serious crime, whereas hate crime is not one in the vast majority of cases. As a rule, these are ordinary crimes. In no way whatsoever could one classify hate speech as a crime against humanity, a crime against peace, or a war crime. For hate crimes, in turn, such classification could be considered only in extreme situations, and certainly not as the norm.

Fundamentally, hate speech and hate crimes are not cross-border. Though some acts of this kind committed via the Internet may indeed satisfy this condition, statistical figures concerning violations of standards of such platforms as Facebook or YouTube are not tantamount to the real number of instances of hate speech and hate crime.

Furthermore, one has to note that it is impossible to prove developments in crime regarding hate speech or hate crime. Among other data, Facebook's statistical figures cited by the European Commission in its roadmap are not reliable due to, first, the fact that Facebook is a private company that can establish its own standards, and second, the fact that said standards are ambiguous, as already evidenced hereinabove. Their scope does not always correlate to that of the law of Member States. Suggestions that the number of hate crimes has risen based on such figures are inadmissible.

It is also worth pointing out that OSCE figures show that the introduction of separate criminal law regulations concerning hate speech and hate crimes has no effect in reducing the number of said crimes. The year 2019 saw 8,585 cases of hate crimes in Germany, 106,672 instances thereof in Great Britain, 761 in Norway, and 2,640 in France. Meanwhile, in 2019, there were only 972 cases of hate crimes in Poland, 256 in Ukraine, and 132 in Hungary⁶⁹.

3. Objections concerning the proposals made in the 3rd pillar of the Strategy

3.1. Comments on Directive 2004/38/EC – no obligation to transcribe 'same-sex marriage'

In the third chapter, the European Commission notes that the Charter of Fundamental Rights enshrines the right to respect for private and family life (Article 7), as well as the right of children to protection and care as is necessary for their well-being (Article 24). Due to differences in family law across Member States, family ties may cease to be recognised when LGBTI families cross the EU's internal borders. According to the 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'.

⁶⁹ OSCE, *2019 Hate Crime Data: Frequently Asked Questions*, <https://hatecrime.osce.org/>, (access: 16 December 2020).

The Commission claims that the 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 recognises the right of 'rainbow families' to move and reside freely in the EU⁷⁰. In fact, however, neither the provisions of the Directive itself nor relevant provisions of the Treaties that constitute the legal basis for this secondary law, even though they provide for the right to move and reside freely in the EU, do not and cannot constitute grounds for requesting the host Member State to transcribe a union that is not recognised by that State's legislation.

By way of introduction, it should be noted that the legal basis for the freedom of movement of EU citizens is established in Article 3(2) of the TEU ('The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime'), Article 21 of the Treaty on the Functioning of the European Union (TFEU) ('Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect') and in the provisions of Title IV ('Free movement of persons, services, and capital') and Title V ('Area of freedom, security and justice') of the TFEU as well as in Article 45 of the Charter of Fundamental Rights of the European Union ('Every citizen of the Union has the right to move and reside freely within the territory of the Member States. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.')

The meaning of the right to move and reside freely within the territory of the European Union is explained in the provisions of Directive 2004/38/EC. In the context of the possibility to transcribe same-sex unions, which in some Member States are referred to as 'marriages', analysed in this report, the following issues should be considered. Pursuant to Article 2(1) of Directive 2004/38/EC, the freedom to move and reside stems from the citizenship of the Union which, pursuant to Article 9 of the TEU, 'shall be additional to and not replace national citizenship.' According to the above principle established in the Treaty, **Union citizenship is secondary and derivative (additional) to national citizenship**. Meanwhile, the citizenship of a given Member State determines the scope of the rights and obligations of individuals who hold that citizenship. In practice, this means that Polish citizens, in accordance with Polish law, cannot establish unions referred to as same-sex marriages. On the other hand, the EU's LGBTIQ Equality Strategy 2020–2025 ('Strategy') puts forward the view that 'EU free movement law, in particular the Free Movement Directive, recognises the right of all EU citizens and their family members, including registered partners and rainbow families, to move and reside freely in the EU'⁷² and that 'the Court of Justice ruled that the term 'spouse', as used in the Directive (...) also applies to a person of the same sex as an EU citizen to whom he or she is married'⁷³. If this assumption of the European Commission were to be implemented, it would mean in practice that individuals forming a same-sex union, recognised as 'marriage' in one Member State, could have their union recognised in any other Member State, even in one that does not legally allow same-sex 'marriages' in its territory (e.g. Poland). As a result of such interpretation, EU citizens arriving in Poland would have more rights

⁷⁰ European Commission, *Union of Equality...*, p. 16.

⁷¹ O. Marzocchi, *Swobodny przepływ osób* [Free movement of persons], <https://www.europarl.europa.eu/factsheets/pl/sheet/147/swobodny-przeplyw-osob>, (access: 7 January 2021).

⁷² 'EU free movement law, in particular the Free Movement Directive⁶⁰, recognises the right of all EU citizens and their family members, including registered partners and rainbow families, to move and reside freely in the EU'. See point 3.1. *in principio* of Strategy, p. 16.

⁷³ '(...) CJEU clarified that the term 'spouse' as used in the Free Movement Directive also applies to same-sex partners'. Ibid.

than Polish citizens, Poland being the host state; indeed, they would have 'special rights' exceeding the framework of the Polish legal system. The Constitution, which is the highest-ranking legal act in Poland, stipulates in Article 18 that in the territory of Poland marriage is solely a union of a man and a woman. Also, the provisions of the Polish Family and Guardianship Code⁷⁴ that govern the practical issues of establishing a marriage relationship make it clear that in Poland marriage is only possible between a man and a woman (Article 1). In light of the above, Poland is one of the Member States of the European Union in which there are no legal grounds enabling the marriage of same-sex individuals. It should be noted that many other Member States, apart from Poland, do not allow same-sex marriages (cf. notes in point 3.5 below).

Moreover, to assume that the Directive quoted above may be a source of law to recognise same-sex unions as equal to marriage also in those Member States whose legislation does not allow it is contrary to **Article 9 of the Charter of Fundamental Rights of the European Union (CFR): 'The right to marry and the right to found a family are guaranteed in accordance with national laws.'** This provision explicitly states that matters involving entering into a marriage relationship fall outside the scope of the European Union's authority. It is in the sole authority of Member States to regulate family law matters. The same opinion was expressed by the European Union Agency for Fundamental Rights (FRA) in its explanations to the provisions of the Charter of Fundamental Rights, where the Agency notes that Article 9 is based on Article 12 of the European Convention on Human Rights (ECHR)⁷⁵, which reads as follows: **'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.'**⁷⁶ Even though the FRA notes that, for the purposes of the Charter of Fundamental Rights, '... the wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family', it explicitly states that the idea of the regulation of Article 9 of the CFR is its similarity to Article 12 of the ECHR, 'however its scope may be wider **when national legislation so provides.**' The above clearly suggests that matters related to marriage are solely governed by national laws and there is no possibility for EU institutions to interfere. What is relevant to this case and should not be overlooked is a note published on the FRA website concerning the status of explanations relating to the provisions of the CFR. It says that '... although they do not as such have the status of law, **they are a valuable tool of interpretation intended to clarify the provisions of the Charter.**' EU institutions that apply the laws of the European Union are obliged to consider such interpretative guidance in their activity, and this obligation stems directly from Article 6(1) sentence 3 of the Treaty on European Union ('The rights, freedoms and principles in the Charter shall be interpreted [...] with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.') in association with Article 52(7) of the CFR ('The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States).') Also, pursuant to Article 6(2) of the TEU, the European Union has acceded to the ECHR, and pursuant to paragraph 3 of that Article, **fundamental rights, as guaranteed by the ECHR, constitute general principles of the Union's law.** Accordingly, the right of men and women to marry and found a family, referred to in Article 12 of the ECHR, **constitutes, in accordance with national law** governing the application

⁷⁴ Act of 25 February, 1964, Family and Guardianship Code, i.e. of 15 July, 2020 (Journal of Laws of 2020, item 1359).

⁷⁵ Convention for the Protection of Human Rights and Fundamental Freedoms made in Rome on 4 November 1950, later amended by Protocols no. 3, 5 and 8 and supplemented with protocol no. 2.

⁷⁶ European Union Agency for Fundamental Rights, Explanations to Article 9 of the EU Charter of Fundamental Rights, <https://fra.europa.eu/en/eu-charter/article/9-right-marry-and-right-found-family>, (access: 18 January 2021).

of that right, **a general principle of the EU law** and, as such, it is at the top of the regulatory hierarchy (primary law). Secondary law of the European Union is lower in the regulatory hierarchy, as are directives adopted by EU institutions, which 'are only valid if they comply with a law that is higher in the hierarchy.'⁷⁷ Evidently, this note also relates to the provisions of Directive 2004/38/EC, which governs free movement of persons within the European Union. The provisions of this secondary legal act (lower-ranking) cannot be interpreted contrary to higher-ranking norms – in this context, contrary to Article 9 of the CFR and Article 12 of the ECHR, which explicitly confers sole power to govern marriage upon Member States. Moreover, it should be noted that the wording of Directive 2004/38/EC also confirms that its provisions recognise the superiority of the provisions of the CFR ('This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union'⁷⁸).

3.2. Notes on the Judgment of the Court of Justice of the European Union of 5 June 2018 (C-673/16)

The Directive 2004/38/EC, which the Strategy presents as the basis for Member States' obligation to recognise 'marriages' between persons of the same sex in their territory is in fact silent in this matter, and the only possible source of such presumption is the Judgment of the Court of Justice of the EU of 5 June 2018 in case C-673/16 *Coman et al. v Romania*⁷⁹. It should be noted that the Judgment triggered much controversy, its provisions being in utter opposition to both the primary law of the European Union discussed hereinabove and to the existing well-grounded case law of the Court of Justice of the EU. As has been shown, **binding provisions of the primary law of the EU establish the sole power of Member States in matters of substantive family law** (marrying and founding a family). Accordingly, none of the norms of primary law grant the European Union the authority to govern matters of substantive family law, in particular matters relating to the institution of marriage. Lack of such authority was confirmed by judgments of the CJEU in the cases: *Maruko* (2008)⁸⁰, *Römer* (2011)⁸¹, *Frédéric Hay* (2013)⁸² and *David. L Parris* (2016)⁸³.

Referring to the arguments raised by the CJEU in the Judgment in case C-673/16, particular attention should be paid to point 35 of the justification, where the Court expressed its opinion that **'the term 'spouse' within the meaning of Directive 2004/38 is gender-neutral** (emphasis by KG) and may therefore cover the same-sex spouse of the Union citizen concerned.' Next, the Court determined that 'whereas, for the purpose of determining whether a partner with whom a Union citizen has contracted a registered partnership on the basis of the legislation of a Member State enjoys the status of 'family member', Article 2(2)(b) of Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State (...), Article 2(2)(a) of that directive applicable by analogy in the present

77 U. Bux, Fact Sheets on the European Union: 'Sources and scope of European Union law', <https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law>, (access: 18 January 2021).

78 Cf. recital: 31 of the Directive 2004/38/EC.

79 Judgment of the Court (Grand Chamber) of 5 June 2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=PL>, (access: 16 November 2020).

80 CJEU judgment of 01 April 2008, C-267/06.

81 CJEU judgment of 10 May 2011, C-147/08.

82 CJEU judgment of 12 December 2013, C-267/12.

83 CJEU judgment of 24 January 2018, C-433/15.

case does not contain any such reference with regard to the concept of 'spouse' within the meaning of the directive. It follows that a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.' This argument, however, is inconsistent with the Treaties of the European Union, which leave it up to the Member States to rule on matters of substantive family law, as well as with the **wording of Directive 2004/38/EC which, as can be proven, does not extend the term 'spouse' to persons of the same sex.** This assumption is based on an analysis of the origin of that regulation, published on the official website of the European Parliament dedicated to free movement of persons in the EU⁸⁴. It says that '... in a bid to transform the Community into an area of genuine freedom and mobility for all its citizens, **directives were adopted in 1990 in order to grant residence rights to persons other than workers:** [emphasis by KG]. Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity; Council Directive 90/366/EEC on the right of residence for students; and **Council Directive 90/364/EEC on the right of residence** [emphasis by KG] for nationals of Member States who do not enjoy this right under other provisions of Community law and for members of their families. **In order to consolidate different pieces of legislation (including those mentioned above) and take account of the large body of case law linked to the free movement of persons, a new comprehensive directive was adopted in 2004– Directive 2004/38/EC** [emphasis by KG] (...)' This means that the existing Directive 2004/38/EC is not a new regulation that introduces its own new terminology, but instead it is a legal act arising from consolidation of previous corresponding instruments. The former corresponding Council Directive 90/364/EEC was adopted in 1990.⁸⁵ In Article 1(2)(a), it defined a family member as 'his or her spouse and their descendants who are dependants.' Although that definition is similar to the current one, the context in which the definition was created cannot be ignored. At the time when Council Directive 90/364/EEC, which serves as the basis for the existing Directive 2004/38/EC, was adopted, Member States comprising the European Community did not recognise unions that are now referred to as same-sex 'marriages' at all. The available data suggests that it started changing only after 2000⁸⁶. Thus, it is obvious that the term 'spouse' used in 1990 in the legal instrument governing the residence of family members in the European Union did not include same-sex persons (such 'marriages' did not yet exist back then in Member States), contrary to what the CJEU suggests in its Judgment in case C-673/16. Thus, it cannot be accepted that – as the CJEU suggests – Directive 2004/38/EC adopted on the basis of the aforementioned Council Directive 90/364/EEC understands the term 'spouse' as 'gender neutral'. This term evidently refers only to persons of opposite sexes, since only such marriages existed in the Community at the time when the legal instrument governing the rights of family members of holders of the right of residence in Member States was adopted. The opinion of the CJEU has no justification in EU regulations, but results only from the extensive interpretation provided by this court. In fact, the activity of the CJEU in such a situation is an attempt to redefine the concepts to which this body is not entitled.

84 O. Marzocchi, *Swobodny...*, [Free...], op. cit.

85 Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180/26 of 13.7.1990

86 Britannica, *Same-sex marriage*, <https://www.britannica.com/topic/same-sex-marriage>, (access: 29 July 2021).

3.3. The issues of EU powers in matters related to substantive family law

In its controversial Judgment in case C-673/16, the Court also concluded that, ‘... admittedly, a person’s status, which is relevant to the rules on marriage, is a matter that falls within the authority of Member States and EU law does not detract from that authority (...) Nevertheless, it is well-established case-law that, in exercising that authority, Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States.’ In this context it should be noted that the Treaties do not contain any provisions governing the recognition of homosexual ‘marriages’ by Member States. According to the provisions of the TFEU, **the European Union has some authority in family law matters which, however, is limited only to cross-border procedural issues (Article 81(3) of the TFEU), excluding substantive matters (defining, among others, the idea of marriage)**. It is clear that nothing in the Treaties obliges Member States to transcribe same-sex unions in their territory.

The legal measures contemplated in the Strategy that the European Commission might take in order to force Member States to recognise homosexual ‘marriages’⁸⁷ will not only be devoid of legal foundations, but they will also constitute an **unlawful presumption of the EU’s powers**. It must be borne in mind that **the principle of conferral expressed in Article 5(2) of the TEU** obliges EU institutions to ‘act only within the limits of the powers conferred upon it by the Member States in the Treaties to attain the objectives set out therein.’ Meanwhile, ‘... powers not conferred upon the Union in the Treaties remain with the Member States.’ Pursuant to the will of the Member States, matters relating to substantive family law, including marriage and founding families, remain outside the Union’s powers and fall within the exclusive authority of the countries making up the Union. The undertaking of legislative activity by the EU institutions in this area is a breach of the above Treaty regulations.

3.4. Attempt to impose recognition of same-sex couples’ parenthood

3.4.1. Draft regulation

In April 2021, the European Commission announced the commencement of works on a regulation concerning recognition of parenthood between the Member States of the European Union. Draft provisions contained in the document suggest that the goal of the regulation will be to force acceptance of adoptions made by same-sex couples in another state. Despite the fact that pursuant to the EU Treaties the substantive family law falls within the scope of exclusive powers of the Member States, the European Commission plans an in-depth interference in the family law system by forcing the Member States to formally accept a situation where another state has recognised parenthood of same-sex couples. As it was in 2018, in the case concerning the directive on the free movement of persons and the Coman and others v. Romania case, where no amendment to the laws was explicitly ordered, but an attempt was made to force formal

87 ‘If necessary, the Commission will take legal action’. Cf. p. 17 of the Strategy.

acceptance of 'same-sex marriages' at the cost of legal chaos and undermined Member States' constitutional regimes, the regulation currently planned is not supposed to impose any changes to the law on adoptions. Yet, formal acceptance of adoptions made in another state is to be forced in spite of the absence of the relevant legal regulations to that effect in the Member State concerned. The entry into effect of provisions introducing common rules for compatibility of conflicting national regulations on family law and the obligation for Member States to recognise judgments of courts in other states in that subject matter will result in the interference in the substantive family law that falls entirely outside the scope of EU powers.

3.4.2. Consequences of adoption of the solutions proposed

In the case of the regulation at issue, one should remember that – unlike for directives which require implementation in national law – EU regulations are applied directly. It means that countries such as Poland may be forced to recognise the 'parenthood' of two men or two women, if it has been recognised in another state, even though their national laws do not permit it. This would have legal significance not only in matters of border crossing or custody over children, but would have an effect in every area of life. It is not only courts or public authorities but also schools, hospitals and any other institutions that would be forced to recognise parenthood of same-sex couples. In practice, one can easily imagine that this will lead to eradication of the terms 'mother' and 'father' from any and all official documents and replacement thereof with gender-neutral 'parent 1' and 'parent 2' forms. Therefore the arguments put forward by the European Commission, although admitting that indeed the substantive law pertaining to parenthood is governed by the national laws of the Member States, yet at the same time claiming that pursuant to Article 81(3) TFEU the Union may adopt measures regarding family law having cross-border implications, are erroneous. In fact, the objective of the resolution is to lead to amendments in national laws governing the most fundamental issues of a family's everyday life rather than to settle a cross-border issue. However, the powers of the Union, as provided for in Article 81(3) TFEU, relate solely to procedural matters of a cross-border nature and not to substantive family law. This can be inferred directly from the provisions of Article 81(1) and (2) TFEU:

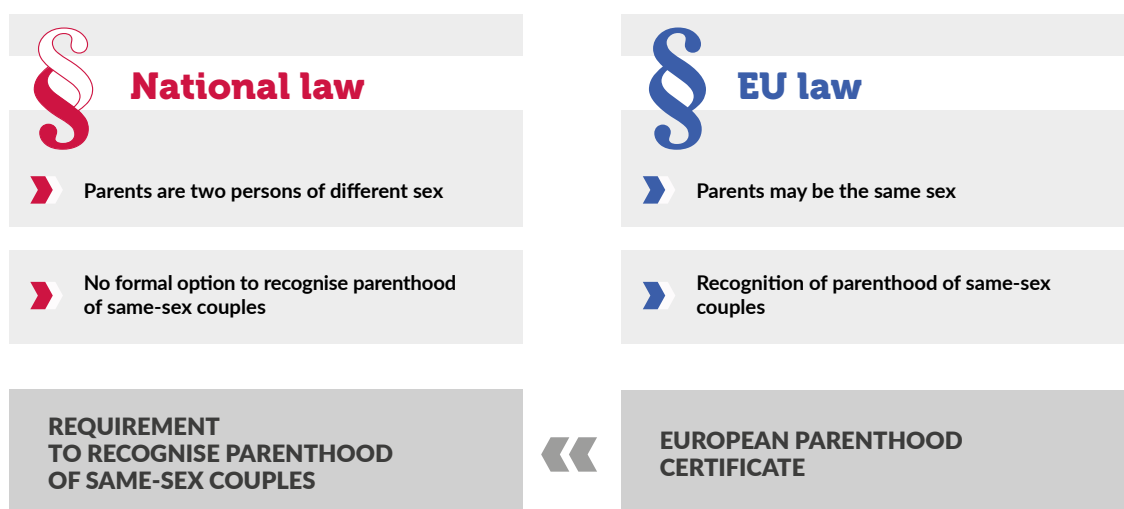
Article 81

1. 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. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
 - a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

- b) the cross-border service of judicial and extrajudicial documents;
- c) the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- d) cooperation in the taking of evidence;
- e) effective access to justice;
- f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- g) the development of alternative methods of dispute settlement;
- h) support for the training of the judiciary and judicial staff.

The foregoing TFEU provisions clearly refer to procedural issues rather than to the subject matter of the law. Given the above, it is evident that the European Union has no powers to enact any regulations in the area of substantive family law, such as definition of marriage or determination of the scope of persons entitled to adopt children, which would be binding on the Member States.

The announced regulation is to also include a solution whereby any objections on the part of states refusing to accept the EU's attempts to interfere in the national law could be circumvented. A lack of possibility to transcribe a foreign registry office record in a situation where the Polish legal system does not provide for the existence of any 'same-sex marriage' or parenthood of any persons other than a woman (mother) and a man (father) is planned to be circumvented by means of implementation of the so-called optional European parenthood certificate. Such certificate would be a form of an alternative birth document to a birth certificate.



The draft regulation is another example of infringement of the Treaty provisions through abuse of the powers granted to the Union's authorities by the Member States. Determination of who may be a spouse and a parent in accordance with the law is a matter of national law. Any attempt to adopt solutions of the type referred to above will be a manifest and, to date, the most flagrant abuse of the powers of the Union.

3.4.3. The ability to object

Therefore, in the event that the works are continued on the draft regulation whereby the EC derives a mandate for its actions from Article 81(3) TFEU, the form of defence against such unjustified interference in family law should be met with a strong objection from the Member States. A decision on the works is to be taken by the Council which must act unanimously. If consent is not granted by at least one Member State, proceeding with the draft regulation can be stopped already at this stage. Should no such objection be raised, however, recognition by the Council of objections submitted by national parliaments at any further stage of the works, in accordance with the procedure stipulated in Article 81(3) TFEU, shall result in a rejection of the 'decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.'

3.5. Legislative procedure in matters of family law

It is worth noting that family law cases involve **sensitive issues**, and therefore with regard to procedural issues (only) EU law provides for a **special legislative procedure**. This is set forth directly in Article 81(3) of the Treaty on the Functioning of the European Union, according to which measures concerning procedural family law with cross-border implications (within the framework of judicial cooperation in civil matters having cross-border implications – Article 81(1) of the TFEU), by derogation from the general rule expressed in paragraph 2 of that Article, are established by the Council, acting in accordance with a special legislative procedure. This means that **legislative acts of the Council involving procedural family law require unanimity across all Member States**. Meanwhile, the Council's authority in this area (and the corresponding authority of the European Commission as the initiator of legislative acts) is restricted to matters having cross-border implications (Article 81(1) of the TFEU) and does not extend to substantive regulations. Substantive law is established by Member States in accordance with their internal legislative procedures (Article 5(2) *in fine* of the TEU). The requirement of unanimity in family matters is not affected by the provisions of Article 81(3)(2) of the TFEU, which provides that 'the Council, on a proposal from the Commission, may adopt a decision determining those aspects of [procedural – note by KG] family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.' In this case as well **'the Council shall act unanimously** after consulting the European Parliament.' Moreover, in light of Article 81(3)(3) of the TFEU, the proposal of the Commission is notified to the parliaments of the Member States, which may express their opposition to such a decision envisioned by the Council. In the case of opposition, the Council cannot adopt a decision concerning those matters of procedural family law that may be subject to ordinary legislative procedure.

The above provisions of the TFEU confirm the will of the Member States to limit the legislative role of the EU, and thereby its interference in procedural matters regarding sensitive family issues.

It is therefore all the more unacceptable to assume that the European Union is competent to govern family (matrimonial) matters of a substantive nature in general, and specifically that its bodies may undertake any legislative acts in this respect without the prior express approval of all Member States.

3.6. Legal orders of EU Member States regarding transcription of foreign marriage certificates of same-sex persons and adoption of children by homosexual couples

A. States that do not recognise civil partnerships or same-sex 'marriages'

1) Poland

The transcription of foreign vital records is limited in two ways. The first limitation are the provisions of Polish law that specify the kind of data that may be included in Polish vital records – such as a birth certificate or marriage certificate. The second are the factors that make transcription impossible, such as the fundamental principles of the legal order of the Republic of Poland.

With regard to the former, it should be noted that the legislator deliberately determined that a birth certificate should contain information about the father, mother, and marital status – information about the man and woman. Accordingly, the prohibition to make any other entries in a transcribed certificate is due not only to technical limitations (there is no relevant field in the form, e.g. a 'parent' field), but it is also the consequence of a deliberate decision of the Polish constitutional law-maker and of the legislator, who follows the same path as the former. Also, given that the transcription of a foreign vital record means 'rewriting' that record, it should be assumed that transcription is only possible if a record complies with Polish legal standards and requirements. Otherwise, it would not be 'rewriting' but circumventing the provisions of Polish general law.

In Polish constitutional reality, it is unacceptable to grant any legal significance under family law, in particular a legal position similar to marriage, to any other relationships, regardless of their alternative or competitive nature and internal subjective composition (persons of the same or different sex). It is equally inadmissible to allow same-sex couples to adopt children.

Therefore, the head of the Registry Office is obliged to refuse to transcribe a foreign marital status certificate, which confirms an event unknown to Polish law, which is the parentage ('implicit adoption') of a child by a person of the same sex as the mother (father) or marriage between people of the same sex. At the same time, it should be noted that some judgments of Polish administrative

courts have allowed such transcriptions⁸⁸. Nonetheless, the Supreme Administrative Court has unequivocally rejected such a line of case law in a resolution of seven judges⁸⁹, stating that such a transcription – inconsistent with the fundamental principles of the Polish legal order – is inadmissible.

Considering the above, recognition of a marriage certificate, registration of a civil partnership or child adoption by same-sex couples is inadmissible in Poland. This matter is strongly rooted in the Polish Constitution, and has been settled both at the legislative level and in the case law of administrative courts. Considering the above, it should be concluded that the proposals made by the Commission are inconsistent both with EU law, by undermining the principle of subsidiarity and trespassing the powers conferred upon the EU by the Treaties, and with Polish national law.

2) Romania

Romanian law does not allow same-sex ‘marriages’ or any form of civil partnerships⁹⁰.

Same-sex ‘marriages’ and civil partnerships formed in another country are not recognised either, since Article 277(1)–(3) of the Romanian Civil Code explicitly states that Romania shall not recognise ‘marriages’ between persons of the same sex or ‘civil partnerships’ formed in another country, either by Romanian citizens or by foreign citizens⁹¹. Following the Judgment of the European Court of Justice in the case *Coman et al.*, which confirmed that the right of same-sex couples to reside in EU Member States is equal to the right of married couples, even when a given State does not recognise single-sex unions, Romania recognises same-sex ‘marriages’ and other formal partnerships formed in another State solely with respect to the right of residence, and not in any other aspects thereof. Romania recognises marriage (the union of a man and woman) as the foundation for a family, natural parenthood and adoption. Nonetheless, the adoption procedure does not require an adoptive parent to be heterosexual. However, there is no path available to same-sex couples to adopt children and it is impossible to adopt a partner’s child⁹².

3) Bulgaria

Bulgarian law does not allow same-sex ‘marriages’ or any form of civil partnerships. The Bulgarian Constitution explicitly prohibits recognition of same-sex ‘marriages’. Nonetheless, following the CJEU Judgment in the case *Coman et al.*, the court in Sofia granted the right of residence to the first same-sex couple, which entered into ‘marriage’ outside of Bulgaria pursuant to the Directive 2004/38/EC. The Judgment was upheld by the Supreme Administrative Court. Same-sex couples do not have the right to adopt children. Individual adoption is possible regardless of sexual orientation.

88 Judgment of the Supreme Administrative Court of 10 October 2018, case ref. II OSK 2552/16; Judgment of the Voivodship Administrative Court in Krakow of 10 May 2016, case ref. III SA/Kr 1400/15; Judgment of the Voivodship Administrative Court in Gdansk of 14 January 2016, case ref. III SA/Gd 835/15; Judgment of the Voivodship Administrative Court in Gliwice of 6 April 2016, case ref. II SA/Gl 1157/15; Judgment of the Voivodship Administrative Court in Krakow of 10 May 2016, case ref. III SA/Kr 1400/15; Judgment of the Voivodship Administrative Court in Poznan of 5 April 2018, case ref. II SA/Po 1169/17.

89 Resolution of the Supreme Administrative Court of 2 December 2019, case ref. II OPS 1/19.

90 Cf. *Codul Civil din 17 iulie 2009*, Article 258(4), Article 259(1), Article 271, <http://legislatie.just.ro/Public/DetaliuDocument/175630>, (access: 08/01/2021), hereinafter: ‘Romanian Civil Code’.

91 *Ibid.*, article 277(1)–(3).

92 LEGE nr. 273 din 21 iunie 2004 privind regimul juridic al adoptiei EMITENT: PARLAMENTUL PUBLICAT IN: MONITORUL OFICIAL nr. 557 din 23 iunie 200, <https://www.protectiacopilului6.ro/Files/legislatie/legislatie-protectia-copilului/11.2008/LEGENr273.pdf>, (access: 19/01/2021).

4) Lithuania

Lithuanian law does not allow same-sex 'marriages' or any form of civil partnerships. The Lithuanian Civil Code explicitly prohibits same-sex 'marriages'. In January 2019, the Lithuanian Supreme Court ruled that, as a consequence of the Judgment of the CJEU in the case *Coman et al.*, Lithuania is obliged to grant the right of residence to same-sex 'marriages' and partnerships pursuant to the Directive 2004/38/EC⁹³.

Adoption is only available to married couples. The Civil Code may offer a loophole, though, as in Article 3.210 it allows adoption by single persons in exceptional circumstances – and it is up to social workers to evaluate the situation and make a decision in individual cases.

5) Latvia

Latvian law does not allow same-sex 'marriages' or any form of civil partnerships⁹⁴.

Latvia recognises same-sex 'marriages' and other institutionalised relationships only to the extent imposed by the Judgment of the CJEU in the case *Colman et al.*, i.e. regarding the right of residence. In Latvia, every citizen above the age of 25 can adopt a child. Thus, individual adoption is possible, regardless of sexual orientation. However, only married couples can adopt the same child jointly⁹⁵.

6) Slovakia

Slovakian law does not allow same-sex 'marriages' or any form of civil partnerships⁹⁶.

Slovakia recognises same-sex 'marriages' and other institutionalised relationships only to the extent imposed by the Judgment of the CJEU in the case *Colman et al.*, i.e. regarding the right of residence. Homosexual couples cannot adopt children. It is impossible to adopt a child whose biological parent is the partner of the adoptive parent⁹⁷.

7) Ukraine

Ukrainian law does not allow same-sex 'marriages' or any form of civil partnerships⁹⁸.

No forms of same-sex unions institutionalised in another state are recognised.

93 Lietuvos Respublikos Konstitucinis Teismas Lietuvos Respublikos Vardu Nutarimas Del Lietuvos Respublikos Įstatymo „DĖL UŽSIENIEČIŲ TEISINĖS PADĖTIES“ 43 STRAIPSNIŲ 1 DALIES 5 PUNKTO ATITIKTIES LIETUVOS RESPUBLIKOS KONSTITUCIJAI 2019 m. sausio 11 d. Nr. KT3-N1/2019 Vilnius, <https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta1898/content>, (access: 20 January 2021).

94 LATVIJAS REPUBLIKAS LIKUMS Civillikums, art. 35, <https://likumi.lv/ta/id/225418-civillikums>, (access: 19/01/2021), hereinafter: 'Latvian Civil Law' and Latvijas Republikas Satversme, Article 110, <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme>, (access: 19 January 2021), hereinafter: 'Latvian Constitution'.

95 Latvian Civil law, Otrā apakšnodāja: Adopcija.

96 ÚSTAVA SLOVENSKEJ REPUBLIKY z 1. septembra 1992, Čl. 41, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/#ustavnyclanok-107>, (access: 19 January 2021), hereinafter: 'Slovakian Constitution'.

97 Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov, <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/36/20170701>, (access: 21 January 2021), Zákon č. 305/2005 Z. z. o sociálnoprávnej ochrane detí a o sociálnej kuratele a o zmene a doplnení niektorých zákonov, <https://www.zakonypreludi.sk/zz/2005-305>, (access: 21 January 2021).

98 Конституція України (Відомості Верховної Ради України (ВВР), 1996, № 30, ст. 141), Стаття 51, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1143222355067739#Text>, (access: 21 January 2021), hereinafter the 'Ukrainian Constitution'.

Same-sex couples do not have the right to adopt children jointly (the prohibition is expressed explicitly in Article 211 of the Family Code). However, individual adoption is legal regardless of sexual orientation. Only foreign heterosexual couples can adopt Ukrainian children⁹⁹.

B. States that recognise civil partnerships but not same-sex 'marriages'.

8) Estonia

Estonian law does not allow same-sex 'marriages'. However, since 2016, it has allowed civil partnerships in the form of 'cohabitation agreements'.

Same-sex 'marriages' formed in another State should not be recognised in Estonia, since, according to Article 7 of the International Private Law¹⁰⁰, foreign laws do not apply if the results of their application are manifestly contrary to the fundamental principles of Estonian law (public order) – in such a case Estonian law applies. In an explanation of this Law, the legislator explicitly stated that one such conflict with the public order would be marriage between persons of the same sex. Thus, the legislator's intention was evidently to make foreign same-sex 'marriages' not recognised by the Estonian legal order. Article 55 of the above Law says that: 'marriages formed in another State are recognised in Estonia if they were formed in accordance with the marriage procedure provided for in the law of the State where they were formed (...)', yet, in light of Article 7 and its interpretation by the legislator, it should be noted that Article 55 does not apply to same-sex 'marriages'. By way of judicial activism, a number of judgments were issued in which courts recognised 'same-sex' marriages as valid in light of Estonian law. These judgments encountered fierce opposition and accusations of violating the law, ignoring the will explicitly expressed by the legislator, and grossly misinterpreting existing legal regulations in a way that altered their meaning¹⁰¹. The main argument used by courts in these judgments was that a lot of time had passed since the enactment of the Law (although it was only in 2002), which allegedly allowed for a departure from the interpretation made by the legislator. Given the developing judicial activism in that direction, Estonia is working on amending the Constitution to define marriage as a union between a man and a woman only. For April 2021, a referendum on the proposed amendment of the Constitution was planned, however on 13 January 2021, a draft resolution to call a referendum on the definition of marriage was defeated by 26 to 49 at second reading.

Everyone, regardless of sexual orientation, can apply individually to adopt a child. A same-sex couple may adopt a child jointly if that child is a biological offspring of one of the partners. If both partners in a same-sex couple are infertile, they can adopt a child who is not related to either of them.

99 Сімейного кодексу України, (Відомості Верховної Ради України (ВВР), 2002, № 21-22, ст.135), Стаття 211, <https://zakon.rada.gov.ua/laws/show/2947-14#Text>, (access: 20 January 2021), hereinafter: 'Ukrainian Family Code'.

100 *Rahvusvahelise eraõiguse seadus Vastu võetud*, 27.03.2002, RT I 2002, 35, 217 jõustumine 01.07.2002, <https://www.riigiteataja.ee/akt/13242136>, (access: 8 January 2021).

101 More on judgments, social reaction and legal counterarguments see V. Vooglaid, *Kohtulik aktivism abielu moiste moonutemisel. Kommentaar Tallinna Ringkonnakohtu, 24. Novembri 2016. A otsusele asjas Ats Joorits vs. Harju Maavalitsus (3-15-2355)*, https://www.juridica.ee/article.php?uri=2018_1_kohtulik_aktivism_abielu_m_iste_moonutemisel_kommentaar_tallinna_ringkonnakohtu_24_novembri_2, (access: 19 January 2021).

Otherwise, a same-sex couple cannot adopt a child who is not related to them, as the law restricts such adoption to married couples only¹⁰².

9) Hungary

Hungarian law does not allow same-sex 'marriages'. However, since 2009 it has allowed civil partnerships in the form of 'registered civil partnerships'¹⁰³.

In 2018, a court in Budapest issued a ruling determining that Hungary should recognise same-sex 'marriages' formed in another State as equivalent to registered civil partnerships, which are the only institutionalised form of same-sex union available in Hungary¹⁰⁴.

Same-sex civil partners cannot adopt children jointly. Individual adoption (by one person) is illegal in Hungary, regardless of one's sexual orientation. Adoption of a partner's biological child is only available to the spouse of a child's parent (therefore it applies only to heterosexual couples). In December 2020, the Hungarian Constitution was amended to make adoption of children by same-sex couples impossible¹⁰⁵.

10) Croatia

Croatian law does not allow same-sex 'marriages'. Since 2003, same-sex and opposite-sex couples, after three years of cohabitation, acquire some of the rights available to married couples¹⁰⁶.

'Marriages' and other institutionalised forms of same-sex unions are recognised in Croatia on par with civil partnerships formed in Croatia. The same applies to unregistered unions of partners of the same sex that have existed for at least 3 years.

Same-sex couples do not have an official right of joint adoption and do not acquire that right after having cohabited for more than three years. However, individual adoption is legal regardless of sexual orientation as well as biological adoption of the child of the adoptive parent's partner. In 2019, the Administrative Court abrogated the decision of social services to dismiss a petition for adoption of a same-sex couple, which the LGBTIQ interpreted as a step towards easier access to adoption¹⁰⁷.

11) Czech Republic

Czech law does not allow same-sex 'marriages' but civil partnerships exist¹⁰⁸.

102 *Perekonnaseadus* Vastu võetud 18.11.2009 RT I 2009, 60, 395 jõustumine 01.07.2010, chapter 11, <https://www.riigiteataja.ee/akt/127062012012>, (access: 8 January 2021).

103 *Magyarország Alaptörvénye* (2011. április 25.), L) cikk, <https://net.jogtar.hu/jogszabaly?docid=a1100425.atv>, (access: 21/01/2021), hereinafter: 'Hungarian Constitution'.

104 *Budapest court rules foreign same-sex marriages must be recognised in Hungary*, <https://www.ilga-europe.org/resources/news/latest-news/budapest-court-equal-marriage>, (access: 08 January 2021).

105 Hungarian Constitution, L) cikk.

106 *Zakon o životnom partnerstvu osoba istog spola* NN 92/14, <https://www.zakon.hr/z/732/Zakon-o-%C5%BEivotnom-partnerstvu-osoba-istog-spola>, (access: 20 January 2021).

107 *Hrvatska nije dozvolila gej parovima da usvajaju decu, već da budu hranitelji*, <https://www.raskrikavanje.rs/page.php?id=Hrvatska-nije-dozvolila-gej-parovi-ma-da-usvajaju-decu-vec-da-budu-hranitelji-564>, (access: 20/01/2021).

108 *ZÁKON ze dne 26. ledna 2006 o registrovaném partnerství a o změně některých souvisejících zákonů*, <https://www.zakonyprolidi.cz/cs/2006-115>, (access: 19/01/2021).

Same-sex marriages formed in another State are treated as civil partnerships. Same-sex couples cannot jointly adopt a child. Adoption of the biological child by the adoptive parent's partner is also impossible. Regardless of sexual orientation and being or not being in a civil partnership, individual adoption is possible¹⁰⁹.

12) Greece

The law does not allow same-sex 'marriages' but civil partnerships exist¹¹⁰.

Same-sex 'marriages' formed in another State are recognised pursuant to the Judgment of the CJEU in the case *Coman et al.* with respect to the right of residence, and otherwise they are treated as civil partnerships. Same-sex couples (civil partnerships) can be foster parents jointly and work is in progress to enable joint adoption. Individual adoption is possible regardless of one's sexual orientation¹¹¹.

13) Italy

Same-sex 'marriages' are not allowed, but civil partnerships were introduced in 2016¹¹².

In 2018, the Court of Cassation ruled that marriages of same-sex persons formed in another State cannot be recognised in Italy. Instead, couples must register their unions as civil partnerships, regardless of whether they married before or after the introduction of civil partnerships in Italy¹¹³.

Foster care is available to everyone. Adoption is primarily reserved for opposite-sex marriages. In special circumstances, individual adoption is possible. For example, when one partner wishes to adopt the biological child of the other partner (both of the same and opposite sex)¹¹⁴.

C. Conclusions

The legal situation regarding the matters discussed herein differs between countries in Europe. Many States do not offer any possibilities for same-sex partners to marry or form a civil partnership. Civil partnerships exist in most Member States, but same-sex marriages cannot be formed or recognised. Most States also prohibit adoption by same-sex couples.

109 Nález č. 234/2016 Sb. *Nález Ústavního soudu ze dne 14. června 2016 sp. zn. Pl. ÚS 7/15 ve věci návrhu na zrušení § 13 odst. 2 zákona č. 115/2006 Sb., o registrovaném partnerství a o změně některých souvisejících zákonů*, <https://www.zakonyprolidi.cz/cs/2016-234>, (access: 21/01/2021).

110 ΣΧΕΔΙΟ ΝΟΜΟΥ «ΣΥΜΦΩΝΟ ΣΥΜΒΙΩΣΗΣ ΚΑΙ ΑΛΛΕΣ ΔΙΑΤΑΞΕΙΣ», <http://www.opengov.gr/ministryofjustice/wp-content/uploads/downloads/2015/11/Asymfonosimvioshs.pdf>, (access: 22/01/2021).

111 ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4538/2018, ΦΕΚ 85/Α/16-5-2018, Μέτρα για την προώθηση των Θεσμών της Αναδοχής και Υιοθεσίας και άλλες διατάξεις, <https://www.e-nomothesia.gr/oikogeneia/nomos-4538-2018-phek-85a-16-5-2018.html>, (access: 19/01/2021).

112 Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, (16G00082) (GU Serie Generale n.118 del 21-05-2016), <https://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg>, (access: 20/01/2021).

113 Matrimonio omosessuale all'estero: unico riconoscimento italiano passa dal downgrading (11696/18), <https://canestrinilex.com/risorse/matrimonio-omosessuale-allestero-unico-riconoscimento-italiano-passa-dal-downgrading-1169618/>, (access: 18 January 2021).

114 Repubblica Italiana La Corte Suprema Di Cassazione Prima Sezione Civile, Composta dagli Ill. Mi Sigg. Re Magistrati, Ud. 04/02.2019 CC, Cron. 17100, R.G.N. 17612/2017, <https://www.aiaf-veneto.it/wp-content/uploads/2019/07/Cass.-Civ.-17100-2019.pdf>, (access: 19 January 2021).

A.

States that do not recognise civil partnerships or same-sex 'marriages'

Romania:

- same-sex 'marriages' and all forms of civil partnerships are illegal;
- same-sex unions formed in another state are not recognised;
- there is no path available to same-sex couples to adopt children and it is impossible to adopt the partner's child.

2

Bulgaria:

- same-sex 'marriages' and all forms of civil partnerships are illegal;
- Article 46 of the Bulgarian Constitution defines marriage as the union of a man and a woman;
- same-sex couples cannot adopt children

3

Lithuania:

- same-sex 'marriages' and all forms of civil partnerships are illegal;
- the Lithuanian Civil Code explicitly defines marriage as the union of a man and a woman;
- adoption is, in principle, only available to married couples.

4

Latvia:

- same-sex marriages are illegal;
- same-sex unions are illegal;
- only married couples can adopt children.

5

Slovakia:

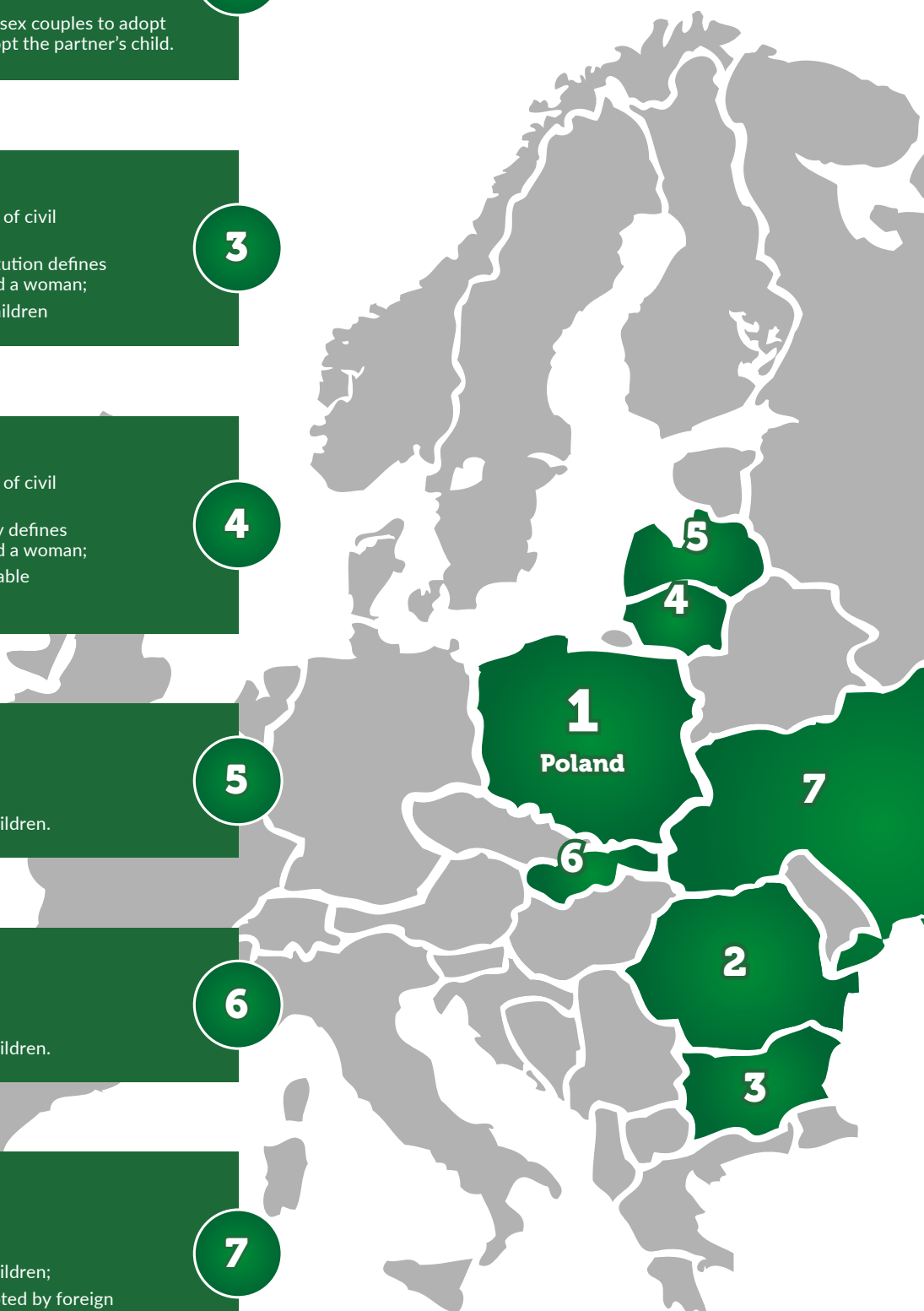
- same-sex marriages are illegal;
- same-sex unions are illegal;
- only married couples can adopt children.

6

Ukraine:

- same-sex marriages are illegal;
- same-sex unions are illegal;
- only married couples can adopt children;
- Ukrainian children cannot be adopted by foreign homosexual couples.

7



B.

States that recognise civil partnerships but not same-sex 'marriages'

Estonia:

- civil partnerships have been legal since 2016;
- same-sex marriages are illegal;
- same-sex marriages formed in another State are not recognised;
- same-sex couples can adopt children.

8

Hungary:

- same-sex marriages are illegal;
- civil partnerships have been legal since 2009;
- same-sex marriages formed in another State are recognised as civil partnerships in Hungary;
- same-sex couples cannot adopt children.

9

Croatia:

- same-sex marriages are illegal;
- civil partnerships are legal;
- same-sex marriages formed in another State are recognised as civil partnerships in Croatia;
- homosexual couples cannot adopt children; individual or biological adoption is allowed.

10

Czech Republic:

- same-sex marriages are illegal;
- civil partnerships are legal;
- same-sex marriages formed in another State are recognised as civil partnerships in the Czech Republic;
- homosexual couples cannot adopt children; individual adoption is allowed.

11

Greece:

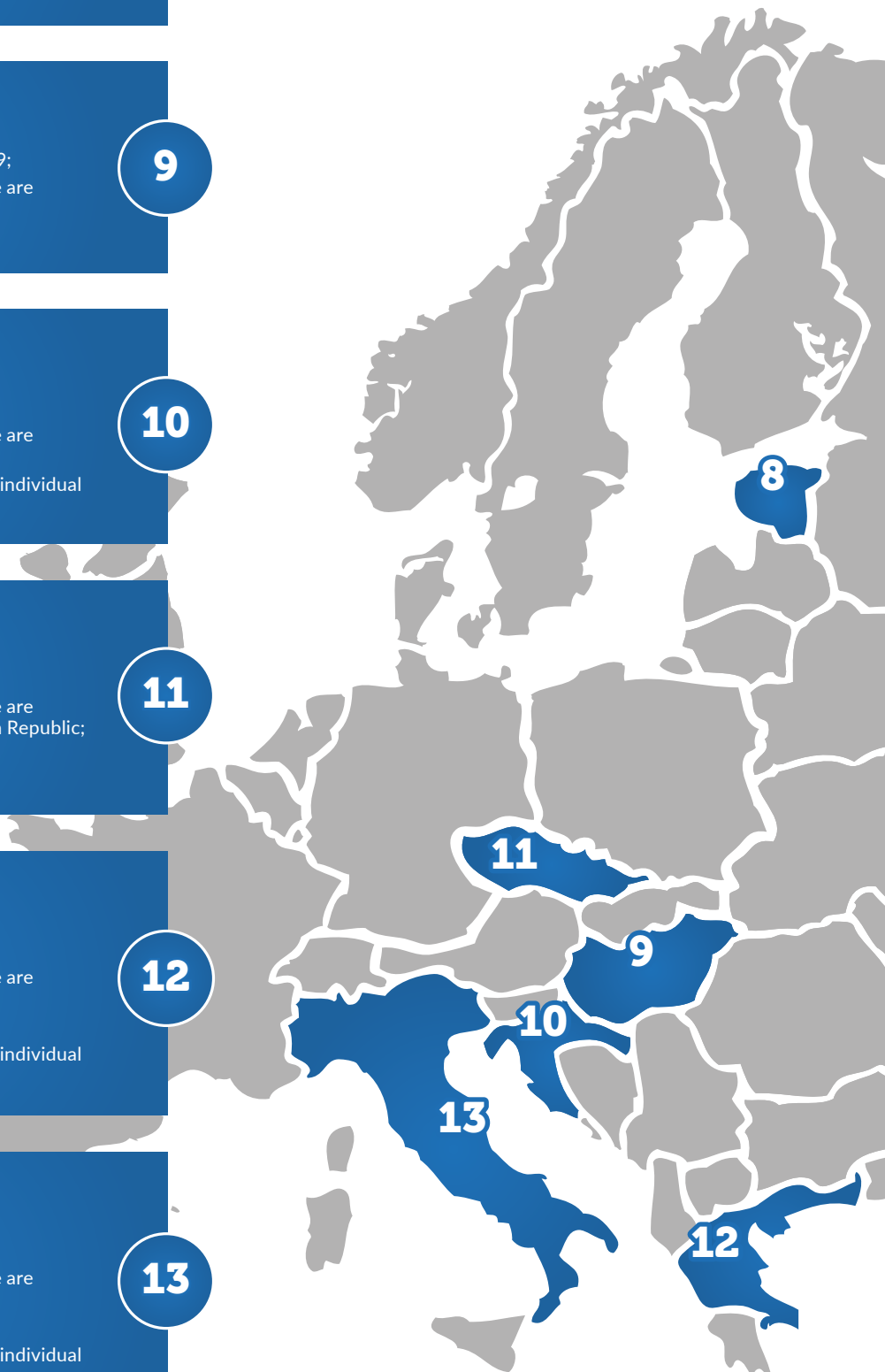
- same-sex marriages are illegal;
- civil partnerships are legal;
- same-sex marriages formed in another State are recognised as civil partnerships in Greece;
- foster care is available to same-sex couples;
- homosexual couples cannot adopt children; individual or biological adoption is allowed.

12

Italy:

- same-sex marriages are illegal;
- civil partnerships are legal;
- same-sex marriages formed in another State are recognised as civil partnerships in Italy;
- foster care is available to everyone;
- homosexual couples cannot adopt children; individual or biological adoption is allowed.

13



VI. Summary

In recent years, the European social policy and activities of NGOs have shown an increasing focus on persons struggling with issues related to sex and sexual orientation. However, the latest studies show that this policy is not effective. In States that have gone to great lengths to shake the fundamental family structures, and hamper the freedom of speech, conscience, and economic activity, the percentage of persons of different sexual orientations who experience discrimination in the most important aspects of life remains high. The reason why these policies are unsuccessful is the erroneous approach to combating discrimination, based on ideological factors instead of on empirical facts. Unfortunately, the European Commission's Strategy repeats the unsuccessful models taken from some of the European States. The Commission's vision of anti-discrimination policy is based on illegitimate and irrelevant – in view of the Treaties – doctrine and case law interpretation of the concepts of 'equality' and 'discrimination'.

It should be recalled once again that in the existing legal orders of the Member States and the European Union, there are guarantees of equality before the law and non-discrimination, deeply rooted in the European legal, doctrinal, and case-law *acquis*. However, one should also bear in mind the actual meaning of the principle of equality before the law – assuming equal treatment of people in a similar factual and legal situation, unless there is objective reason not to. Moreover, EU attempts at compliance with this principle are limited by the powers granted by Member States in specific fields and by the principles of proportionality and subsidiarity. In reference to the demands to introduce into EU Member States the so-called 'same-sex marriages' or another kind of registered same-sex partnerships as an element of combating discrimination, it must be noted that they are groundless for two reasons. Firstly, homosexuals are not in a factual situation comparable to heterosexuals. Secondly, shaping substantive family law falls under the exclusive authority of EU Member States. Therefore, there are no legal grounds for claims regarding LGBTIQ+ discrimination in countries not recognising formal same-sex partnerships, or demands that the European Union should introduce such laws. Meanwhile, it is worth mentioning that the preferential financing of LGBTIQ organisations and social projects addressing strictly this area is a contradiction of the principle of equality before the law and non-discrimination.

Significant doubts are also raised by the increasingly frequent use of an expanding interpretation of the term 'hate speech', which is not defined in international law. The idea of combating 'hate speech', legitimised by the common disapproval of hatred, **involves, without any precision, many more behaviours than those which the advocates of improving the public debate culture want to counteract.**

It actually leads to the eradication of opinions that are entirely legitimate in the public debate. This problem concerns, in particular, the criticism of LGBTIQ organisations' activities, which is a priori considered 'homophobic', without any deeper analysis of its content. This contradicts one of the foundations of a democratic society – the freedom of speech and opinion.

The demands made by LGBTIQ circles and the European Commission to implement in companies and public administration offices so-called Diversity Charters, whose aim is to grant certain privileges to people who identify as LGBTIQ, are also illegitimate. They pose a real threat of discrimination of those who do not share such views and of the implementation of mechanisms that in fact violate EU and national laws.

To sum up, the Strategy published by the European Commission is an inadequate instrument and, in many aspects, it exceeds the powers conferred upon the European Union. Its application should be limited only to the implementation of postulates consistent with treaty law and human rights. Attempts to interfere in the family laws of Member States by forcing them to recognise same-sex unions established in another State are groundless and constitute a violation of EU powers and the autonomy of Member States.

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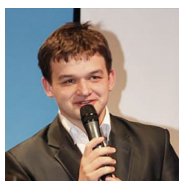
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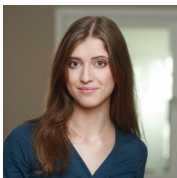
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On 12 November 2020, the European Commission announced the adoption of the first European Union LGBTIQ Equality Strategy (hereinafter: the Strategy). Never before had the Commission taken a stance on these matters through an official document. Even though the Commission's Strategy is non-binding, it sets the direction for the Commission's policy and is relevant to the interpretation of current legislation.

The Strategy tries to introduce new concepts and categories of law that are not justifiable by the applicable norms and for which there is no consensus among EU Member States. These attempts are also a manifestation of unauthorised attempts to exceed the EU's powers formulated in the Treaties and to violate the principle of proportionality and subsidiarity. It is particularly outrageous that the Commission's Strategy includes false information that has been disseminated in the public domain by radical activists that supposedly there are "LGBT-free zones" in Europe (implicitly in Poland).

According to the latest studies published by the European Union Agency for Fundamental Rights (hereinafter: "the FRA"), the Commission's model of combating discrimination is not effective. In countries that have implemented anti-discriminatory policies founded on thorough reconstruction of family law and interference in the freedom of speech and economic activity, the scale of discrimination experienced by persons with homosexual inclinations or gender identity disorders is significantly higher than in countries like Poland, that have refrained from such actions.

This report analyses the latest FRA surveys based on feedback from nearly 140,000 respondents. Its subsequent parts discuss – from a number of perspectives – the most controversial concepts and proposals [stipulated in the Commission's Strategy]. At first, the report focuses on the analysis of existing provisions of international law governing equality before the law and the fight against discrimination. Subsequently, it examines the principles of proportionality and subsidiarity. Having these principles in mind, the focus of the report then shifts to the review of relevant case law and legal doctrine which are applicable to the respective pillars of the Strategy. Finally, the authors point out the most objectionable proposals laid down in the Strategy.

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