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Promotion of Equality and Protection against Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union¹

1. Introduction

The EU initially had little focus on lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) rights, reflecting the limited awareness of sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) issues in the 1950s and 1960s. It took years for legal improvements for LGBTIQ persons to take place, despite events like the 1969 Stonewall riots. Differences among EU Member States, shaped by history and religion, still complicate unified LGBTIQ protections.²

Although the EU's original focus was economic integration (possibly as a means to ensure peace, democracy, and the rule of law in Europe³), it rapidly expanded to address human rights, since a truly integrated market very quickly involves these issues. This includes protecting LGBTIQ persons' right to move freely across Europe and work without experiencing discrimination,⁴ and can even play a role for non-discrimination

¹ This article is an abridged and updated version of A.R. Ziegler, "The European Union as a Protector and Promoter of Equality: Discrimination on Grounds of Sexual Orientation and Gender Identity" [in:] *The European Union as Protector and Promoter of Equality: European Union and its Neighbours in a Globalized World*, vol. 1, ed. T. Giegrich, Cham 2020.

² See, for example, infringement procedure against Hungary.

³ See: D.U. Stikker, "The Functional Approach to European Integration," *Foreign Affairs* 1951, vol. 29, no. 1, pp. 436–444.

⁴ See: A.R. Ziegler, "LGBT Rights and Economic Migration: Will the Liberalization of the Movement of Persons in Economic Integration Agreements Increase the Need for Common Regional Standards Regarding Civil Status Rights?" [in:] *Equality and Justice – Sexual Orientation and Gender Identity in the XXI Century*, ed. A. Schuster, Udine 2011, pp. 219–240.

issues in the regulation of goods and services.⁵ While the EU has no competence in criminal or family law, it still influences these areas indirectly through employment and free movement protections. Additionally, the EU's foreign policy, though less developed, is beginning to address LGBTIQ concerns, particularly regarding asylum protections for individuals persecuted for their sexual orientation or gender identity.

2. Legal foundations in the treaties

There are a few treaty provisions that are key for the protection of LGBTIQ persons in the EU.

Article 2 of the Treaty on European Union (TEU), adopted in 2007, highlights the respect for human dignity, minority rights, pluralism, non-discrimination, and tolerance, all of which are vital in discussions about LGBTIQ rights.⁶ Article 3.3 TEU focuses on combating social exclusion, discrimination, and promoting cultural diversity, which can be interpreted both in favour of and against the acceptance of different lifestyles.

However, it is Article 10 and Article 19 of the Treaty on the Functioning of the European Union (TFEU) that most directly address the protection of sexual minorities. Article 10 TFEU aims to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. This provision is notable because it is rare for Constitutions, even in EU Member States, to explicitly mention "sexual orientation."⁷ Article 10 TFEU must be read in conjunction with Article 19 TFEU, which gives the EU power to take action against such discrimination, but this requires unanimous agreement from Member States and the consent of the European Parliament, which can make progress difficult because of differing government stances.

Additionally, Article 6 TEU refers to the Charter of Fundamental Rights of the European Union, which prohibits discrimination based on sexual orientation in Article 21. While this was revolutionary when adopted, it is now seen as lacking specificity for intersex and trans persons, who are not explicitly mentioned.⁸ However,

⁵ See for details: R. Wintemute, "European Law Against Discrimination on Grounds of Sexual Orientation" [in:] *Same-Sex Relationships and Beyond – Gender Matters in the EU*, eds. K. Boele-Woelki, A. Fuchs, Cambridge 2017, pp. 180–203; D. Pudzianowska, K. Śmiszek, *Combating Sexual Orientation Discrimination in the European Union*, Luxembourg 2015.

⁶ See, for example, the language used in the so-called Yogyakarta Principles, a set of principles developed by LGBTIQ activists in 2007 (updated in 2017) that relate the specific situation of LGBTIQ persons to the more general discussion of human rights, available at: <https://yogyakartaprinciples.org> [accessed: 12.01.2026].

⁷ As an example, one can mention the revised Swiss Constitution of 1999 where the word "lifestyle" was used to avoid clear reference to "sexual orientation" (and even more so to "gender identity").

⁸ See below for a discussion of the parallel development of a Directive establishing a general framework for equal treatment in employment and occupation in 2000.

the European Court of Justice has addressed some of these gaps in its case law, though opinions vary on whether the Court has done enough.⁹

3. EU actors

Based on the provisions discussed above, EU institutions have adopted specific instruments, and the ECJ has referred to them in its case law, which is covered in the next section. A more political approach is taken by the European Parliament, which frequently adopts declarations on LGBTIQ rights both within Member States and globally.¹⁰ Notably, the Parliament often issues (non-legislative) resolutions and declarations when other EU institutions or Member States are reluctant or unable to act.¹¹ In this context, the “European Parliament – Intergroup on LGBTIQ Rights”¹² also plays a key role in making sure that LGBTIQ issues are included in the work of the Parliament.

In 2020, the Commission adopted the “LGBTIQ Equality Strategy 2020–2025,”¹³ the first strategy specific to LGBTIQ equality. The strategy outlines a range of measures to enhance efforts, integrate LGBTIQ equality across all policy domains, and amplify the voices of LGBTIQ minorities.¹⁴ An updated strategy is part of the political guidelines for 2024–2029.¹⁵ Unfortunately, the Commission is inconsistent in its willingness to protect LGBTIQ persons, as is discussed below.

Among the special institutions created to better protect human rights, the European Union Agency for Fundamental Rights (FRA) in Vienna¹⁶ and the European Institute for Gender Equality (EIGE) in Vilnius stand out. This is notably so as “sexual orientation” is specifically referred to in the establishment of EIGE, though other SOGIESC criteria are not mentioned.¹⁷ Additionally, NGOs like ILGA Europe (based in Brussels)¹⁸ and

⁹ See: H. De Waele, A. Van der Vleuten, “Judicial Activism in the European Court of Justice: The Case of LGBT Rights,” *Journal of International Law and Practice* 2011, vol. 19, pp. 639–666.

¹⁰ For example, the Resolution of 11 December 2019 on public discrimination and hate speech against LGBTIQ persons, including LGBTIQ free zones (2019/2933(RSP)) or the Resolution of 24 October 2019 on the situation of LGBTIQ people in Uganda (2019/2879(RSP)).

¹¹ For example, the Resolution of 19 April 2023 on combating discrimination in the EU, the long-awaited horizontal anti-discrimination directive (2023/2582(RSP)).

¹² European Parliament – Intergroup on LGBTIQ Rights, <https://www.lgbt-ep.eu/about> [accessed: 12.01.2026].

¹³ European Commission, Union of Equality: LGBTIQ Equality Strategy 2020–2025, 12 November 2020 (COM(2020)698 final).

¹⁴ *Ibid.*

¹⁵ European Commission, Political Guidelines 2024–2029, 18 July 2024, p. 20.

¹⁶ FRA, LGBTI, <https://fra.europa.eu/en/theme/lgbt> [accessed: 12.01.2026]. See most recently: FRA, *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU – Comparative Legal Analysis – Update 2015*, Luxembourg 2015.

¹⁷ Council Regulation 1922/2006/EC on establishing a European Institute for Gender Equality, OJ L 403, 30.12.2006, p. 9.

¹⁸ ILGA Europe, <https://www.ilga-europe.org> [accessed: 12.01.2026].

ECSOL (European Commission for Sexual Orientation Law)¹⁹ also play a significant role, focusing much of their work on the EU, alongside their broader international efforts.

4. Applicable law among Member States

4.1. Economic freedoms, non-discrimination, and LGBTIQ persons

4.1.1. Goods and services

Without a clear mandate to harmonize Member States' human rights policies, the EU's influence in this area often stems from economic integration, particularly in labour regulations and internal market integration.²⁰

A major advancement would be a general ban on discrimination in access to goods and services, education, and access to social benefits in a wider area of fields. Currently, no EU-wide law prohibits discrimination based on SOGIESC in these areas.²¹ The proposed 2008 "Horizontal Anti-discrimination Directive"²² aims to address this, and has once again become the subject of discussion after initially being withdrawn on 11 February 2025 after seventeen years of stagnation.²³ The decision to withdraw the proposition was especially reprehensible given how recent events have shown the urgent need for such legislation.

Namely, an alarming number of EU Member States have been scaling back protections of LGBTIQ persons against discrimination or hindering their access to full enjoyment of rights.²⁴ For example, Hungary adopted an anti-LGBTIQ law in 2021, notably prohibiting or limiting access to content relating to LGBTIQ topics, which prompted the Commission to launch an infringement procedure, which ended with the ECJ ruling that the law was in violation of internal market rules, the fundamental rights of individuals, and EU values.²⁵

By planning on silently withdrawing the proposal instead of bringing it back to the forefront or proposing an alternative, the Commission failed to stand by the EU values it is supposed to defend, and directly contradicted its position on the importance of

¹⁹ ECSOL, <https://www.sexualorientationlaw.eu> [accessed: 12.01.2026].

²⁰ See for an early and general assessment: O. Dubos, J.-P. Marguenaud, *Sexe, sexualité et droits européens: enjeux politiques et scientifiques des libertés individuelles*, Paris 2007.

²¹ But there exists a Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37.

²² Proposal for a Council Directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation, or religious belief, COM(2008)0426 – 2008/0140(CNS) of 2 July 2008.

²³ EU Commission Communication, Commission work programme 2025 – Moving forward together: A Bolder, Simpler, Faster Union, COM/2025/45, Annex IV, No. 26.

²⁴ ILGA Europe, 2025 Rule of Law Report – targeted stakeholder consultation, 2025, p. 1.

²⁵ ECJ, Judgment of 21 April 2026, *Commission v Hungary*, C-769/22.

such legislation.²⁶ Luckily, the Commission decided not to withdraw the proposal in the end.²⁷

4.1.2. Persons

Of the four basic freedoms, the one with most relevance for LGBTIQ persons today is certainly the free movement of persons.²⁸ Since 2018, the ECJ has delivered multiple judgements stating that LGBTIQ persons cannot be discriminated against when their right to freedom of movement is involved, notably relating to Directive 2004/38. Thus, Member States must recognize legal documents delivered in other Member states, including same-sex marriages,²⁹ birth certificates designating two parents of the same sex,³⁰ as well as name and gender modifications,³¹ even when such situations are not legal in their national laws or require different legal procedures.

Regarding parenthood specifically, on 7 December 2022, the Commission adopted a proposal for a Regulation that would facilitate the recognition in a Member State of the parenthood of children established in another Member State, irrespective of how they were conceived or born, and irrespective of their type of family.³² Because some Member States still refuse to comply with the ECJ judgements, this Regulation would significantly improve the right to freedom of movement of rainbow families, but it must first be adopted unanimously by the Council, where it is currently being discussed.

4.1.3. Non-discrimination (in the workplace)

Since the Treaty of Amsterdam (1997), the EU can combat discrimination based on sex, race, religion, disability, age, or sexual orientation, but only with unanimous Member State approval. As a result, protections for sexual orientation remain limited. And while several anti-discrimination directives exist, only Directive 2000/78 of 27 November 2000³³ explicitly covers sexual orientation, whereas others are limited to criteria such as race or sex.³⁴

²⁶ The Commission stated that the adoption of the Equal Treatment Directive remained a priority as recently as 16 July 2024. See: Commission response to the resolution on the implementation of the EU Equality Strategy 2020–2025 (SP(2024)299), or Commission response to the resolution on combating discrimination in the EU, the long awaited horizontal anti-discrimination directive (SP(2023)312).

²⁷ European Parliamentary Research Service (EPRD), Proposal for a horizontal equal treatment directive – Complementary impact assessment, 2025, pp. 20–21.

²⁸ See: A.R. Ziegler, “LGBT Rights and Economic Migration...”.

²⁹ ECJ, Judgment of 5 June 2018, *Coman & Hamilton*, C-673/16.

³⁰ ECJ, Judgment of 14 December 2021, *Stolichna obshtina, rayon “Pancharevo”*, C-490/20; ECJ, Judgment of 24 June 2022, *Rzecznik Praw Obywatelskich*, C-2/21.

³¹ ECJ, Judgment of 4 October 2024, *Mirin*, C-4/23.

³² Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022)695.

³³ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

³⁴ There is controversy as to whether the legitimacy of this difference in the scope of protection (“hierarchy of grounds”) is legitimate and consistent with international human rights law. See,

Workplace non-discrimination aligns with the EU's role in regulating free movement and production standards. The ECJ has protected LGBTIQ persons from discrimination since the mid-1990s.³⁵

In recent years, the ECJ has significantly widened the scope of Directive 2000/78 even applying it to ongoing discrimination based on past decisions,³⁶ or to situations where statements can lead to a presumption that there has been discrimination³⁷ or that the conditions for access to employment are discriminatory.³⁸

4.2. Foreign relations law

4.2.1. Relations to third countries in general

Even if the protection of LGBTIQ persons in the EU remains uneven because of the differences among the Member States and the limited competences of the EU in the field, its Member States still belong to the group with the best protection worldwide. Therefore, the EU must lead by example and advance LGBTIQ equality around the world.³⁹ Notably, it must ensure that LGBTIQ rights are upheld in partner countries.⁴⁰

However, it is unclear how this will be done during the next four years since EU Commission President Ursula von der Leyen has failed to properly put human rights at the center of the EU's foreign policy guidelines of her second term.⁴¹ Also, contradictory decisions within the EU affect the EU's credibility on this matter.

4.2.2. Accession

The EU's foreign relations law is recent and limited in scope. In treaty negotiations for accession, the EU demands human rights protections, including for LGBTIQ persons.⁴² Candidate countries must adopt specific legislation, making LGBTIQ rights a key and sometimes controversial part of the enlargement process. To support these measures, the EU also provides funding to civil society organizations through the Instrument for

for example: E. Howard, "EU Anti-discrimination Law: Has the CJEU Stopped Moving Forward?," *International Journal of Discrimination and the Law* 2018, vol. 18, no. 2–3, pp. 60–81; S.B. Lahuerta, A. Zbyszewska, "EU Equality Law: Looking Ahead After Twenty Years of Policy-Making," *European Law Blog*, 2019, <https://europeanlawblog.eu/2019/04/08/eu-equality-law-looking-ahead-after-20-years-of-policymaking> [accessed: 12.01.2026].

³⁵ See: K. Waaldijk, M. Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, The Hague 2006.

³⁶ ECJ, Judgment of 15 January 2019, *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA*, C-258/17, para. 71.

³⁷ ECJ, Judgment of 25 April 2013, *Associatia Accept v Consiliul National*, C-81/12.

³⁸ ECJ, Judgment of 23 April 2020, *NH v Associazione Avvocatura per i diritti LGBTIQ*, C-507/18.

³⁹ See: European Commission (n 13), p. 17 ff.; or Council of the EU, Guidelines to Promote and Protect the Enjoyment of all Human Rights by LGBTIQ Persons, 24 June 2013.

⁴⁰ European Commission (n 13), p. 17 ff.

⁴¹ P. Dam, "EU President overlooks Rights in New Commissioners' Mandates – Von der Leyen's neglect of Rights Persists as She Addresses the Incoming EU Executive," *Human Rights Watch*, 26 September 2024, <https://www.hrw.org/news/2024/09/26/eu-president-overlooks-rights-new-commissioners-mandates> [accessed: 12.01.2026].

⁴² European Commission (n 13), p. 17 ff.

Pre-Accession Assistance (IPA).⁴³ For example, from 2022 to 2024, the EU allocated EUR 15 million to promote equality, inclusion, and diversity under the human rights and democracy programme.⁴⁴

4.2.3. Common Commercial Policy (CCP)

The EU's Common Commercial Policy is its most developed external relations area. While integrating LGBTIQ rights into multilateral agreements is challenging, the EU often includes such conditions in trade policies with developing countries. The key instrument is the Generalised Scheme of Preferences, which provides unilateral trade benefits to vulnerable developing countries with three different arrangements (GSP, GSP+ and EBA⁴⁵). The EU links these benefits to compliance with international values, including human rights, and regularly assesses partners' treatment of LGBTIQ persons when reviewing whether they should still be entitled to benefits.⁴⁶

For example, in 2021, the European Parliament adopted a resolution calling on the European Commission to consider whether there was sufficient reason to temporarily withdraw Sri Lanka's GSP+ status, as a last resort, notably because of concerns regarding criminalization of LGBTIQ individuals.⁴⁷

4.2.4. Asylum

The EU's refugee policies, influenced by internal integration and border control removal, also affect LGBTIQ asylum seekers. Because of migration challenges, addressing LGBTIQ-specific issues is complex.⁴⁸ The EU has taken measures⁴⁹ that have an impact on the treatment of refugees related to their gender identity and sexual orientation.⁵⁰ Current EU norms include "gender identity" under "gender"⁵¹ and classify

⁴³ Regulation 2021/1529 of 15 September 2021 establishing the Instrument for Pre-Accession assistance (IPA III), OJ L 330, 20.09.2021, p. 1.

⁴⁴ Commission implementing decision on the financing of the multiannual action plan for the thematic programme on human rights and democracy for 2022–2024, 25 July 2022, C(2022)5452.

⁴⁵ EC, Generalised Scheme of Preferences, https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en [accessed: 12.01.2026].

⁴⁶ See: Council of the EU, Human Rights Guidelines on Non-Discrimination in External Action, 18 March 2019 (6337/19).

⁴⁷ See the European Parliament resolution of 10 June 2021 on the situation in Sri Lanka, in particular the arrests under the Prevention of Terrorism Act (2021/2748(RSP)).

⁴⁸ See, for example: S. Jansen, T. Spijkerboer, *Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Amsterdam 2011.

⁴⁹ Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9.

⁵⁰ Here as in other areas, the role of the ECHR should not be forgotten. See: S. Falcetta, P.J. Johnson, "Migration, Sexual Orientation, and the European Convention on Human Rights," *Journal of Immigration, Asylum and Nationality Law* 2018, vol. 32, no. 3; and C. Byron, "The European Court of Human Rights: A Living Instrument as Applied to Homosexuality," *The Judges' Journal* 2016, vol. 55, no. 3.

⁵¹ Article 10(1) Letter d Directive 2011/95/EU.

sexual orientation as a “particular social group.” The ECJ has ruled that asylum may be granted if homosexuality is criminalized,⁵² that LGBTIQ dignity and privacy must be respected in asylum procedures,⁵³ that “psychological tests” to determine sexual orientation are inadmissible,⁵⁴ and that Member States must respect and recognize the gender identity of transgender refugees.⁵⁵

5. Conclusions

While the EU Member States are generally advanced in LGBTIQ protection, significant differences remain because of the EU’s limited competence in areas like family law and education. Even where the EU can act, unanimity rules slow progress. However, policies in areas like the internal market and asylum have led to compromises improving LGBTIQ rights, sometimes clarified by ECJ rulings. Despite varying acceptance within the EU, its foreign relations, especially through the Parliament, often demand a human rights baseline, particularly for candidate countries and trade with developing nations.

However, it is vital that EU institutions be unwavering and consistent in their protection of LGBTIQ rights, notably by making full use of EU tools to sanction violations (for example, actions under the Rule of Law Conditionality Regulation⁵⁶). Otherwise, their credibility comes into question. For example, as of early 2026, the Commission has yet to take any action against Bulgaria for adopting an anti-LGBTIQ propaganda law in August 2024, despite its similarity to the Hungarian law of 2021 that was deemed a violation of EU values by the ECJ.⁵⁷

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⁵² ECJ, Judgment of 7 November 2013, *X, Y and Z v Minister voor Immigratie en Asiel*, C-199/12, C-200/12 and C-201/12 (joined).

⁵³ ECJ, Judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, C-148/13, C-149/13 and C-150/13 (joined).

⁵⁴ ECJ, Third Chamber, Judgment of 25 January 2018, *F v Bevándorlási és Állampolgársági Hivatal*, C-473/16.

⁵⁵ ECJ, Judgment of 13 March 2025, *Deldits*, C- 247/23.

⁵⁶ Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

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Summary

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Promotion of Equality and Protection against Discrimination on Grounds of Sexual Orientation and Gender Identity in the European Union

Despite significant progress for the protection of the rights of LGBTIQ persons in the EU, there are still many differences among Member States of the Union. These differences mainly lie in areas outside EU competences, yet the EU is still able to influence these indirectly. The EU also acts as a promoter of human rights and equality on a global scale through its foreign policy. Howev-

er, varying importance is still given to the protection of LGBTIQ rights by EU institutions like the Commission, notably in the EU. By making inconsistent decisions, the EU affects its credibility.

Keywords: LGBTIQ rights, European Union, protection of human rights, discrimination.

Streszczenie

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Promowanie równości oraz ochrona przed dyskryminacją ze względu na orientację seksualną i tożsamość płciową w Unii Europejskiej

Pomimo znacznego postępu w zakresie ochrony praw osób LGBTIQ w Unii Europejskiej nadal utrzymują się znaczne różnice między państwami członkowskimi w odniesieniu do ich realizacji. Mimo że rozbieżności te dotyczą przede wszystkim obszarów wykraczających poza kompetencje unijne, wspólnota europejska nadal może wpływać na nie pośrednio. Jednocześnie Unia jest promotorem praw człowieka i równości w skali globalnej, wykorzystując w tym celu swoją politykę zagraniczną. Jednak instytucje unijne, w szczególności Komisja Europejska, przywiązują różną wagę do ochrony praw osób LGBTIQ, zwłaszcza w obrębie wspólnoty. Podejmowanie niespójnych decyzji wpływa negatywnie na wiarygodność całego systemu unijnego.

Słowa kluczowe: prawa podmiotowe osób LGBTIQ, Unia Europejska, ochrona praw człowieka, dyskryminacja.