



**Observatory for  
Sociopolitical Developments  
in Europe**

# **LGBTI rights: Germany in a European comparison**

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# 1 Introduction

Thanks to the work of European activists, civil-society organisations and institutional agencies in past decades in the EU Member States, important progress has been achieved for the improvement of the rights of lesbian, gay, bisexual, transgender and intersexual persons (LGBTI). The governments of many EU Member States have taken widespread initiatives since the end of the 1980s. Since the adoption of the Treaty of Lisbon and the acceptance of the Charter of Fundamental Rights of the EU in the year 2009, the EU has had clear competencies for LGBTI policy. Therefore nowadays – with LGBTI identities forming a significant element of European identity – it exercises a central model function on an international level.<sup>1</sup>

The European region of the *International Lesbian, Gay, Bisexual, Trans and Intersex Association* (ILGA-Europe), an umbrella organisation with a total of 422 member organisations in 45 European countries, is involved politically with the legal and social situation of LGBTI people in Europe. In co-operation with its member organisations, ILGA-Europe publishes *Rainbow Europe*, an annual index which evaluates the legal position of LGBTI people in European states. With regard to EU Member States, the following information can be gleaned from the index:

1. The legal position of LGBTI people and its development are very heterogeneous within the EU Member States.
2. The EU currently does not play any effective role in structuring LGBTI policy.
3. In spite of progress in Germany since the beginning of the 2000s, progress in LGBTI legislation has stagnated in past years.
4. In comparison with other EU Member States, Germany needs to improve its LGBTI policies.

The first section of the present study will evaluate the overall results of the last issues of the index. The central question here is: how does the legal position of LGBTI people in Germany compare with the situation in other EU states? Then, based on this knowledge, the second section will discuss the following central problem areas:

- What role does the EU play in improving the social and legal situation of LGBTI people, and what areas of LGBTI policy require improvement in EU law?
- What relevant measures are in place in EU Member States other than Germany for the improvement of the legal position of LGBTI people?

Based on three of the six main areas of the index (*equality and non-discrimination, acknowledgement of the family and hate crime and hate speech*) the index identifies legal and political measures of LGBTI policy that are not yet applied in Germany in contrast to other EU Member States. As improving LGBTI rights in EU Member States depends not only on legislative decisions of national governments but also on EU law, LGBTI rights at EU level will also be examined.

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1 Colpani, G., Habed, A. J. (2014): In Europe it's Different: Homonationalism and Peripheral Desires for Europe. LGBT Activism and the Making of Europe: A Rainbow Europe.

## 2 Rainbow Europe: Germany in EU comparison

Rainbow Europe is a weighted index which has been published annually by ILGA-Europe since 2009. The index compares the legal position of LGBTI people in 49 European states based on percentage evaluations. It consists of the following six main categories, which include 48 sub-categories in total:

1. **Equality and non-discrimination:** This area refers to legislative protection against discrimination of LGBTI people by means of existing laws, e.g. anti-discrimination laws.
2. **Acknowledgement of the family:** This area refers to the legal equality of every form of union (e.g. marriage or registered life partnership) and parenthood (concerning reproductive rights or adoption laws).
3. **Protection against hate speech and crime:** This area refers to the explicit naming of sexual orientation and gender identity in legal provisions against hate speech and hate crime as well as the implementation of political strategies for combating this type of crime.
4. **Legal gender recognition and bodily integrity:** This area refers to the right to self-determination of transgender and intersexual persons and the prerequisites for legal recognition of sex changes in order to guarantee the intellectual and physical integrity of persons.
5. **Freedom of speech, freedom of assembly and freedom of association for LGBTI people:** This area examines whether this right is guaranteed.
6. **Asylum policy for LGBTI refugees:** This area examines whether states recognise refugees who are persecuted in their countries of origin due to their sexual orientation or gender identity, and whether asylum processes of national authorities for recognition or revocation of refugee status<sup>2</sup> fulfil certain minimum standards (e.g. training of personnel of asylum-granting authorities or abolition of tests and surveys about sexual practices in order to check sexual orientation).<sup>3</sup>

The sub-categories of the main areas correspond to legal and political measures which can be applied by European states. For every category fulfilled, a state receives points which, summed up, result in the overall evaluation. The categories are weighted, i.e. they have a different relevance for the overall evaluation of the LGBTI legal position of the states.<sup>4</sup> The different categories and their respective weightings are selected in co-operation with ILGA-Europe and its member organisations.

The legal position of LGBTI people is represented by means of percentage evaluations (from 0% to 100%). *Rainbow Europe 2015* still indicates a very heterogeneous distribution of the percentage evaluation of the LGBTI legal position in the EU: results vary from 18% to 86%, with eight Member States falling below 30% and five Member States achieving percentages

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2 Directive 2011/95/EU of the European Parliament and the Council, dated 13 December 2011, regulates the minimum standards for processes in EU Member States related to recognition or revocation of refugee status. However, this directive does not include any minimum standards for processes related to recognition or revocation of refugee status due to the monitoring of sexual orientation or gender identity (see Art. 10 (1) d).

3 The judgment of the Court of Justice of the European Union on 2 December 2014 (case numbers: C-148/13, C-149/13, C-150/13) stipulates explicitly that statements made by asylum applicants regarding their sexual orientation can be verified, but only within the limits allowed by the Charter of Fundamental Rights of the European Union.

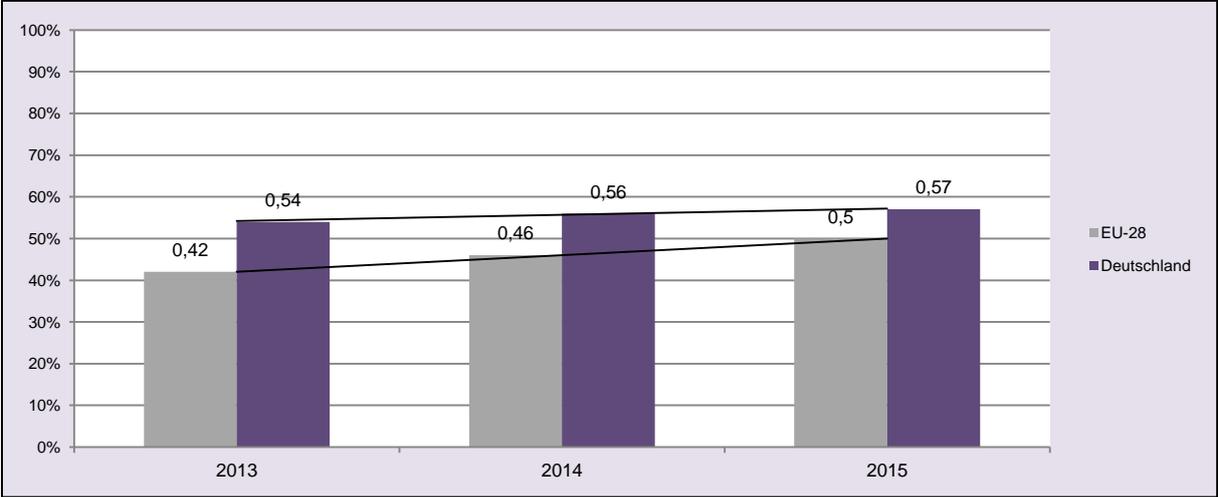
4 An overview of the data matrix of the 2015 Index, including main areas and sub-categories, can be downloaded at [http://www.ilga-europe.org/sites/default/files/Attachments/side\\_b-rainbow\\_eurpe\\_index\\_may\\_2015\\_no\\_crops.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/side_b-rainbow_eurpe_index_may_2015_no_crops.pdf)

above 70%. The EU average is 50%. Germany placed tenth among the 28 EU Member States both in 2013 (54%) and in 2014 (56%). With a 2015 result of 57%, Germany occupied place 13 after the United Kingdom, Belgium, Malta, Sweden, Croatia, Spain, Netherlands, Denmark, Portugal, France, Finland and Austria.

**2.1 The development of the legal position of LGBTI people in the EU**

Illustration 1 shows the average overall result of EU Member States in comparison with Germany in the years 2013, 2014 and 2015. The chart shows that Germany still has above-average scores in comparison with the EU-28, but also that development in Germany is slower than in the EU-28: the convergence of percentages of the EU-28 with respect to Germany is indicated in the reduced difference of percentage points. In 2013 the difference was twelve points; in 2014 it had shrunk to ten, and in 2015 to seven points.<sup>5</sup>

**Illustration 1: Development of the percentage evaluation of the legal position of LGBTI people: Germany and the EU-28**



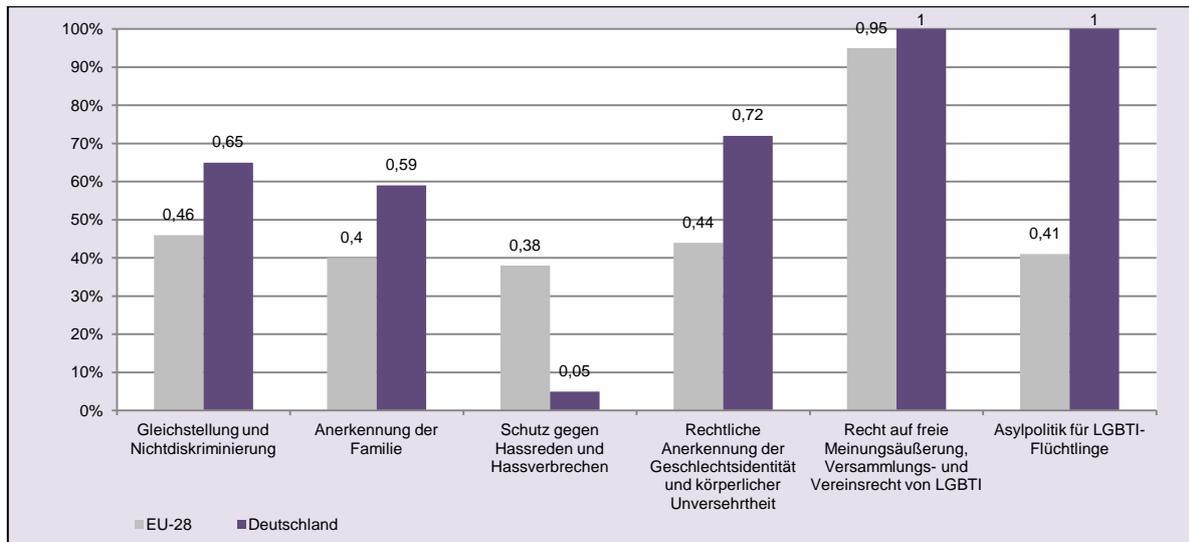
Source: Online ILGA-Europe data, own calculation and own representation.

**2.2 Germany’s improvement potential in EU comparison**

In five of the six main areas of the index, Germany has a higher score than the average of the EU-28. However, if we consider the maximum scores in each case, there is potential for improvement in particular in the first three areas: *legal provisions against discrimination, acknowledgement of the family and protection against hate speech and crime*, where Germany achieves scores below 70% in each case.

5 The 2015 data does not refer to the 2015 *Rainbow Europe* publication, but to the revised online version of the index (last downloaded on 2 October 2015).

## Illustration 2: Percentage scores of Germany and the EU-28 in the six areas of Rainbow Europe 2015<sup>6</sup>



Source: Online ILGA-Europe data, own calculation and representation.

- Although Germany achieves a far better score than the EU-28 in the area of *equality and non-discrimination*, improvement potential still exists in comparison with some other EU Member States: Germany does not provide constitutional protection against discrimination. In addition, there is no nation-wide action plan currently in place in Germany for combating anti-LGBTI discrimination, unlike eleven other EU Member States.
- In the area of *recognition the family*, Germany also scores above-average in comparison with the EU-28. However, there is room for improvement here too: registered same-sex unions in Germany still have numerous limitations compared to heterosexual marriages, for instance adoption law or access to medically-assisted reproduction facilities.
- The area of *protection against hate speech and hate crime* is Germany's lowest score. Although transgender and homophobic hate crimes and hate speech in Germany are prosecuted, they are not explicitly covered by criminal law, in contrast to most EU Member States.
- Germany's second-best score is for *legal gender recognition and bodily integrity*; in this area, Germany is one of the best-scoring EU Member States.
- In addition, Germany gets top scores in the areas of *freedom of assembly, association and expression for LGBTI people* and *asylum policy for LGBTI refugees*. This is an outstanding position in comparison with other EU Member States: according to ILGA-Europe data, 24 EU Member States currently recognise refugees who are persecuted in their countries of origin due to sexual orientation or gender identity. However, only nine of them (including Belgium, Denmark, Germany and Sweden) have asylum processes in place for the recognition or revocation of refugee status for LGBTI people that comply with minimum standards for the guarantee of human integrity.

<sup>6</sup> Illustration 2 does not refer to Rainbow Europe 2015, but to the revised online version of the index (last downloaded on 1 October 2015).

### **3 Political and legal measures: Germany in EU comparison**

The present section will focus on the three main categories of *Rainbow Europe* where Germany had the lowest scores: *equality and non-discrimination*, *acknowledgement of the family and protection against hate speech and hate crime*. Based on the sub-categories within these areas, we shall give an overview of selected legal and political measures that have been implemented in other EU Member States. To describe the current role of the EU in improving LGBTI rights and the challenges facing EU legislators, this section will also consider the legal and political framework at EU level.

#### **3.1 Equality and non-discrimination**

As early as in Article 13 of the Treaty for the Foundation of the European Community, the EU was authorised to make laws against discrimination due to sexual orientation (among other things). With the Treaty of Amsterdam in the year 1999, these competencies were extended to the area of human rights. Furthermore, the EU Charter of Fundamental Rights was signed by the EU Council, Parliament and Commission in the year 2000. Its Article 21 gives the EU responsibility for combating discrimination due, inter alia, to sexual orientation.

In spite of the EU's clear legal mandate and the commitment of two of its central bodies – the EU Commission and the EU Parliament – to preserve and protect human rights in Europe, the level of legislative protection against discrimination for reasons of sexual orientation and gender identity does not seem to be sufficiently developed in some EU Member States (see Table 1).

##### **3.1.1 The scope of anti-discrimination legislation in EU Member States**

EU anti-discrimination regulations have direct effects on the improvement and protection of human rights in EU Member States. Both the Charter of Fundamental Rights and the TFEU require the EU to actively combat discrimination due, i.a., to sexual orientation. However, the EU's current anti-discrimination regulations do not offer any protection against discrimination due to sexual orientation beyond the area of employment: only the Employment Equality Directive 2000/78/EG, which had to be applied by the Member States by the end of 2003, prohibits discrimination due to a wide spectrum of personal features (inter alia age, disability, gender, religion or belief as well as sexual orientation). In areas other than employment, for instance social protection (including social insurance and health care), education or access to goods or services that are available to the general public, there are currently no EU anti-discrimination regulations. Discrimination on the basis of gender represents the only exception.

Grouped according to personal discrimination features and areas of application, Table 1 indicates EU anti-discrimination directives that have been implemented and EU directives which, when implemented, required the Member States to create an anti-discrimination authority.

**Table 1: Implemented EU anti-discrimination directives and anti-discrimination legislation in Germany**

Area of application	Employment	Access to goods and services	Social protection including social insurance and health care	Education
Personal features				
Race and ethnic origin	<b>Directive 2000/43/EG</b> <b>implementing the principle of equal treatment between persons irrespective of racial or ethnic origin</b> <b>(obligation to create bodies for the promotion of equal treatment)</b>			
Gender	<b>Directive 2006/54/EG</b> on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation	<b>Directive 2004/113/EG</b> implementing the principle of equal treatment between men and women in the access to and supply of goods and services <b>(obligation to create a body for the promotion of equal treatment)</b>	<b>Directive 79/7/EWG</b> of the Council of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security	(Germany: AGG)
Religion and belief	<b>Directive 2000/78/EG</b> establishing a general framework for equal treatment in employment and occupation	No data available to EU Member States (DE: AGG)	No data available to EU Member States (DE: AGG)	
Disability		No data available to EU Member States (DE: AGG)	No data available to EU Member States (DE: AGG)	
Age		No data available to EU Member States (DE: AGG)	No data available to EU Member States (DE: AGG)	
Sexual orientation (DE sexual identity)		No data available to EU Member States (DE: AGG)	No data available to EU Member States (DE: AGG)	
Gender identity (DE sexual identity)	16 EU Member States (DE: AGG)	No data available to EU Member States (DE: AGG)	No data available to EU Member States (DE: AGG)	

Source: Own representation on the basis of ILGA-Europe data.

## **Anti-discrimination law in Germany: General Act on Equal Treatment [Allgemeines Gleichbehandlungsgesetz, AGG]**

With the coming into force of the AGG [the English translation will continue to use the German abbreviation] in 2006, all EU anti-discrimination directives listed in Table 1 were enacted into German law. At the same time, a German federal anti-discrimination body was created [Antidiskriminierungsstelle des Bundes, ADS].<sup>7</sup> It is worth mentioning that the AGG provides a different protection level according to each personal feature. Article 20 (2), for instance, authorises different treatment due to sexual identity (inter alia) with private-law insurance if differences are based on "verifiable insurance reasons". In comparison with anti-discrimination laws in other EU Member States, the AGG also has limitations such as a lower level of protection against dismissal in employment or shorter notice periods for taking legal steps against discrimination.<sup>8</sup> In addition, anti-discrimination laws in some EU Member States include comparatively more areas of application than the AGG that are especially relevant to

<sup>7</sup> The duties of the ADS, which comply with the EU anti-discrimination directives, are stipulated in the AGG. Because of the implementation of the EU anti-discrimination directives, there are homologous anti-discrimination bodies with similar competencies in all 28 EU Member States.

<sup>8</sup> FRA (2010): Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Germany, pp. 11-12.

discrimination due to sexual orientation or gender identity. Thus, for example, anti-discrimination legislation in Belgium includes discrimination due to "current and future state of health", which indirectly concerns LGBT people, as discrimination against LGBT persons is often due to prejudices with respect to HIV, Aids and other sexually transmitted illnesses.<sup>9</sup>

### The directive proposal of the EU Commission

Directive 2006/54/EG is the last anti-discrimination directive issued by the EU Council. Since then, no legislative progress has been made for combating discrimination at EU level. With the objective of extending anti-discrimination protection in EU Member States to areas outside the labour market, the EU Commission in 2008 submitted a proposal for a comprehensive anti-discrimination directive. The implementation of such a directive would guarantee EU-wide prohibition of discrimination for reasons of (inter alia) religion or belief, disability, age or sexual orientation in all the areas shown in Table 2.<sup>10</sup> The ratification of the directive requires a unanimous decision of the 28 EU Member States as well as the approval of the EU Parliament. The anti-discrimination directive is still in the process of negotiation in the EU Council, but it is being blocked by the governments of some EU Member States, including Germany. One argument against the introduction of such a directive is that it would exceed the competencies of the EU and that implementation would cause high administrative costs.<sup>11</sup> However, the EU Parliament has passed numerous resolutions since 2009 recommending to the Council that it should adopt this directive.<sup>12</sup>

#### 3.1.2 National LGBTI action plans in EU Member States

LGBTI action plans are central to the improvement of the social situation of LGBTI people, since they are dedicated to reducing the gap between *de jure* and *de facto* situations. In other words, action plans provide concrete instruments and measures likely to improve legislative protection and recognition of LGBTI rights in practice.<sup>13</sup>

In Germany the "National action plan of the Federal Republic of Germany against racism, xenophobia, anti-Semitism and intolerance" is currently ongoing. According to the coalition contract, it is intended to be extended to cover homophobia and transphobia.<sup>14</sup> There are already LGBT action plans<sup>15</sup> in place in the German states of Baden-Württemberg, Berlin, Bremen, Mecklenburg-Vorpommern, North-Rhine Westphalia, Rhineland-Palatinate and Schleswig-Holstein.<sup>16</sup> According to *Rainbow Europe 2015*, eleven EU Member States have

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9 FRA (2010): Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Belgium, p. 12.

10 European commission (2008): Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

11 Intergroup on LGBT rights (2013): Press conference: EU anti-discrimination law still stalled after 5 years, MEPs regret (2 June 2013), <http://www.lgbt-ep.eu/parliamentary-work/press-conference-eu-anti-discrimination-law-still-stalled-after-5-years-meps-regret/> (last downloaded on 7 July 2015).

12 Intergroup on LGBT rights (2013): Plenary summary: Anti-discrimination Directive, Roadmap, Hungary, Lithuania, Nigeria (4 July 2013), <http://www.lgbt-ep.eu/news-stories/plenary-summary-anti-discrimination-directive-roadmap-hungary-lithuania-nigeria/> (last downloaded on 7 July 2015).

13 See also: United Nations (2002): Handbook on National Human Rights Plans of Action, Professional Training Series No. 10, Geneva, New York.

14 Coalition contract between CDU, CSU and SPD: Structuring Germany's future, 18<sup>th</sup> Legislative Period, p. 74.

15 Most EU regional and national action plans focus on LGBT, i.e. without including concrete measures for intersex people.

16 An overview of the action plans in place in the various German federal states can be called up on the website of the German Association of Lesbians and Gays: <http://www.lsvd.de/politik/aktionsplaene-in-den-laendern.html> (downloaded on 1 July 2015).

initiated national action plans that include measures for the LGBTI target group. However, the scope of the measures vary widely. Here are some of the reference points of the ongoing or already concluded national LGBTI action plans in EU Member States:

1. **Target group:** The action plans focus on LGBT. However, there are no national action plans in EU Member States that include measures and/or fields of action in the area of intersexuality. Some national action plans link gender equality with LGBT policies.
2. **Preliminary studies and research:** Most national action plans are based on studies and research conducted to develop measures and determine objectives. *Monitoring* instruments to quantify the objectives achieved are included in most action plans.
3. **Area of application:** Most action plans aim at a comprehensive expansion of civil, political, social and cultural rights, while others are intended to cover only certain areas, e.g. prevention of violence and discrimination,.
4. **Integration of governmental authorities, ministries and civil-society organisations:** Most action plans call for close co-operation with different governmental agencies and organisations of civil society, both for the development and for the implementation of the measures.
5. **Local competencies:** Only a few action plans take local government authorities into account for the provision of the measures.

### EU LGBTI action plan

In June 2015, the EU Parliament once again called on the Commission to develop an independent EU strategy to combat anti-LGBTI discrimination.<sup>17</sup> In a debate of the European Parliament Committee on Civil Liberties, Justice, and Home Affairs, EU Commissioner for Justice, Consumers and Gender Equality Věra Jourová stated in June 2015 that she intended to develop an EU action plan for LGBTI rights in the course of 2015.<sup>18</sup>

Table 2 includes information relating to the preliminary studies, fields of action, objectives and participating agencies of the selected action plans with concrete measures for LGBT rights in EU Member States.

**Table 2: National action plans for LGBT rights**

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<sup>17</sup> European Parliament 2014-2019, in the sitting of Tuesday 9 June 2015: Texts Adopted.

<sup>18</sup> Intergroup on LGBT rights (2015): Commissioner Jourová committed to LGBTI action plan in 2015 (28 May 2015), <http://www.lgbt-ep.eu/press-releases/commissioner-jourova-committed-to-lgbti-action-plan-in-2015/> (downloaded on 7 July 2015).

EU Member States, schedule and Main actors	National action plan	Description and preparatory studies and/or research	LGBT policy: Fields of action and objectives
<p><b>Belgium (2013-2014),</b> Ministry of the Interior and Equal Opportunity</p>	<p><i>Plan d'Action Interfédéral Contre Les Violences Homophobes et Transphobes</i> (English: Interfederal action plan against transphobic and homophobic violence)</p>	<p>Against the background of the homophobic murder at Ihsane Jarfi in 2012, the government of Belgium and the federal states in 2013 jointly decided on a national action plan for the prevention and combating of homophobic and transphobic violence. The project was co-ordinated by the Ministry of the Interior and Equal Opportunity.</p> <p><u>Preliminary studies and research:</u> <i>Centre pour l'Egalité des Chances et la Lutte contre le Racisme</i> (English: Center for equal opportunity and the fight against racism) and <i>l'Institut pour l'Egalité des Femmes et des Hommes</i> (English: Institute for equality of women and men).</p>	<ul style="list-style-type: none"> <li>• Preparation of scientific studies on the status of violence against LGBT people.</li> <li>• Reinforcement of legal protection countering violence against LGBT people.</li> <li>• Sensitisation of society to violence against LGBT people.</li> <li>• Development and implementation of offers of assistance for victims of homophobic and transphobic violence.</li> <li>• <i>Monitoring</i> and reinforced prosecution of homophobic and transphobic criminality.</li> </ul>
<p><b>France (from 2012),</b> Inter-ministerial co-operation</p>	<p><i>Programme d'actions gouvernemental contre les violences et les discriminations commises à raison de l'orientation sexuelle ou de l'identité de genre</i> English: Government action programme against violence and discrimination due to sexual orientation or gender identity)</p>	<p>The national action plan was conceived with intensive inter-ministerial co-operation and in co-operation with organisations of civil society: a consultation process was implemented with the participation of more than one hundred civil-society organisations and governmental institutions. It is France's first inter-ministerial action plan against discrimination.</p> <p><u>Preliminary studies and research:</u> Different studies of the <i>Institut français d'opinion publique</i> (English: French Public Opinion Institute, IFOP), the <i>Institut national de prévention et d'éducation pour la santé</i> (National Institute for Health Safety and Education, INPES) and the <i>Institut national d'études démographiques</i> (National Institute of Demographic Studies, INED).</p>	<ul style="list-style-type: none"> <li>• Combatting violence against LGBT.</li> <li>• Combatting routine discrimination against LGBT.</li> <li>• Promotion of positive retention with respect to LGBT already at youth.</li> <li>• Reinforcement of the extension of LGBT human rights on international level.</li> </ul>
<p><b>Portugal 2014-2017,</b> Council of Ministers and Comissão para a Cidadania e a Igualdade de Género English: Commission for citizenship and gender equality, CIG)</p>	<p><i>Plano Nacional Para a Igualdade des Género, Cidadania e Não – Discriminação</i> English: National plan for gender equality, citizenship and non-discrimination).</p>	<p>This national action plan is based on seven pillars for combating discrimination due to different characteristics. One of the pillars focuses on combating discrimination due to sexual orientation and gender identity.</p> <p>No previous studies and/or research are referred to.</p>	<ul style="list-style-type: none"> <li>• Sensitisation to discrimination due to sexual orientation and gender identity.</li> <li>• Promotion of training for workers in relevant areas, e.g. health centres or educational facilities, with focus on sexual orientation and gender identity.</li> <li>• <i>Monitoring</i> homophobic and transphobic criminality.</li> <li>• <i>Monitoring</i> and implementation of international directives for combating discrimination for reasons of sexual orientation and gender identity.</li> </ul>
<p><b>Netherlands (2011-2015)</b> Ministry of Education, Culture and Science, inter-ministerial work</p>	<p><i>LGBT and Gender Equality Policy Plan of the Netherlands</i></p>	<p>This action plan aims at both achieving gender equality and improving the social situation of LGBTI people. Various regional and local government authorities as well as civil-society organisations are involved in the implementation of the action plan and the achievement of its objectives.</p> <p>During the term of the action plan, EUR 17.5 million was earmarked annually for the development and implementation of the measures.</p> <p><u>Preliminary studies and research inter alia):</u></p> <ul style="list-style-type: none"> <li>• <i>Report on sexual health in the Netherlands, 2010.</i></li> <li>• <i>Health Behaviour in School-aged Children, 2009.</i></li> <li>• <i>Parliament of the Netherlands, Parliamentary Papers 2008-2009, No. 30950, No. 15 (police report concerning homophobic violence).</i></li> <li>• <i>Report on sexual health in the Netherlands, 2010.</i></li> <li>• <i>Domestic Prevalence study into violence, 2010.</i></li> </ul>	<ul style="list-style-type: none"> <li>• Promotion of social equality of LGBT people.</li> <li>• Assuring and strengthening the social role of LGBT people: support of the victims, their willingness to report, recording and prosecution of discrimination and violence.</li> <li>• Promotion of social acceptance of LGBT: with focus on school, occupation, sport and senior care areas.</li> <li>• Promotion of the improvement of LGBT rights both at international and European level.</li> </ul>

<p><b>Sweden</b><sup>19</sup> (2014-2016), Ministry of Culture, various governmental authorities, i.a. police, Swedish agency for youth and civil society, central office for health and social welfare</p>	<p><i>Strategy for equal rights and opportunities regardless of sexual orientation, gender identity or gender expression</i></p>	<p>The action plan promotes co-operation among various government authorities with the following main focal points: violence, discrimination and other violations of LGBT rights, the social situation of young LGBT people, health services, care and social services for LGBT people, private and family life of LGBT people, culture and civil society.</p> <p>For the time period of the action plan, SEK 6 million (approx. EUR 640,000) was provided for education and sensitisation measures in the public sector concerning LGBT.</p>	<ul style="list-style-type: none"> <li>• Support of police in monitoring hate crimes.</li> <li>• Information about LGBT people and creation of an open and unprejudiced environment in schools.</li> <li>• Measures to improve knowledge about the situation of LGBT people and their treatment by social services.</li> <li>• Combatting homophobia and transphobia among young persons through education.</li> <li>• Implementing sensitisation campaigns.</li> </ul>
<p><b>Ireland, (from 2013)</b> Department of Education and Skills and Department of Children and Youth Affairs</p>	<p><i>Action Plan On Bullying</i></p>	<p>This action plan aims at combating bullying in schools, in particular transphobic and homophobic attacks against pupils. Contributions from government agencies involved and organisations of civil society for the conception of the measures are to be found in the text of the action plan.</p> <p>Numerous research projects carried out by ministries, civil-society organisations at universities are referred to.</p> <p>In 2013 EUR 500,000 was set aside for the implementation of the action plan.</p>	<ul style="list-style-type: none"> <li>• Implementation of a sensitisation campaign on the Internet.</li> <li>• Implementation of an anti-bullying directive to record bullying incidents in schools.</li> <li>• Training and sensitisation measures for parents and teaching staff.</li> </ul>

Source: own representation.

### 3.2 Recognition of the family in EU Member States

Since the late 1980s, some EU Member States have introduced pioneering measures for the removal of limitations on the rights of same-sex couples and parents. Compared to the rest of the EU, Germany still offers LGTBI families a relatively good legal situation. However, improvement is still needed in order to properly anchor variety of family models in German legislation.

The following section will examine the status and scope of the legal recognition of same-sex couples as well as their adoption possibilities in EU Member States. This will be followed by a presentation of the main rights of same-sex couples in the EU: joint adoption right and the adoption right of the second non-biological parent (stepchild adoption).

#### 3.2.1 Legal recognition of same-sex couples in EU Member States

In 1989 Denmark adopted the first law world-wide recognising same-sex couples in the form of a registered life partnership. Since then, 18 EU Member States have recognised same-sex unions in different legal forms, such as marriage, registered life partnership or life companions. As a result of the jurisdiction of the European Court of Justice (ECJ), same-sex registered unions now have comparable civil rights as opposite-gender marriages: two ECJ judgements in 2008 and 2011 respectively have stipulated that pension schemes and inheritance laws applying to registered same-sex life partnerships must resemble the systems applying to opposite-gender marriages.<sup>20</sup>

<sup>19</sup> The Swedish action plan for LGBT is not available in English. Information was obtained from the Swedish government website:

Government Offices of Sweden (2015): A strategy for equal rights and opportunities regardless of sexual orientation, gender identity or gender expression  
<http://www.government.se/articles/2015/05/a-strategy-for-equal-rights-and-opportunities-regardless-of-sexual-orientation-gender-identity-or-gender-expression/> (last downloaded on 7 July 2015).

<sup>20</sup> The ECJ judgment of 1 April 2008 stipulated that same-sex life partners could have claim to a widow's/widower's pension from an occupation-related pension scheme (File Number: C-267/06). Another ECJ judgment, dated 10 May 2011,

However, same-sex registered life partnerships and marriages do not have the same rights as opposite-gender marriages in all EU Member States. Although Germany, Finland, Croatia, the Czech Republic and Hungary recognise same-sex couples in the form of a registered union, same-sex couples in these countries do not have joint adoption rights. In Portugal same-sex marriages do not have any adoption rights whatsoever and no claim to medically assisted reproduction. In Belgium, same-sex couples were granted joint adoption rights three years after same-sex marriage was introduced in 2006.

Moreover, there are additional significant civil rights violations in the nine EU Member States that do not recognise same-sex couples in any legal form (i.a. in succession laws, work relationships, pension systems or insurance contracts). According to *Rainbow Europe 2015* data, Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Romania and Slovakia currently do not have any legal form of recognition of same-sex life partnerships.<sup>21</sup> On 21 July 2015 the European Court of Human Rights (ECHR) – the court of justice responsible for compliance with the European Human Rights Convention (ECHR)<sup>22</sup> – ruled that the non-recognition of same-sex couples in Italy violates the ECHR.<sup>23</sup> We can therefore assume that EU Member States will soon be called upon to recognise same-sex couples, at least in the form of a registered union.

Table 3 shows all EU Member States that recognise same-sex marriage in the chronological order of its introduction as well as all EU Member States that allow registered life partnerships, also listed chronologically. Eurobarometer polls show a certain connection between the time of introduction of same-sex marriages and their social acceptance in the EU Member States: same-sex marriage was introduced earliest in EU Member States with the highest social acceptance.

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stipulated that supplementary benefits of a partner living in a life union that are lower than those paid for married couples can represent discrimination due to sexual orientation (File Number: C-147/08).

21 It is worth mentioning that constitutional stipulations often form a large obstacle in the recognition of same-sex marriages: Eight EU Member States (Bulgaria, Croatia, Hungary, Italy, Latvia, Lithuania, Poland and Slovakia) currently have legal constitutional stipulations which permit marriage only for opposite-gender partners.

22 The European Human Rights Convention is signed by all EU Member States.

23 ECHR judgment of 21 July 2015: *Oliari and Others v. Italy* (application numbers: 18766/11; 36030/11).

**Table 3: Coming into force of national laws for the recognition of same-sex unions in EU Member States**

Same-sex marriages			Registered same-sex unions	
EU Member State	Allowed as of	Approval in the population according to Eurobarometer 2006 (green: more than 50%; red: below 50%)	EU Member State	Allowed as of
Netherlands	2001	82%	Denmark	1989
Belgium	2003	62%	Sweden	1995
Spain	2005	56%	Netherlands	1998
Sweden	2009	71%	France	1999
Portugal	2010	29%	Belgium	2000
Denmark	2012	69%	Germany	2001
France	2013	48%	Finland	2002
UK	2014	46%	Luxembourg	2004
Malta	2015	18%	UK	2004
Luxembourg	2015	58%	Czech republic	2006
Ireland	(2015)	41%	Hungarians	2010
Finland	(2017)	45%	Ireland	2010
			Malta	2014
			Estonia	(2016)

Source: Own representation according to Eurobarometer data for 2006, ILGA-Europe and Kollman, K. 2014.

### 3.2.2 Joint adoption right of both parents in EU Member States

In all EU Member States, individual persons have the right to adopt independently of their sexual orientation: In on a 2008 judgement, the ECHM ruled that rejection of adoption due to the sexual orientation of the applicants is discriminatory.<sup>24</sup> However, joint adoption right for same-sex couples currently exists in only ten EU Member States. Table 4 shows when joint adoption rights were granted to same-sex couples in EU Member States. It also shows which legal form of same-sex unions (same-sex marriages or registered partnerships) applied at the time of the introduction of joint adoption right.

24 E.B. v. France (application number 43546/02), European Court of Human Rights, 22 January 2008.

**Table 4: Common adoption law for same-sex couples in EU Member States**

EU Member State	Coming into force of joint adoption right			Approval in the population according to Eurobarometer 2006 (green: more than 50%; red: less than 50%)
	Year	Same-sex marriage	Registered life partnerships	
Netherlands	2001	✓	✓	69%
Sweden	2003		✓	51%
Spain	2005	✓	✓	43%
UK	2005		✓	33%
Belgium	2006	✓	✓	43%
Denmark	2010		✓	44%
France	2013	✓	✓	35%
Malta	2014		✓	7%
Luxembourg	2015	✓	✓	39%
Ireland	2015		✓	30%
Austria	(2015)		✓	44%
Finland	(2017)	✓	✓	24%

Source: Own representation according to data of ILGA-Europe and Eurobarometer 2006.

Table 4 shows that before same-sex marriage was approved in Sweden, the United Kingdom, Denmark and Malta, adoption was already possible for same-sex couples. In the other five EU Member States, joint adoption right for same-sex couples and the recognition of the same-sex marriage were introduced simultaneously. In some EU Member States, such as France, Luxembourg or Spain, same-sex couples can adopt jointly only through the formalisation of a marriage. The low acceptance rate for adoption rights for same-sex couples among European citizens is worth mentioning: 68% of the population of the EU-25 were opposed to the Eurobarometer 2006 question *Should the adoption of children by same-sex couples be authorised everywhere?*<sup>25</sup>

### 3.2.3 Adoption right of the non-biological parent in EU Member States

Germany, Finland and Slovenia are the only EU Member States in which stepchild adoption<sup>26</sup> is allowed for same-sex couples while joint adoption is not authorised. The other nine EU Member States where stepchild adoption is allowed also allow joint adoption for same-sex couples.

Germany's law relating to life partnerships, revised in 2005, granted stepchild adoption rights and other civil rights to registered life partners (Section 9 (7) LPartG). Since then, no legislative progress has been made in Germany with regard to adoption rights for same-sex couples.

25 According to national public opinion polls, social acceptance to joint adoption rights for same-sex couples has increased considerably in most EU Member States. However, no studies have been made on this topic since 2006 to show this trend at European level.

26 In a stepchild adoption, the non-biological parent adopts the child of the biological parent. This way the same legal situation results between the non-biological parent and the stepchild as between the biological parent and the biological child.

## Inner-European recognition of same-sex couples and parents

In view of the principle of personal freedom of movement within the EU, there are legal problems involved in inner-European recognition of the rights of same-sex couples: Directive 2004/38/EG stipulates that if a person living in an opposite-gender marriage moves to an EU Member State and obtains citizenship or residence rights, the other partner also has this right in the target state.<sup>27</sup> However, the civil status of same-sex couples is not recognised in some EU states, so that the other partner in this case is denied these civil rights.<sup>28</sup>

In addition, the EU has not issued any regulations concerning the adoption right of same-sex couples. This means, for instance, that the inner-European recognition of the adoption right of same-sex couples can be problematic. According to Directive 2003/86/EG (on the right to family reunification), EU Member States retain the right to make the directive applicable to same-sex couples.<sup>29</sup> This means that if legally recognised same-sex unions with children move into an EU Member State where the adoption right of the second non-biological parent is not recognised, the adoption can lose its validity for the non-biological parent of the child in this EU country. Parents could therefore lose the right to fetch their children from day-care or school or to make decisions on the education or the health of the child.<sup>30</sup>

### 3.3 Hate crime and hate speech against LGBTI people

In all EU Member States, people can experience physical or psychological violence due to their sexual orientation or gender identity and find themselves frequently confronted with deep hatred, intolerance or disapproval. This type of violence is designated as "hate crime". "Hate speech", i.e. the public propagation, incitement, promotion or justification of hate, discrimination or animosity towards others, can encourage hate crimes. Hate speech can be heard both from normal citizens and from political opinion-makers or even from persons in official positions in the media or on the Internet.<sup>31</sup>

Hate crime and hate speech against LGBTI people still have deep social roots throughout the EU. In 2012, the European Union Agency for Fundamental Rights (FRA) conducted an EU-wide inquiry entitled *LGBT Survey 2012* to record hate crime and discrimination against LGBT people. The results of more than 93,000 responses received were published in 2013.<sup>32</sup> They show that LGBT people face very difficult situations in many routine life sectors, such as education or employment. In the past five years, 26% of respondents were victims of attacks or received threats of violence. Among the transgender persons surveyed, this figure

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27 Directive 2004/38/EG of the European Parliament and of the Council, dated 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.

28 European Parliament, Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs (2012): Towards an EU Roadmap for Equality on Grounds of Sexual Orientation and Gender Identity, p. 42.

29 Council Directive 2003/86/EG of 22 September 2003 on the right to family reunification, see Section 10

30 European Parliament, Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs (2012): Towards an EU Roadmap for Equality on Grounds of Sexual Orientation and Gender Identity, p. 43.

31 Council of Europe (2011): Discrimination on grounds of sexual orientation and gender identity in Europe, p. 51.

32 For the methodology of the inquiry, see: FRA (2013): EU LGBT survey - Technical report - Methodology, online survey, questionnaire and sample.

rose to 35%.<sup>33</sup> Furthermore, the *LGBT Survey 2012* indicates that, among those surveyed, 5% of lesbian women, 6% of homosexual men, 4% of bisexual women, 5% of bisexual men and 8% of transgender persons had been victims of attacks or received threats of violence in the preceding twelve months and that this could be attributed in part or exclusively to the fact that they were perceived as LGBT persons.

In case of the question in the *LGBT Survey 2012* *In your opinion, how widespread are assaults and harassment against lesbian, gay, bisexual and/or transgender people in the country where you live?*<sup>34</sup>, the EU average for countries with the response "fairly widespread" is 30%. The EU average with the response "very widespread" is 8%. In twelve EU Member States (Bulgaria, Croatia, Cyprus, France, Greece, Hungary, Italy, Lithuania, Malta, Romania, Slovakia and Slovenia), more than 40% those surveyed thought that hate crimes against LGBT people were either fairly widespread or very widespread. The survey indicates that requirement continues to exist in the EU for active political and legal measures for the combating of hate crimes and hate speech.

Although EU Member States view hate crime against LGBTI people as socially unacceptable, there are no EU regulations forcing states to include hate crime and hate speech against LGBTI people into their criminal laws or to take measures to prevent and combat this type of criminality.<sup>35</sup> Only Directive 2012/29/EU refers to sexual orientation and gender identity as a disadvantaging factor of the vulnerability of the victim. It includes minimum standards for recognition of victims of crimes as well as for their respectful, sensitive and professional treatment, without discriminating against them due to (i.a.) their sexual orientation and gender identity.<sup>36</sup>

In order to structure social change in the direction of respect and tolerance, political programmes with bundles of measures should be developed and implemented for the prevention and combating of violence. As mentioned above, the implementation of a national LGBTI action plan can be effective in opposing social intolerance towards LGBTI people (see 3.1.2). This can be purposefully oriented to the prevention and combating of hate crimes, like the national action plans of Belgium and France (see Table 2). Both of these action plans include social sensitisation and educational programmes as well as programmes for the support of the victims of transphobic and homophobic motivated violence.

The following sections present two central measures for combating hate crime and hate speech from a European perspective: criminal prosecution, and recording and official publication of data about hate crimes against LGBTI people.

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33 FRA (2013): EU LGBT survey, European Union lesbian, gay, bisexual and transgender survey, Results at a glance, p. 21.

34 See Survey data explorer - LGBT Survey 2012: <http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-lgbt-survey-2012>

35 European Parliament, Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs Civil Liberties, Justice And Home Affairs (2012): Towards an EU Roadmap for Equality on Grounds of Sexual Orientation and Gender Identity, pp. 49-51.

36 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, cf. Article 9.

### **3.3.1 Criminal prosecution of hate crime and hate speech against LGBTI people in EU Member States**

Council framework decision 2008/913/JI of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law calls for EU Member States to initiate legal measures to penalise public incitement to violence or hate against any group defined on the basis of race, colour of skin, religion, origin or ethnic origin or against a member of such a group. However, the framework decision includes only the above characteristics, and not sexual orientation or disability. In Germany the framework decision led to a change to Section 46 (2) of the Criminal Code. Since 2015, racist and xenophobic motives as well as “other forms of contempt of one’s fellow human beings” are viewed as aggravating circumstances in determining the penalty. However, homophobic motives were not registered explicitly in the new version of the article. Nor do the legal provisions covering hate speech (Section 130 of the Criminal Code) mention homophobic motives explicitly.

According to a study from published by the Council of Europe in 2011, violence and discrimination due to sexual orientation are registered explicitly as crimes in 18 European states; the list does not include Germany. In addition homophobic motives have been accepted as aggravating circumstances in criminal prosecutions in 13 EU Member States (Belgium, Croatia, Denmark, France, Greece, Lithuania, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom).<sup>37</sup> There are twelve EU Member States where transphobic or homophobic motives are not designated explicitly in criminal law, either as a crime or as an aggravating circumstance.

### **3.3.2 Recording and official publication of data about hate crimes in EU Member States**

A central measure in the fight against hate crime is the investigation and transparent publication of dependable data regarding the number of incidents, the number of convictions, the reasons for which these crimes were found to be discriminating and the penalties imposed on the culprits.<sup>38</sup> Two of the consequences of the lack of dependable data of this type are that no effective policy can be developed on the basis of sound facts and that these crimes are not perceived by the public.

The statistics on hate crime that are available to the public have very different scopes in the various EU Member States, and the responsibility for recording this type of criminality is in the hands of a variety of governmental agencies, e.g. bureaus of statistics, ministries, or police authorities. Both the frequency of data publication and the scope of the motives of hate crimes that are recorded vary.

In 2012, the European Union Agency for Fundamental Rights (FRA) developed a classification of EU Member States on the basis of the mechanisms used for the collection of official data concerning hate crime. The most important criteria of the classification are how many prejudice-related motives are registered and how often the data is published.

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<sup>37</sup> Council of Europe (2011): Discrimination on grounds of sexual orientation and gender identity in Europe, p. 52.

<sup>38</sup> FRA (2012): Making hate crime visible in the European Union: acknowledging victims' rights. p. 45.

According to these criteria, the data investigation mechanisms of the EU Member States are divided into three categories:<sup>39</sup>

- **Limited data investigation:** Data collection is limited to a few incidents and a narrow range of bias motivations. Data are usually not published. This category includes 13 EU Member States: Bulgaria, Cyprus, Estonia, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Portugal, Slovenia and Spain.
- **Good data investigation:** A range of bias motivations are recorded. Data are regularly published. (Austria, Belgium, Czech Republic, Denmark, France, Germany, Lithuania, Poland and Slovakia.
- **Comprehensive data investigation:** A range of bias motivations, types of crimes (e.g. attack, threat, etc.) and characteristics of incidents are recorded. The data is always published. This category includes four EU Member States: Finland, Netherlands, Sweden, United Kingdom.

A differentiation can also be made as to whether the authorities collecting the statistics publish sexual orientation as a motive for hate crime in an explicit form (either as a characteristic of the victim or as a characteristic of the victim as perceived by the culprit).

According to FRA 2012, only eight EU Member States (Belgium, Denmark, Finland, Lithuania, Germany, Netherlands, Sweden and the United Kingdom) register and publish details of homophobic hate crime on a national level. In Germany, the annual report by the federal agency for internal security within the Federal Ministry of the Interior publishes data about extremist right-wing and left-wing criminality as well as foreigner criminality in connection with extremism. Homophobic crimes are covered by the comprehensive term "right-wing extremist criminality", but not represented in any differentiated form.<sup>40</sup> Germany's annual police criminal statistics publishes only some data about transphobic and homophobic motivated criminality under the motive "sexual self-determination".<sup>41</sup>

Finland, the United Kingdom, Sweden and the Netherlands regularly register and publish data about incidents of hate crime motivated by the victim's gender identity and/or perceived gender identity. The annual report of the Finnish Police Academy includes crimes motivated (i.a.) by the victim's sexual orientation or trans-identity. Sweden's annual report on hate crime registers crimes motivated (i.a.) by homophobia, bi-phobia, heterophobia and transphobia. The Dutch annual report about criminal discrimination includes (i.a.) the victim's sexual orientation and gender. In the United Kingdom, hate offences are registered under a series of bias-related motives, such as sexual orientation and gender identity.

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39 Ibid. p. 36-41.

40 Federal Ministry of the Interior (2015): Verfassungsschutzbericht 2014 [report on the protection of the constitution], p. 23.

41 Federal Ministry of the Interior (2015): Police criminal statistics 2014.

## 4 Summary

This paper has shown that the legal situation of LGBTI people in the EU Member States is very heterogeneous, and developing very differently as well. Certain analogies were found in the application of individual LGBTI policy measures, but drawing up a comprehensive typology of EU Member States according to the legal position of LGBTI people and how it has developed seems rather impracticable. Our analysis shows that progress has been made in improving the legal position of LGBTI people in some EU Member States, but that further improvement is needed with regard to LGBTI policies in Europe. In spite of EU competencies in this area and the poor legal position of LGBTI people in some EU Member States, the EU currently does not play any effective role in LGBTI policy structuring. This paper indicates the necessity of an EU-wide legal framework that would focus on the current disadvantaged position of LGBTI people and on achieving long-term improvement. Both civil-society organisations and EU institutions such as the EU Parliament and the FRA have spoken up on the difficult social situation of LGBTI people in Europe. However, this problem is frequently not perceived as such in society, and disapproval and intolerance with respect to LGBTI people still remain. What is needed therefore are a political commitment and dedicated approaches for the dismantling of the legal and social obstacles faced by LGBTI people in their everyday life.

### Gender equality and non-discrimination

Unlike the discrimination factors *sexual orientation* and *gender identity*, discrimination factors such as *gender* or *ethnic origin* play a considerably greater role in EU law and in anti-discrimination legislation in the majority of EU Member States. Germany's anti-discrimination law, which also concerns LGBTI people, is relatively comprehensive in EU comparison. However, improvement is needed in this area in many EU Member States. The ratification of a comprehensive EU anti-discrimination directive therefore seems appropriate.

National action plans have direct effects on the fight against discrimination. They identify legal and social problems of disadvantaged persons and provide concrete measures for overcoming them. Eleven EU Member States have or have had national action plans in place. Seven of Germany's federal states have implemented action plans for LGBT people<sup>42</sup>, but up to now there has been no nation-wide LGBTI strategy.

### Acknowledgement of the family

Currently 18 EU Member States recognise same-sex couples in different legal forms: marriage, registered life partnerships or status as life companion. The nine EU Member States that do not recognise same-sex couples in any legal form are clearly creating civil rights violations. In addition, same-sex couples experience discrimination compared to opposite-gender couples in areas such as joint adoption rights (currently authorised in only ten Member States). This right is not guaranteed in Germany.

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<sup>42</sup> Intersexual persons are not considered in these action plans.

## **Hate crime and speech against LGBTI**

In spite of the increase in hate crime against LGBTI people in EU Member States, the EU has no regulations in place to prevent and combat this type of criminality. Homophobic motivated hate crimes are explicitly covered by the criminal code in 17 EU Member States, but not in Germany. Here, transphobic and homophobic motivated hate crimes are included under all forms of discrimination in a universal comprehensive term in the German Criminal Code.

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