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UN & CoE

January

12 January – Committee for the Elimination of Racial Discrimination (CERD) publishes concluding observations on the combined 11th and 12th periodic reports of Slovakia

30 January – In *Enver Sahin v. Turkey* (No. 23065/12), the European Court of Human Rights (ECtHR) rules that Turkish courts failed to adequately assess the suitability of a reasonable accommodation offered by a university to a student with a disability, in violation of his right to education (Article 2 Protocol 1 of the ECHR) and the prohibition of discrimination on the grounds of disability (Article 14 of the ECHR)

February

27 February – European Commission against Racism and Intolerance (ECRI) publishes revised General Policy Recommendations No. 2 on Equality bodies to combat racism and intolerance at national level and No. 7 on National legislation to combat racism and racial discrimination

ECRI publishes its fifth monitoring report on Spain and Sweden and conclusions on the implementation of priority recommendations in respect of Greece

March

22 March – UN Human Rights Council (HRC) adopts a resolution on freedom of religion or belief and a resolution on rights of persons belonging to national or ethnic, religious and linguistic minorities

23 March – UN HRC adopts a resolution on Equality and non-discrimination of persons with disabilities and the right of persons with disabilities to access to justice. UN HRC also adopts a resolution on Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence against, persons based on religion or belief

April

May

11 May – UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity issues his first report

15 May – In *Transgender Europe and ILGA-Europe v. the Czech Republic* (No. 117/2015), the European Committee on Social Rights finds that the requirement for transgender persons to undergo medical sterilisation before legal gender recognition violates their right to protection of health (Article 11 of the European Social Charter)

15 May – ECRI publishes its fifth monitoring report on Croatia and Malta; and conclusions on the implementation of priority recommendations in respect of Austria, the Czech Republic, Estonia, Hungary and Poland

June

1 June – Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2222 on promoting diversity and equality in politics

6 June – CERD publishes concluding observations on the combined 22nd and 23rd periodic reports of Sweden

18 June – World Health Organization (WHO) removes all trans-related categories from the chapter of International Classification of Diseases on mental and behavioural disorders

July

16–17 July – UN Human Rights Committee adopts views in three cases against France concerning religious clothing, finding a violation of the right to freedom of religion enshrined in Article 18 of the International Covenant Civil and Political Rights (ICCPR) and intersectional discrimination on the grounds of gender and religion (Article 26 of the ICCPR)

September

18 September – In *Lachiri v. Belgium* (No. 3413/09), ECtHR rules that banning headscarves in the courtroom amounts to unjustified restriction on the exercise of the right to manifest one's religion enshrined in Article 9 of the ECHR

25 September – CERD publishes concluding observations on the combined 6th to 12th periodic reports of Latvia

October

10 October – PACE adopts Resolution 2239 (2018) on achieving equality regardless of sexual orientation in the area of private and family life

November

December

19 December – In *Molla Sali v. Greece* (GC) (No. 20452/14), ECtHR rules that the application of Islamic law (sharia) in litigation concerning succession to estate of Greek Muslim against the wishes of the parties concerned constitutes discriminatory treatment and a breach of the right to free self-identification, in violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property) of the ECHR

EU

January

18 January – In *Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA, Ministerio Fiscal* (C-270/16), the Court of Justice of the European Union (CJEU) holds that a law allowing an employer to dismiss an employee from work for absences related to disability may result in indirect discrimination based on disability

February

7 February – European Parliament (EP) adopts a resolution on protection and non-discrimination with regard to minorities in the EU Member States

28 February – In *John v. Freie Hansestadt Bremen* (C-46/17) the CJEU holds that prolonging an employment contract beyond the retirement age does not violate the prohibition of age discrimination

March

1 March – European Commission publishes second annual report on the implementation of the 'List of actions to advance LGBTI equality'

14 March – In *Stollwitzer v. ÖBB Personenverkehr* (C-482/16), the CJEU rules that a domestic law, which retroactively allows periods of activity before the age of 18 to be included for the purpose of categorising employees within pay scales, in order to combat age discrimination in employment, conforms with EU law

April

17 April – In *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.* (C-414/16), the CJEU rules that genuine and determining occupational requirements, provided for by the Employment Equality Directive (2000/78/EC) with regard to ethos of religious organisations, must comply with the principle of proportionality, and must be subject to effective judicial review

May

29 May – European Commission tables a Proposal for a Regulation laying down common provisions on the European Structural and Investment Funds

30 May – European Commission tables a Proposal for a Regulation on the European Social Fund Plus

June

5 June – In *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Others* (C-673/16), CJEU clarifies that the word 'spouse' used in the Free Movement Directive (2004/38/EC) is gender neutral and EU Member States must recognise the right of same-sex spouses to move and reside freely under the EU law on free movement, regardless of whether or not provisions of national law allow marriage between persons of the same sex

7 June – European Commission tables a Proposal for a Regulation establishing the Rights and Values programme

22 June – European Commission adopts a Recommendation on standards for equality bodies

26 June – In *MB v. Secretary of State for Work and Pensions* (C-451/16), CJEU rules that requiring annulment of any marriage preceding the change of gender in order to obtain a retirement pension constitutes direct discrimination on the grounds of sex

July

September

11 September – In *IR v. JQ* (Case C-68/17), CJEU holds that dismissing a Catholic doctor from a Catholic hospital because of his divorce and remarriage amounts to discrimination on the grounds of religion

October

November

December

4 December – In *Minister for Justice, Equality, and The Commissioner of the Garda Síochána v. Workplace Relations Commission* (C-378/17), CJEU holds, in the context of several age discrimination complaints brought before the Workplace Relations Commission of Ireland, that national authorities must disapply national rules that are contrary to EU law

European Parliament on 'The cost of non-Europe in the area of equality and the fight against racism and xenophobia',⁵ which quantified the damage caused by gaps and shortcomings in non-discrimination law and policies. Still, more discussions at political level will be needed to attain the unanimity required to adopt the directive.⁶

Meanwhile, in May 2018, the European Commission tabled proposals for new EU financial instruments under the 2021–2027 Multiannual Financial Framework (MFF) to support equality and non-discrimination policies, such as the new Rights and Values Programme⁷ and the European Social Fund Plus.⁸ The Rights and Values programme will finance actions to prevent and combat inequalities and discrimination, while the European Social Fund Plus will support, complement and add value to the policies of the Member States to ensure equal opportunities, in line with the principles set out in the European Pillar of Social Rights.

The most significant development in 2018, however, was the Commission's proposal for a new Common Provisions Regulation (CPR) for the European Structural and Investment Funds (ESIF).⁹ Instead of *ex ante* conditionalities, it now sets out four horizontal 'enabling conditions' to be monitored and applied throughout the entire new programming period. Two of them are directly relevant to the area of non-discrimination: the "effective application and implementation of the EU Charter of Fundamental Rights", which includes the right to non-discrimination in Article 21; and the "implementation of the United Nations Convention on the Rights of Persons with Disabilities".¹⁰ To receive payments for operations supported by EU funds, Member States will have to show their compliance with these enabling conditions throughout the programming period.¹¹

3.2. Recommendation on equality bodies highlights need to strengthen effectiveness and functional independence

The EU directives on racial equality and on gender equality¹² include the duty for Member States to establish or designate an equality body, tasked with providing independent assistance to victims of discrimination in pursuing their complaints, conducting independent surveys concerning discrimination, publishing independent reports and

making recommendations on any issue relating to such discrimination.

All Member States have established or designated equality bodies. Most of them go beyond the minimum standards set out in these directives and also include discrimination based on age, sexual orientation, disability, religion and belief, or other grounds. However, there are significant differences across the EU in the mandates, competences and resources of these equality bodies.¹³

The surveys conducted by FRA have consistently shown high levels of underreporting of discrimination incidents and low levels of trust in the effective response of existing redress mechanisms, particularly among those most at risk of experiencing discrimination, such as migrants and minorities.¹⁴ This suggests that there are barriers and challenges that hamper the effectiveness of equality bodies. For example, the findings of FRA's 'Being black in the EU' report¹⁵ reveal that only one in six respondents who felt racially discriminated against reported or made a complaint about this to any organisation or body, mostly because they did not believe that anything would change as a result. For more information on how rights awareness and knowledge of equality bodies can affect reporting, see [Chapter 4](#) on Racism and xenophobia.

To improve the equality bodies' independence and effectiveness, the European Commission adopted on 22 June 2018 a Recommendation on standards for equality bodies.¹⁶ This recommendation follows earlier work of the European Network of Equality Bodies, Equinet, on standards for equality bodies,¹⁷ as well as ECRI's revised General Policy Recommendation No. 2 on equality bodies to combat racism and intolerance at national level, issued in February 2018.¹⁸ The standards set out in the recommendation refer to the mandates of equality bodies; their independence and effectiveness; and their coordination and cooperation. The Commission recommendation stresses that Member States should ensure that each equality body has the human, technical and financial resources, premises and infrastructure necessary to perform its tasks and exercise its powers effectively.¹⁹

Against this backdrop, country reports published in 2018 by the Council of Europe's European Commission against Racism and Intolerance (ECRI) for **Austria**,²⁰ **Croatia**,²¹ **Malta**,²² **Portugal**,²³ **Spain**²⁴ and **Sweden**²⁵ point to a number of areas for improvement. Main concerns stated by ECRI include lack of effective activity of the equality body (**Spain**) lack of full independence of equality bodies (**Croatia**, **Malta**, **Portugal**), the equality body not having authority over actions by public authorities, in particular law enforcement (**Sweden**), the restriction that it can bring

civil cases concerning only collective interests and not individuals (**Croatia**), and the overall complexity of the institutional system of equality bodies (**Austria**).

The UN Committee on the Elimination of Racial Discrimination (CERD) made similar recommendations in 2018 in its concluding observations on **Latvia**,²⁶ **Slovakia**²⁷ and **Sweden**.²⁸ It called on States to provide equality bodies with adequate human, financial and technical resources and to broaden their mandates.

In **Germany**, the equality body pointed to the lack of effective instruments to tackle structural discrimination and the lack of powers to take cases to court, make binding decisions and impose sanctions in discrimination cases.²⁹

“Independent equality bodies play an essential role in implementing Union legislation effectively and enforcing it comprehensively and consistently. Equality Bodies are also valuable institutions for the sustained development of equal and inclusive democratic societies.”

European Commission, Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, Recital 30

3.3. Diverse efforts promote LGBTI equality

In March, the European Commission presented its second annual report on the list of actions to advance LGBTI equality³⁰ and confirmed its commitment to the implementation of this list.

National actions plans to improve the security, welfare and equal opportunities for LGBTI persons were adopted in **Belgium**,³¹ **Denmark**,³² **Luxembourg**,³³ **Portugal**,³⁴ **Italy**,³⁵ **Malta**,³⁶ the **Netherlands**³⁷ and the **United Kingdom**.³⁸

Promising practice

Raising awareness on intersexuality

In **Luxembourg**, the Ministry for Family Affairs, Integration and the Greater Region launched an awareness-raising campaign on intersexuality. It is called ‘Female? Male? Intersex? Let’s keep an open mind’. The aim of this campaign is to inform people about variations of sex characteristics and fight against discrimination that intersex people can experience. The campaign includes websites in French and in German.

For more information, see www.intersex.lu and www.intersex.lu.

simplified procedures for gender reassignment on the basis of self-determination; and stopping unnecessary surgical interventions on intersex children. **Luxembourg** included gender identity among the prohibited grounds of discrimination in its Criminal Code.³⁹

In several Member States, lack of legislative developments or proper implementation of existing laws resulted in courts having to enforce the protection against discrimination of LGBTI persons. In **Greece**, the constitutionality of Law 4356/2015, which allows homosexual couples to enter a civil union, was challenged before the highest administrative court, the Council of State. It was argued that it offended morals and the institutions of marriage and family. The court held⁴⁰ that a civil union does not compete with the institution of marriage, and does not in any way affect the constitutionally protected family. The court pointed out that the concept of ‘family’ changes as society evolves and the concept of ‘morals’ protected by the Constitution does not coincide with the teachings of the Church.

In **Estonia**, the Supreme Court confirmed⁴¹ the validity and binding force of the Registered Partnership Act (which provides rules governing cohabitation, regardless of the sex of partners) despite the lack of implementing legislation.

In **Poland**, the courts confirmed the prohibition of discrimination in access to services for LGBTI persons. In 2018, the **Polish** Supreme Court dismissed the Prosecutor General’s cassation appeal⁴² against the judgment of the Regional Court in Łódź that upheld the conviction of a printer who refused to produce promotional materials for an LGBT organisation.⁴³ The court decided that the justification for refusing to perform services cannot be based on an individual’s beliefs. Another **Polish** case concerned a coach who refused to organise training in krav-maga, a form of self-defence and physical training, for homosexual persons. In October, the Regional Court in Poznań upheld the judgment of the District Court, which found the coach guilty of denying services without a justified reason.⁴⁴

In **Hungary**, an LGBTI group was barred from organising events at a public space run by a state-owned non-profit firm.⁴⁵ Similarly, an LGBTQ umbrella organisation was refused permission by a prestigious university and its non-profit partner to hold an event on the university premises.⁴⁶ In all cases the Equal Treatment Authority (ETA) found direct discrimination on the grounds of sexual orientation and sexual identity. The ETA’s decisions have been upheld in court.

A number of Member States introduced relevant legal changes and policy measures throughout the year. These involved the status of same-sex families;

Equality of same-sex families advances

The European Parliament adopted a resolution on the protection of and non-discrimination against minorities in the EU Member States.⁴⁷ The resolution deals with autochthonous, national and linguistic minorities in particular, but also calls on the Commission to take action to ensure that LGBTI individuals and their families can exercise their right to free movement and are provided with clear and accessible information on the recognition of cross-border rights for LGBTI persons and their families in the EU.

Member States introduced legislation that increased the equality of same-sex couples, in particular with regard to parental rights and free movement. **Germany** enacted a law to allow same sex couples who had entered into registered partnership to change their status to that of a married couple.⁴⁸ Several Member States strengthened parental rights of same-sex couples. In **Greece**, Law 4538/2018⁴⁹ introduced a provision that allows same-sex couples in a civil partnership to become foster parents. In **Finland**, the new Maternity Act⁵⁰ was adopted to ensure that both women in a same-sex couple are legally recognised as mothers from the moment of a child's birth. **Malta** amended the Embryo Protection Act⁵¹ by changing the definition of who is eligible for state-provided *in vitro* fertilisation services, expanding the scope of "prospective parent" to "any person regardless of gender or sexual orientation". **Ireland** enacted legislation enabling same-sex couples to register both of their names on their child's identification documents, including birth certificate and passport.⁵² The amending legislation recognises the legal parenthood of both parents.

Furthermore, **Greece** amended the law⁵³ on domestic violence because it had implemented the Istanbul Convention.⁵⁴ The amendment extends the prohibition of domestic abuse beyond married couples to cover civil partnerships and couples living in a long-term relationship, including same-sex couples.⁵⁵

With regard to the free movement of same-sex couples, the CJEU clarified in *Coman*⁵⁶ that the term 'spouse' used in the Free Movement Directive⁵⁷ is gender neutral, and may therefore cover the same-sex spouse of an EU citizen. Therefore, if a same-sex marriage has been lawfully concluded in another Member State, and a Member State refuses to recognise it for the sole purpose of granting a right of residence to a third-country family member of a Union citizen, that refusal may interfere with the exercise of the right to free movement. The effects of freedom of movement cannot vary between Member States depending on whether or not provisions of national law allow same-sex marriage.

Nevertheless, the court also observed that the EU respects the national identity of Member States, inherent in their fundamental structures, both political

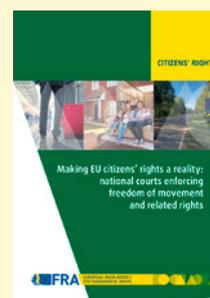
and constitutional. Therefore, a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States. EU law does not detract from that competence, the Member States being free to decide whether or not to allow homosexual marriage. Lastly, the CJEU observed that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the EU Charter of Fundamental Rights. The fundamental right to respect for family and private life is guaranteed by Article 7 of the Charter and has the same meaning and the same scope as those guaranteed by Article 8 of the ECHR. It is apparent from the case law of the ECtHR that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as a relationship of a heterosexual couple in the same situation.⁵⁸

Consequently, the Constitutional Court of **Romania**,⁵⁹ which requested the preliminary ruling in *Coman*, found that same-sex couples and different-sex couples are in comparable situations when it comes to legal protection of private and family life guaranteed by the Romanian Constitution. The court also found that same-sex couples in stable relationships should benefit from legal recognition.

FRA ACTIVITY

Highlighting the impact of the Free Movement Directive

FRA has published a report on 'Making EU citizens' rights a reality'. It presents an EU-wide, comparative overview of the application of the Free Movement Directive (2004/38/EC) across the 28 Member States, based on a review of select case law at national level. The report particularly



covers the entry and residence requirements that may be imposed on nationals of another Member State, and their family members. Several cases concern discrimination on the ground of nationality, and voting rights.

Providing insight into how national courts approach the provisions relating to Union citizenship and freedom of movement, it highlights the importance of their proper interpretation and their impact on vital areas of life for EU citizens and their families, including same-sex partners.

For more information, see FRA (2018), *Making EU citizens' rights a reality: National courts enforcing freedom of movement and related rights*, Luxembourg, Publications Office.

In **Hungary**, the Regional Court of Appeal affirmed⁶⁰ that an American-Hungarian same-sex couple have the right to have their marriage, which was contracted abroad, recognised as a registered partnership in Hungary. The Hungarian court referred to the ECtHR judgment in *Orlandi*.⁶¹

Another case also has implications for the right to free movement. It concerns children born abroad from a surrogate mother and raised by a couple in a same-sex marriage, one of the spouses being a Polish citizen. The **Polish** Supreme Administrative Court held⁶² that the children have the right to have their Polish citizenship confirmed, in accordance with the Polish Constitution and the Convention on the Rights of the Child (CRC), which prohibits discriminating against children on the grounds of the way they were born or the status of the parents.

Furthermore, the **Polish** Supreme Administrative Court shifted from previous jurisprudence in this matter and ruled that the transcription of a UK birth certificate of a child who has two mothers is compatible with the Polish legal order and that the refusal to acknowledge the transcript would violate EU law.⁶³ Although the Polish Family Code does not recognise parental rights of same-sex couples, the court noted that the case concerns the rights of a child and not recognition of same-sex partnerships by Polish law.

Right to gender self-determination increasingly acknowledged

The World Health Organization (WHO) released its new International Classification of Diseases (ICD-11) in 2018. It has removed all trans-related categories from the chapter on mental and behavioural disorders, depathologising them. The new classification also introduces concepts of gender incongruence to the chapter on sexual health.⁶⁴

Following recommendations from the EU and many international organisations, some EU Member States simplified their laws relating to legal gender reassignment, based on self-determination (**Portugal, Belgium, Luxembourg**). Some Member States introduced non-binary gender markers into their laws (**Austria, Germany, the Netherlands**). New case law at national and European levels also helped strengthen the right to self-determination.

Portugal adopted a law guaranteeing the right to gender identity and gender expression and self-determination and to the protection of sex characteristics of each person.⁶⁵ This law prohibits all kinds of discrimination based on these grounds and entitles the victim to compensation. It also establishes a simplified procedure based on self-determination for official recognition of gender identity. Young people

aged between 16 and 18 will be able to access this procedure via a legal representative, but their ability to provide free and informed consent must be confirmed by a medical certificate. The law also makes it illegal to perform unnecessary surgery on intersex children.

In January, **Belgium** modified the requirements for transgender persons to adjust how the civil registry records their gender.⁶⁶ The law abolished the strict medical conditions for legal gender reassignment, which required sterilisation or sex reassignment surgery. The procedure is now solely administrative. A transgender minor, from the age of 12, may request a change of their first name with the assistance of a parent or legal representative.

A law simplifying the procedure to modify the reference to sex and first names in documents for trans and intersex people was adopted in **Luxembourg**.⁶⁷ The old procedure was complex and required a medical, including psychological, assessment. The new law provides for an administrative procedure based on self-determination. The procedure involves submitting an application to the Ministry of Justice and can be also accessed by minors with the support of guardians/parents.

In December, the **German** parliament adopted the Law for amending the information to be entered in the birth register, which came into force on 22 December.⁶⁸ The law introduces 'diverse' as a gender marker in addition to 'male' and 'female'. However, persons concerned need to prove their intersexuality with a medical certificate, which can be waived only in exceptional cases.⁶⁹

Croatia has no standardised procedure for adjusting the certificate or diploma after gender reassignment or after choosing to live in another gender identity. That remains an unsolved problem for trans persons. Following the intervention of the Ombudsperson for Gender Equality, the Ministry of Science and Education in cooperation with the Ministry of Public Administration prepared official instructions and sent them to all educational institutions in May.⁷⁰

In March, the **Swedish** parliament decided that trans people who were forcibly sterilised between 1972 and 2013, as a requirement for legal gender recognition, should receive compensation.⁷¹ It became the first country to pay damages to victims of such forced sterilisation.

Meanwhile, the courts also paved the way for legal and social developments.

The CJEU found in *MB v. Secretary of State for Work and Pensions* that the requirement of annulment of any marriage preceding the change of gender in

order to obtain a retirement pension constitutes direct discrimination on the grounds of sex.⁷²

The European Committee on Social Rights decided in *Transgender Europe and ILGA-Europe v. the Czech Republic*⁷³ that the requirement for transgender persons to undergo medical sterilisation before legal gender recognition violates their right to protection of health (Article 11 of the ESC).

On 15 June, **Austria's** Constitutional Court ruled⁷⁴ that sex entries in civil registries and in identity documents have to reflect individual self-determined gender identity. People who do not want to be identified as either male or female should have the right to refrain from an entry, or use other terms, such as 'diverse', 'inter' or 'open'. Ultimately, the court left it to public authorities to decide how to implement the judgment appropriately. The court stated that forcing intersex persons to register a male or female gender but not offering an additional option violated their right to respect for private life as protected by Article 8 of the ECHR. It held that the interpretation of the term 'gender' in the Austrian Personal Status Act must not be restricted to binary gender and the provision in question may therefore remain in force. The court also emphasised the obligation of the legislature to leave open the sex-assignment in particular in respect of children until these persons are in a position to decide themselves on their gender identity. As a result of this judgment, on 20 December, the Federal Ministry of the Interior issued a decree on the official implementation of the third gender option.⁷⁵ Persons with a 'variant of sexual development' (*Variante der Geschlechtsentwicklung*) can request that their registered sex be changed to 'diverse'. As in **Germany**, a medical certificate is required to declare that the person is intersex. However, in Germany, the certificate can be issued by a trusted doctor. This can provide at least some protection from discrimination and repeated trauma for intersex people. In Austria, the certificate must come from a sex development variance board: a group of medical experts on variants of gender development, established by the Ministry of Health.

In the **Netherlands**, the District Court of Limburg⁷⁶ ruled on the inability of a non-binary person to change the sex on their birth certificate to 'gender cannot be determined'. The court held that it constitutes an infringement of the rights to private life, self-determination and personal autonomy, as guaranteed in Article 2 of the Universal Declaration of Human Rights, Article 8 of the ECHR and the Yogyakarta Principles. In this case, the plaintiff's sex could not be determined at birth, but the parents decided to

register the person as male. As an adult, the plaintiff had the sex marker in the birth certificate changed to female. Subsequently, the plaintiff wished to change it into 'undetermined', which was not possible anymore. Following the court order, the sex marker in the birth certificate was changed to 'gender cannot be determined'. In October, the municipality of Breda issued the plaintiff with a gender-neutral passport, with an 'X' sex marker.⁷⁷

FRA ACTIVITY

Updating FRA's EU-wide LGBTI survey

The agency is undertaking an EU-wide LGBTI survey in 2019, seven years after the first one. The survey will collect information on the experiences of discrimination and hate crime as well as the views of lesbian, gay, bisexual, trans and, for the first time, intersex people across the EU and North Macedonia.

For more information, see FRA's [webpage on the survey](#).

3.4. Debate around religious symbols and practices persists

Controversies around laws banning religious clothing or symbols at work or in public spaces, reported on in previous fundamental rights reports, continued in 2018. Although such laws are intended to signal that the expression of religious beliefs should remain in the private domain, striking a balance between this and freedom of religion or belief remains a challenge. Such bans risk disproportionately affecting Muslim women who wear religious clothing that covers their hair, face or body. Enforcing such laws proves particularly challenging in areas where there is no clearly defined line between the public and private spheres. Courts deal with discrimination claims in varying ways across the EU.

However, even where such laws do not exist, hate-motivated discrimination, harassment or violence against members of a certain religion who wear religious clothing can have an impact on the right to freedom of religion or belief. This can affect, in particular, Muslim women, Sikhs and Jewish men. In 2018, 70 % of the respondents in FRA's second survey on discrimination and hate crime against Jews in the EU said that they avoided wearing in public clothing or symbols that could identify them as Jewish because they feared the consequences.⁷⁸

FRA ACTIVITY

Collecting data on discrimination and hate crime against Jews

In 2018, FRA conducted the second survey on discrimination and hate crime against Jews. It collected comparable data on the experiences, perceptions and views of discrimination and hate crime victimisation of persons who self-identify as Jewish on the basis of their religion, ethnicity or any other reason. The results cover 12 Member States, where over 96 % of the EU's estimated Jewish population live, with over 16,000 respondents aged 16 and over. The findings point to rising levels of antisemitism. About 90 % of respondents feel that antisemitism is growing in their country, while about 70 % cite public spaces, the media and politics as common sources of antisemitism.



FRA (2018), *Experiences and perceptions of antisemitism: Second survey on discrimination and hate crime against Jews in the EU*, Luxembourg, Publications Office.

In 2018, the UN Human Rights Committee adopted views in three cases against **France** concerning religious clothing: two cases concerning the prohibition on wearing a niqab in public⁷⁹ and one regarding refusal to allow a worker in a childcare centre to wear an Islamic headscarf.⁸⁰ In all three cases, the committee found a violation of the right to religion (Article 18 of the ICCPR) and intersectional discrimination on the grounds of gender and religion (Article 26).

In *Lachiri v. Belgium*,⁸¹ the applicant had been excluded from a courtroom on account of her refusal to remove her headscarf. The ECtHR found that the exclusion of an ordinary citizen, not representing the State, from the courtroom had amounted to a restriction on the exercise of her right to manifest her religion, and the need for the restriction had not been justified, in violation of Article 9 of the ECHR.

Denmark amended its Criminal Code⁸² to ban wearing in public clothing that conceals the face. This would make it illegal for Muslim women to wear burkas and niqabs in public. In **Luxembourg**, the Criminal Code was amended⁸³ to specify public places where fully concealing clothing (burka, niqab) is not allowed, such as public transport, places for meeting/picking up minors, schools, hospitals, retirement houses, and judicial and administrative buildings.⁸⁴ In June, the

Dutch Senate passed a law imposing a limited ban on face-covering clothing.⁸⁵ The ban includes burqas and niqabs worn by some Muslim women, but also ski masks and full-face helmets in some public settings such as schools, hospitals and public transport. The law took effect on 1 January 2019.

In **Belgium**, the Tribunal of Ghent ruled⁸⁶ in two cases that a burkini ban in swimming pools amounts to indirect discrimination on the ground of religious beliefs. Although it stems from a neutral general requirement to wear a swimming suit to access the pool, it affects Muslim women who want to wear a burkini for religious reasons.

Other religious symbols have also been subjects of discussion.

The **French** Administrative Court of Appeal⁸⁷ held that it was justified under the principle of neutrality to end the contract of an Egyptian trainee at a public hospital because he wore a long beard. The court held that a beard, even long, does not in itself constitute a religious sign, but, in the absence of other factors, the applicant had failed in his duty to respect the principle of neutrality. Even though his beard was not combined with any religious proselytising behaviour, and was not the subject of remarks on the part of patients, the applicant did not establish that his beard was not a religious sign.

A case from **Sweden** also centred on the interpretation of the burden of proof rules.⁸⁸ It concerned a female Muslim dentist who for religious reasons refused to uncover her arms, which was against health safety protocols. It was not disputed that the requirement was more burdensome for some Muslim women than for other groups, and the focus was on the proportionality test. It had to be demonstrated whether or not special disposable forearm protection instead of having bare forearms could cause genuine hygiene concerns. The Labour Court found that, when the employer had presented 'genuinely objective theoretical hygienic reasons', the burden of proof had shifted back to the claimant. Since the Equality Ombudsman failed to confute the employer's expert, the claimant lost the case.

Another case from **Sweden** involved a female Muslim internship applicant, who was rejected during an interview at an interpretation company after refusing to shake hands with a male manager. The Labour Court⁸⁹ held that she was discriminated against on grounds of religion, and that the termination of the job interview was neither appropriate nor necessary to uphold the legitimate interest of respecting gender equality in the workplace.

FRA ACTIVITY

Updated handbook on non-discrimination law

In March 2018, FRA, together with the ECtHR, published an update of the Handbook on European non-discrimination law. The handbook is designed to assist legal practitioners – such as judges, prosecutors and lawyers, as well as law enforcement officers – and improve knowledge of relevant EU and Council of Europe standards and the differences in the application of non-discrimination law, particularly through case law of the CJEU, the ECtHR and other relevant bodies, including the European Committee of Social Rights.



For more information, see FRA (2018), *Handbook on European non-discrimination law*, Luxembourg, Publications Office.

3.5. EU and Member States bolster collection and use of equality data

Equality data, understood as any piece of information that is useful for the purpose of describing and analysing the state of equality,⁹⁰ are indispensable to inform evidence-based non-discrimination policies, monitor trends, and assess the implementation of EU equality directives and international human rights standards, such as the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Elimination of All Forms of Racial Discrimination. Yet equality data collection in Member States continues to have major gaps and challenges that need to be tackled, as recent studies published by the European Commission show.⁹¹ Several initiatives at both EU and national level addressed these in 2018.

To support Member States in their efforts to improve the collection and use of equality data, in February 2018 the EU High Level Group on Non-discrimination, Diversity and Equality (HLG) set up a Subgroup on Equality Data. FRA coordinates this subgroup, which comprises representatives of Member States, the European Commission and Eurostat. Member States appointed representatives coming from government departments, national statistical institutes and equality bodies.⁹²

The subgroup started its work by identifying a number of common gaps and challenges in EU Member States, including the lack of a coordinated approach for

equality data collection and use; insufficient resources and awareness of the importance of collecting equality data; incomplete identification of population groups at risk of discrimination due to overreliance on proxies; and insufficient consultation with relevant stakeholders in the design and implementation of equality data collection.

In response to the challenges identified, the subgroup prepared a set of 11 guidelines on improving the collection and use of equality data, which the HLG endorsed at its October 2018 meeting. The text features a number of concrete institutional and operational steps that Member States can undertake to enhance the availability and quality of equality data and to promote their effective use in developing evidence-based equality and non-discrimination policies.

Guidelines on improving the collection and use of equality data

A. Institutional and structural guidelines

1. Map existing sources of equality data and identify data gaps
2. Foster inter-institutional cooperation in the collection and use of equality data
3. Set up a data hub on equality and non-discrimination
4. Build institutional capacity to collect robust and reliable equality data
5. Facilitate effective use of equality data

B. Operational guidelines

6. Ensure comprehensiveness of equality data
7. Mainstream equality data into EU and national surveys
8. Ensure regular and timely equality data collection
9. Enhance validity and reliability of equality data
10. Ensure representativeness of equality data
11. Improve comparability of equality data

See European Commission, *EU High Level Group on Non-Discrimination, Equality and Diversity (2018), Guidelines on improving the collection and use of equality data*.

As a complement to these guidelines, the subgroup prepared a diagnostic mapping tool that EU Member States can use to assess the availability of equality data collected at national level and a compendium of practices that can provide inspiration when they implement the guidelines.⁹³

In line with the recommendations in the guidelines, several EU Member States took action in 2018 to

improve the availability of equality data. The **Finnish** Ministry of Justice,⁹⁴ the **United Kingdom's** Office for National Statistics⁹⁵ and the **German** equality body⁹⁶ mapped equality data sources to identify gaps and areas for improvement, while the **Irish** Department of Justice and Equality adopted a comprehensive Data and Research Strategy.⁹⁷

In **Italy**⁹⁸ and **Spain**,⁹⁹ inter-institutional agreements to strengthen equality data collection in specific areas, such as on LGBTI people and hate crime, were signed. The **Irish** National Disability Authority introduced a set of 58 indicators in eight areas of life to measure progress against the national Disability Inclusion Strategy.¹⁰⁰ On Roma issues, the **Croatian** Office for Human Rights and Rights of National Minorities published a study that combined external and self-identification methods to produce the first precise indication of the size of the Roma population in Croatia.¹⁰¹ Likewise, the **Italian** Statistical Office (ISTAT) set up a working group composed of representatives of relevant ministries, local administrations and civil society organisations to foster inter-institutional cooperation in the collection and use of data on Roma, Sinti and Caminanti minorities.¹⁰²

3.6. Discrimination based on age, disability, sexual orientation and gender identity remains an everyday reality

The year 2018 saw the publication of research findings drawing on equality data, shining light on some of the manifold ways in which discrimination and unequal treatment continue to affect European societies in key areas of life. Employment and education featured prominently among the various areas in which discrimination is experienced and received particular attention in the research.

Discrimination in employment

Research carried out by equality bodies revealed the persistence of large employment gaps between different groups (**United Kingdom**), and a high incidence of discrimination in the area of employment with little use of redress mechanisms to protect rights, mainly because people perceive them as ineffective (**Slovenia**). There is also limited knowledge on the extent to which equality legislation forbids asking questions about protected characteristics in job interviews (**Germany**). Furthermore, discrimination tends to increase when grounds such as gender, age, skin colour and religion intersect (**France**).

The Equality Commission for Northern Ireland (**United Kingdom**) published a Statement on key inequalities in employment,¹⁰³ showing 14 persistent employment gaps affecting different groups, including people with disabilities, people aged 18–24 and aged 50–64, and Irish Travellers, in particular Traveller women.

The Advocate of the Principle of Equality in **Slovenia** conducted a survey of 1,011 respondents on their perception of discrimination, their experiences of discrimination, and their awareness of rights.¹⁰⁴ Approximately one fifth of respondents had experienced discrimination in the previous 12 months. In almost half of the cases, the discrimination occurred at the workplace. The grounds of discrimination most frequently cited were age, social status and health status. Three out of four respondents who had experienced discrimination did not report it. More than half of them stated that their main reason for not reporting the discrimination was that it would not change anything.

The **German** equality body commissioned a survey through phone interviews to shed light on the awareness of prohibitions to ask questions related to protected characteristics at job interviews. Out of the sample of 1000 respondents aged 15 years and over who had had at least one interview for a job or a training place in the previous five years, 86 % considered questions related to their age in principle admissible, 72 % considered questions on nationality and on disability admissible, and 39 % considered asking a female candidate whether she is pregnant to be admissible. Very few (6 %) had had personal experiences with anonymised job application procedures. One in two (49 %) stated the use of such an application procedure would be an additional reason for them to apply for a specific job.¹⁰⁵

The Public Defender of Rights conducted a survey on working conditions and experiences of discrimination in the legal profession in **France**.¹⁰⁶ Out of the sample of 7,138 respondents, 38.6 % (53.3 % of women and 21.4 % of men) had personally experienced discrimination in the last five years regarding issues such as job status, salary or task assignment. The prevalence of discrimination was particularly high among respondents whom others perceive¹⁰⁷ as black (56.8 %) or Arab (49.6 %), Muslim (28.9 %) and homosexual or bisexual (18.5 %). Looking at the intersections of different grounds, findings show that while 38.6 % of all respondents had experienced discrimination during the last five years, the proportion is higher in a number of groups, from women aged 40–49 who are perceived as white (47.8 %), through men aged 30–49 perceived as black or Arab (65.7 %) and women aged 30–39 who have at least one child (69.1 %), to Muslim women aged 30–49 (74.2 %).

Looking into online job advertisements, studies conducted by equality bodies and human rights institutions in the **Netherlands**¹⁰⁸ and **Germany**¹⁰⁹ revealed a low prevalence of openly discriminatory job requirements, in most cases regarding age and gender, but a high impact of these job requirements on older workers when considering applying for a job.

Two studies looked in particular at inequalities and discrimination on the ground of disability. The Disability and Human Rights Observatory of **Portugal**¹¹⁰ drew on data from 2011–2017. Its report confirmed that the economic activity rate of persons with a disability is significantly lower than that of persons without disabilities, and that it is harder for them to gain employment and easier for them to lose their jobs. The study by the **Swedish** Employment Agency¹¹¹ revealed that one out of three respondents with impaired ability to work had experienced at least one discriminatory situation, ranging from negative attitudes on the part of employers to bullying.

However, there is also a strong positive correlation between collecting data on the workforce and taking action to reduce discriminatory situations, research reveals. The Equality and Human Rights Commission (**United Kingdom**) published a report on disability and ethnicity pay gaps.¹¹² It found that all employers that had collected and analysed data on disability and ethnicity pay gaps had also taken action to address inequalities. However, although over three in four (77 %) employers state that achieving workforce diversity is a priority, only 44 % collect data on differences in pay and career prospects between employees with and without disabilities, and 36 % do so on such differences between employees of different ethnic groups.

Research carried out in **Austria**,¹¹³ **Denmark**,¹¹⁴ **Slovakia**,¹¹⁵ and the **United Kingdom**¹¹⁶ consistently shows that a significant number of LGBT people are still reluctant to be open at work regarding their sexual orientation and/or gender identity; frequently experience discriminatory situations ranging from jokes and insults to harassment, non-promotion or being fired; and tend not to report these situations. Moreover, trans persons indicate that they experience discrimination at comparably higher rates and are less likely to report such incidents.

Promising practice

Taking action to counter discrimination in the labour market

In **Belgium**, the Flemish government's Department of Work and Social Economy, as part of its broader anti-discrimination policy, has created incentives for economic sectors to develop binding sectoral codes of conduct against all forms of discrimination. The government will financially support actions leading to their adoption. As a further incentive, the government will provide results-based compensation to the sectors if the reports sent in by the sectors receive positive evaluations.

For more information, see Belgium, Flemish Government: Department of Work and Social Economy (2018), Sector Agreements 2018–2019 (Sectorconvenants 2018–2019).

The **Swedish** Public Employment Agency launched an information campaign on television and in cinemas, print media and social media, promoting access to jobs for people with disabilities. The website of the campaign provides information to counteract prevailing prejudices and offers employers an online form to show their interest in hiring people with disabilities. Likewise, people with disabilities looking for a job can create a profile to be matched with an employer.

For more information, see Sweden, Swedish Public Employment Agency (2018), Make room! (Gör plats!).

The Ministry for Labour, Family, Social Affairs and Equal Opportunities of **Slovenia** has created a certificate for 'older worker-friendly' companies. The certificate will be awarded to companies that have at least 15 % of employees aged over 45 years, carry out special measures addressed at older workers, reach a certain score in a survey conducted among their older workers regarding their professional development, and are commercially successful.

For more information, see Slovenia, Ministry for Labour, Family, Social Affairs and Equal Opportunities (2018), Older worker-friendly companies (Starejšim prijazno podjetje).

The **Irish** Equality and Human Rights Commission has issued retirement and fixed-term contract guidelines to ensure that older workers who wish to continue in employment are not discriminated against. They provide guidance to legal and human resources professionals, trade unions, employers and others on interpreting and applying sections of employment law relating to older workers.

For more information, see Ireland, Equality and Human Rights Commission (2018), Retirement and fixed-term contracts: Guidelines.

Inequalities in education

Education also featured prominently in studies on discrimination. It drew attention from equality bodies and public authorities in **Belgium, Cyprus, Denmark, the Netherlands and Portugal**.

A large-scale study on inequalities and discrimination in education systems looked at ethnic origin, socio-economic origin, sexual orientation and disability, at the request of the **Belgian** Equality Body (Unia).¹¹⁷ It showed how certain minority groups are redirected towards a less favourable curriculum in higher education. The report made several recommendations to remedy the systemic deficiencies found, including the adoption of registration procedures that contribute better to social diversity; introducing measures to combat harassment of LGBTI pupils; and enhancing reasonable accommodation for pupils with disabilities.

Similarly, a study on the situation of children with disabilities in private schools carried out by the **Danish** Institute for Human Rights found, among other things, that children with disabilities at private schools are 31 % more likely to move to a public school than classmates without a disability. The study recommends that the Ministry of Education ensure inspections of how private schools comply with the prohibition of discrimination, including in cases of exclusion, and that the Danish Parliament introduce a legal obligation to provide reasonable accommodation to children with disabilities in the educational system.¹¹⁸

On discrimination and sexual orientation, universities and non-governmental organisations in **Cyprus**,¹¹⁹ the **Netherlands**¹²⁰ and **Portugal**¹²¹ carried out research based on online surveys. The results stressed the need to ensure that schools become safe environments in view of the high prevalence of homophobic and transphobic verbal and physical harassment.

FRA opinions

The current EU legal framework provides comprehensive protection against discrimination on grounds of gender and racial or ethnic origin in key areas of life. However, it currently offers protection against discrimination on grounds of religion or belief, disability, age and sexual orientation only in the area of employment and occupation. By the end of 2018, after 10 years of negotiations, the Council of the EU had still not adopted the Equal Treatment Directive, which would extend this protection to the areas of education, social protection, and access to and supply of goods and services, including housing. This means that EU law protects an individual facing discrimination in, for example, the area of housing if the discrimination is on grounds of racial or ethnic discrimination, but not if it is on grounds of sexual orientation or other grounds. This results in an artificial hierarchy of grounds within the EU, with some of them more protected than others.

Article 21 of the EU Charter of Fundamental Rights prohibits 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. Article 19 of the Treaty of the Functioning of the European Union holds that 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.

FRA opinion 3.1

In view of the overwhelming evidence of discrimination on different grounds in areas such as education, social protection and access to goods and services, including housing, the EU legislator should step up efforts to adopt the Equal Treatment Directive. This would ensure that EU legislation offers comprehensive protection against discrimination in key areas of life, including on grounds of religion or belief, disability, age and sexual orientation.

Discrimination and inequalities on different grounds remain realities in everyday life throughout the EU, the findings of FRA surveys and various national studies published in 2018 confirm. These findings also consistently show that people who experience discrimination seldom report it. The most common reason cited for not reporting is the belief that nothing would change as a result.

In light of this evidence, it can be noted that both the Racial Equality Directive and the Employment

Equality Directive stipulate under their provisions on positive action that, to ensure full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the protected grounds.

The Racial Equality Directive and the directives in the area of gender equality also establish bodies for the promotion of equal treatment. They are tasked with providing assistance to victims of discrimination, conducting research on discrimination and making recommendations on how to address discrimination. All EU Member States have established such equality bodies. However, several European Commission against Racism and Intolerance (ECRI) and Committee for the Elimination of Racial Discrimination (CERD) country reports published in 2018 expressed concerns regarding the effectiveness, independence and adequacy of human, financial and technical resources of the equality bodies monitored.

The European Commission's Recommendation on standards for equality bodies and ECRI's revised General Policy Recommendation No. 2 provide comprehensive guidance on how equality bodies' mandates, structures and means can be strengthened to increase their effectiveness.

FRA opinion 3.2

EU Member States should ensure that equality bodies can fulfil effectively and independently the tasks assigned to them in the EU's non-discrimination legislation. This entails ensuring that equality bodies are allocated sufficient human, financial and technical resources. When doing so, Member States should give due consideration to the European Commission's Recommendation on standards for equality bodies as well as ECRI's revised General Policy Recommendation no. 2.

FRA opinion 3.3

In line with the principle of equal treatment and the EU equality directives, EU Member States should consider introducing measures to prevent or compensate for disadvantages linked to any of the protected grounds. Such disadvantages could be identified through the analysis of data on discrimination experiences in key areas of life, which should be collected systematically in the EU.

The European Commission presented its second annual report on the list of actions to advance LGBTI equality and confirmed its dedication to the list's successful implementation. Through a number

of high-level groups and working groups, the Commission supports the Member States in their efforts to advance LGBTI equality.

The European Parliament called on the Commission to take action to ensure that LGBTI individuals and their families can exercise their right to free movement and are provided with clear and accessible information on the recognition of cross-border rights for LGBTI persons and their families in the EU.

A number of Member States also took action to advance LGBTI equality and introduced relevant legal changes and policy measures throughout the year. These involved the status of same-sex families; simplified procedures for gender reassignment on the basis of self-determination; and stopping unnecessary surgical interventions on intersex children. In several Member States, courts paved the way for legislative developments or ensured their proper enforcement.

FRA opinion 3.4

EU Member States are encouraged to continue adopting and implementing specific measures to ensure that lesbian, gay, bisexual, trans and intersex (LGBTI) persons can fully avail themselves of all their fundamental rights available under EU and national law. In doing so, Member States are encouraged to use the list of actions to advance LGBTI equality published by the European Commission to guide their efforts.

As in previous years, restrictions on religious clothing and symbols at work or in public spaces continued to shape debates in the EU in 2018. Although most EU Member States justify such laws with the intention of preserving neutrality, or as a way to ease social interaction and coexistence, it remains difficult to strike the balance between freedom of religion or belief and other legitimate aims pursued in a democratic society. These restrictions particularly affect Muslim women. Enforcing such laws proves particularly challenging in areas where there is no clearly defined line between the public and the private sphere, and the way courts deal with discrimination claims in this context varies across the EU.

Article 10 of the EU Charter of Fundamental Rights guarantees everyone's right to freedom of thought, conscience and religion. This right includes the freedom to change one's religion or belief and the freedom to manifest religion or belief in worship, teaching, practice and observance, either alone or in community with others. Article 21 of the EU Charter of Fundamental Rights prohibits any discrimination on the ground of religion or belief.

FRA opinion 3.5

EU Member States should ensure that any legal restrictions on symbols or garments associated with religion comply fully with international human rights law, including relevant case law of the European Court of Human Rights. Any legislative or administrative proposal that risks limiting the freedom to express one's religion or belief should embed fundamental rights considerations and fully respect the principles of legality, necessity and proportionality.

Equality data, understood as any pieces of information that are useful for describing and analysing the state of equality, are indispensable to inform evidence-based non-discrimination policies, monitor trends, and assess the implementation of anti-discrimination legislation. Furthermore, under the Racial Equality Directive and the Employment Equality Directive, every five years EU Member States have to communicate all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of these directives. The next obligation to communicate is due in 2020.

The Subgroup on Equality Data set up under the EU High Level Group on Non-Discrimination, Equality and Diversity identified a number of common challenges that affect the availability and quality of equality data in Member States. These challenges include the lack of a coordinated approach to equality data collection and use, incomplete identification of population groups at risk of discrimination due to overreliance on proxies, and insufficient consultation with relevant stakeholders in the design and implementation of data collection. The 11 guidelines on improving the collection and use of equality data prepared by the subgroup offer concrete guidance on addressing these challenges at national level. Although the guidelines are for Member States, by analogy they could also be applied within EU institutions and bodies to strengthen diversity monitoring.

FRA opinion 3.6

EU Member States should adopt a coordinated approach to equality data collection and ensure reliable, valid and comparable equality data disaggregated by protected characteristics, based on self-identification and in compliance with the principles and safeguards set out under the General Data Protection Regulation. When doing so, Member States should give due consideration to the guidelines on improving the collection and use of equality data adopted by the EU High Level Group on Non-Discrimination, Equality and Diversity. As a future step, EU institutions and bodies should consider applying these guidelines within their own structures.

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