

# **Exploring the Lisbon Treaty**

New opportunities  
for equality and human rights applied  
to sexual orientation and gender identity

**by Olivier De Schutter**  
Professor, University of Louvain and College of Europe  
Visiting professor, Columbia University



**Assessment of the opportunities  
created for the defence and promotion  
of the human rights of LGBTI people  
by the Treaty of Lisbon,  
commissioned by ILGA-Europe**

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## Introduction

The Treaty of Lisbon entered into force on 1 December 2009.<sup>1</sup> As a result, the Charter of Fundamental Rights, initially proclaimed at the Nice European Council of December 2000, becomes legally binding.<sup>2</sup> In addition, the Treaty of Lisbon provides that the EU shall accede to the European Convention on Human Rights, the major human rights treaty opened for adoption within the framework of the Council of Europe. And the Treaty of Lisbon brings about significant changes in the decision-making procedures of the EU, as well as in the role of the non-discrimination provisions of the treaties. This paper seeks to take stock of these developments and of their significance for the protection and promotion of LGBTI rights in the EU, in particular with a view to highlighting the possibilities opened for non-governmental organisations seeking to advocate these rights.

Chapter I of this contribution explores the implications of these advances for the protection of the rights of lesbians, gays and trans persons in the EU. It focuses on the governance mechanisms that the EU institutions have gradually developed in order to ensure that fundamental rights shall be taken into account in all the decision- and policy-making of the EU. Indeed, the recognition of the binding force of the Charter of Fundamental Rights, it shall be argued, is not only a legal event: it is rather, primarily, a political event, because it encourages a change in the culture of the EU institutions and of the EU Member States when they act in the field of application of EU law. This chapter therefore examines how the Charter is integrated in decision-making within the EU, and how this could be further improved in the future.

Chapter II of the paper examines the law- and policy-making in the EU, following the entry into force of the Treaty of Lisbon. This chapter will focus in particular on actors, and on how non-governmental organisations defending the rights of LGBTI persons can be involved in decision-making in the EU. Finally, Chapter III builds on the two preceding chapters in order to provide some reflections on the future of a strategy for the implementation of LGBTI rights in the EU.

## I. The constitutional structure of the EU following the Treaty of Lisbon

### 1. The significance of the binding nature of the Charter of Fundamental Rights

The recognition of the binding force of the EU Charter of Fundamental Rights is the last step in an evolution that began forty years ago. The European Court of Justice (now the Court of Justice of the European Union) has applied fundamental rights as part of the general principles of law it applies and ensures respect for in the scope of application of the treaties, since the 1970s.<sup>3</sup> But the case-law that resulted was both in part unpredictable and not very visible, and it did not provide the required guidance to either the institutions of the European Union or to the Member States implementing EU law, although fundamental rights were to be complied with in both situations.

At the Cologne European Council of 3-4 June 1999, the Heads of States and Governments therefore decided that a charter should be prepared, in order to make more visible the *acquis* of the European Union in the area of fundamental rights. This instrument was drafted at the request of the European

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<sup>1</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1).

<sup>2</sup> Article 6 § 2 of the EU Treaty now refers to the EU Charter of Fundamental Rights in the revised form it has been proclaimed, in a revised form, on 12 December 2007 (OJ C 303 of 14.12.2007, p. 1)). It states that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

<sup>3</sup> See, e.g., Case C-29/69, *Stauder v Ulm* [1969] ECR 4119; Case C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case C-4/73, *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v Germany* [1989] ECR 2609.

Council by a body of 62 members in what came to be known as the 'Convention' between December 1999 and October 2000. The result was the EU Charter of Fundamental Rights, finally proclaimed on 7 December 2000 at the Nice European Council closing the French presidency, jointly by the Council, together with the European Commission and the European Parliament.<sup>4</sup>

The proclamation of the Charter did not as such make it into a binding instrument, although it could be argued that it formed an interinstitutional agreement obligatory for the institutions concerned.<sup>5</sup> However, although the Charter remained a political declaration, it nevertheless was perceived as highly legitimate because it essentially was a restatement in a codified form of the existing *acquis* of the EU legal order in the area of fundamental rights, and because the "convention" which had been tasked with preparing the document included representatives of the national governments and of the European Commission, as well as members of national parliaments and of the European Parliament. Indeed, following its proclamation, the EU Charter of Fundamental Rights was referred to by Advocates General to the European Court of Justice,<sup>6</sup> by the Court of First Instance (now the General Court),<sup>7</sup> and by the Civil Service Tribunal.<sup>8</sup> The Court of Justice of the European Communities itself (now Court of Justice of the European Union) moved cautiously in this direction.<sup>9</sup>

Perhaps even more important than the recognition of its authority by the courts, the Charter of Fundamental Rights gradually led the institutions of the EU to integrate a concern for fundamental rights in their law- and policy-making. This process of integration appeared to be greatly facilitated by the fact that the *acquis* of the EU in the area of fundamental rights was now codified into a single catalogue of rights that was perceived as highly legitimate.

This is relevant to LGBTI rights insofar as the Charter of Fundamental Rights provides a protection from discrimination on grounds of both sexual orientation and gender identity: indeed, it follows from Articles 20 (equality before the law) and 21 (non-discrimination, *inter alia*, on grounds of sex and sexual orientation) of the Charter that, in the field of application of EU law, no difference of treatment on grounds of sexual orientation or gender identity can be allowed.<sup>10</sup> The next section reviews which tools the different institutions of the EU have developed in order to take into account the Charter of Fundamental Rights in their practice (2.). This is followed by a discussion of the next steps that could deepen this integration of fundamental rights (3.).

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<sup>4</sup> OJ C 364 of 18.12.2000, p. 1.

<sup>5</sup> See Olivier De Schutter and Emmanuelle Bribosia, "La Charte des droits fondamentaux de l'Union européenne", *Journal des tribunaux*, 24 mars 2001, pp. 281-293.

<sup>6</sup> See, e.g., AG Tizzano, opinion of 19 February 2001 in Case C-173/99, *BECTU*, [2001] ECR I-4881 (on the status of the right to paid leave as a fundamental right, justifying a broad reading of the relevant instrument of EU secondary law).

<sup>7</sup> Case T-198/01, *Technische Glaswerke Ilmenau* [2002] II-2153, para. 115 ; Joined Cases T-377/00, T-379/00, T-380/11, T-260/01 and T-272/01, *Philip Morris International e.a. v. Commission* [2003].

<sup>8</sup> Case F-1/05, *Landgren*, [2006] II-A-1-459, para. 72.

<sup>9</sup> The Court of Justice referred to the Charter of Fundamental Rights for the first time in a judgment of 27 June 2006, concerning an action for annulment filed by the European Parliament against the 2003 Directive on the right to family reunification (directive 2003/86/EC of 22 September 2003) : see Case C-540/03, *Parliament v. Council*, [2006] I-5769, para. 38. However, the reference to the Charter in that case still has a rather ambiguous status, since the Charter was referred to by the Preamble of the instrument (in that case, the Family Reunification Directive) against which the application was filed. It is only in 2007 that the Court referred to the Charter of Fundamental Rights in other situations, i.e., even in the absence of any explicit reference to the Charter in secondary legislation : see Case C-432/03, *Ubinet* [2007] ECR I-2271, para. 37 ; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paras. 43-44; Case C-341/05, *Laval un Partneri* [2007] ECR I-11767, paras. 90-91; Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council* [2008] ECR I-6351, para. 335.

<sup>10</sup> It should be noted that this prohibition of discrimination already was imposed in the case-law of the European Court of Justice in the field of application of EU law. This is one of the reasons why the Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom, appended to the Treaty of Lisbon (see OJ C 306 of 17.12.2007, p. 156), shall be devoid of any legal effect : although as a result of this protocol, the domestic courts in Poland and in the United Kingdom could be tempted to abstain from referring to the Court of Justice of the European Union questions of interpretation of EU law arising from the obligation to take into account fundamental rights in the implementation of EU law by the national authorities of these countries, this would be in violation of the requirement -- that the Treaty of Lisbon confirmed in Art. 6 § 3 of the EU Treaty, as amended -- that fundamental rights as part of the general principles of law applied by the Court of Justice should be complied with in the field of application of EU law.

## **2. The integration of the Charter of Fundamental Rights in law- and policy-making: the existing practice of the institutions**

### **2.1. The European Parliament**

The European Parliament has pledged to strengthen its de facto role of guardian of fundamental rights in the interinstitutional dialogue, in a resolution it adopted on 15 December 2010 on the situation of fundamental rights in the European Union.<sup>11</sup> In order to do so, the European Parliament has essentially two tools at its disposal, which it developed in particular following the adoption of the Charter of Fundamental Rights.

*The verification of the compatibility of legislative proposals with the Charter of Fundamental Rights.* On the basis of the Charter, it is has become possible for the European Parliament to systematically check whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles which had been proclaimed in Nice. Article 36 of the Rules of Procedure of the European Parliament now states, under the heading "Respect for the Charter of Fundamental Rights of the European Union", the following:

1. Parliament shall in all its activities fully respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union.

Parliament shall also fully respect the rights and principles enshrined in Article 2 and in Article 6(2) and (3) of the Treaty on European Union.

2. Where the committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter. The opinion of that committee shall be annexed to the report of the committee responsible for the subject-matter.

Where either the European Parliament committee responsible for the subject matter, or the LIBE (Civil Liberties, Justice and Home Affairs) committee (that the rules of procedure of the Parliament designate as "responsible for the interpretation of the Charter"), have doubts about the requirements of the Charter, they may choose to request an opinion on the subject from the Fundamental Rights Agency of the European Union. Indeed, whereas, in principle, the Regulation establishing the Fundamental Rights Agency does not authorize the Agency to adopt opinions concerning pending legislative proposals, this prohibition may be circumvented if it receives a request from an institution involved in the procedure, since the Agency may "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission".<sup>12</sup>

*The political sanctions mechanism for violations of the values on which the Union is founded.* A second development was the result, not of the adoption of the Charter itself, but of the existence of the Charter in combination with the entry into force on 1 May 1999 of the Treaty of Amsterdam. This Treaty not only formulated in Article 6(1) EU the values on which the Union was founded, which

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<sup>11</sup> Resolution of 15 December 2010 on "The situation of fundamental rights in the European Union (2009-2010) -- Institutional aspects following the entry into force of the Treaty of Lisbon", (2009/2161 (INI) (rapp. J. Voggenhuber), para. 21.

<sup>12</sup> Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1 (see Art. 2 § 1, d) and § 2). The role of the Agency is to 'provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights' (Art. 2).

include human rights and fundamental freedoms. It also backed up this affirmation by a mechanism provided for in Article 7 EU, allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values. In addition, as a result of the crisis opened by the entry into the Austrian ruling governmental coalition of Jörg Haider's Freedom Party of Austria (FPÖ),<sup>13</sup> this mechanism was improved by the Treaty of Nice, which introduced the possibility of recommendations being adopted preventively, where a 'clear risk of a serious breach' of those values is found to be present.<sup>14</sup>

The inclusion of such a political sanctions mechanism soon raised the question whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the member states of the European Union. The European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As this committee noted itself, the Treaty of Nice "acknowledges Parliament's special role as an advocate for European citizens' by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach."<sup>15</sup> But even before that Treaty entered into force, the European Parliament had inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union, invoking the need for the Parliament to contribute its role in ensuring that the values on which the EU is built are effectively upheld.<sup>16</sup> By providing a clearer grid of analysis, the adoption of the EU Charter of Fundamental Rights at the Nice European Summit of 2000 was seen as facilitating this practice, making the exercise less subjective.<sup>17</sup>

This practice of the European Parliament has been uneven over the years. Between 2002 and 2006, at the request of the Parliament, a network of independent experts on fundamental rights was established by the European Commission, both in order to provide independent advice to the institutions of the EU on issues related to fundamental rights and to prepare annual reports on the situation of fundamental

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13 On this crisis, see Meredith Happold, "Fourteen against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government", *International and Comparative Law Quarterly*, vol. 49 (2000), p. 953; and Emmanuelle Bribosia/Olivier De Schutter/Thomas Ronse/Anne Weyembergh, "Le contrôle par l'Union européenne du respect de la démocratie et des droits de l'homme par ses Etats membres: à propos de l'Autriche", *Journal des tribunaux – Droit européen* (2000) 61. On the insertion of Article 7(1) EU by the Treaty of Nice, see Grainne de Búrca, "Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU", in De Schutter/Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?*, Bruxelles, Bruylant, 2005, pp. 245-278, at pp. 259-262.

14 This preventive mechanism is now described in Article 7(1) EU.

15 See the Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) (rapp. J. Voggenhuber), at 6 of the proposal for a resolution; this passage has been maintained without amendment in the European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004 (see at. 6 of the operative part of the resolution).

16 Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, 177-350), at 2-3 (in which the Parliament notes that "following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)", and that "it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee [the LIBE Committee] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter").

17 See the Report on the situation as regards fundamental rights in the European Union (2000) (rapp. Thierry Cornillet), PE 302.216/DEF, EP doc. A5-0223/2001 (2000/2231(INI)); the Report on the human rights situation in the European Union (2001) (rapp. Joke Swiebel), PE 311.039/DEF, EP doc. A5-0451/2002 (2001/2014(INI)) (and Resolution of 15 January 2003 on the situation concerning fundamental rights in the European Union (2001), OJ C 38 E, 12.2.2004, 174); Report on the situation as regards fundamental rights in the European Union (2002) (rapp. Fodé Sylla), PE 329.881/DEF, EP doc. A5-0281/2003 (2002/2013(INI)) (and Resolution of 4 September 2003 on the situation as regards fundamental rights in the European Union (2002), P5\_TA(2003)0376); Report on the situation as regards fundamental rights in the European Union (2003) (rapp. Alima Boumediene-Thiery), PE 329.936/DEF, EP doc. A5-0207/2004 (2003/2006(INI)). The resolution proposed on the basis of the report by Ms Alima Boumediene-Thiery was rejected by the European Parliament. The Cornillet Report was the first one to use the EU Charter of Fundamental Rights as its template. However, the practice of preparing an annual report on the situation of fundamental rights of the Union predated the adoption of the Charter: see Resolution on the annual report on human rights in the EU (1998-1999), (rapp. Haarder) of 16 March 2000 (EP doc. A5-0050/2000).

rights in the EU (including in the 15, and then 25, EU Member States). In part because this network prepared reports that were more detailed and better researched than what the European Parliament could achieve itself, and in part because of what was perceived as the increasingly politicized nature of the debates based on the reports prepared by the Parliament,<sup>18</sup> the practice of adopting annual reports on the situation of fundamental rights in the European Union -- which was supported by the work of the network of independent experts during 2002-2004 -- was discontinued by the European Parliament between 2004 and 2008, although the network itself ceased functioning in 2007, with the establishment of the EU Agency for Fundamental Rights. In January 2009 however, the European Parliament adopted a report on the situation of fundamental rights in the EU between 2004-2008,<sup>19</sup> and it now appears that it shall adopt regular reports on the situation of fundamental rights in the EU, probably on an annual basis.<sup>20</sup>

Following the amendments of the Treaty of Lisbon, the Treaty on the European Union now describes the values of the European Union in Article 2 EU, which states :

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The political sanctions mechanisms established first in 1999, with the entry into force of the Treaty of Amsterdam, and improved when the Treaty of Nice entered into force in 2003, remains unchanged with the Treaty of Lisbon. The mechanism is described in Article 7 of the EU Treaty :

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

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<sup>18</sup> The failure, in 2004, to achieve consensus on a draft resolution based on the report by Ms Alima Boumediene-Thiery on the situation of fundamental rights in the EU in 2003 played a significant role in this respect.

<sup>19</sup> See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, of 5.12.2008) ; and the Resolution of the European Parliament of 14 January 2009 on the situation of fundamental rights in the Union 2004-2008 (2007/2145(INI)).

<sup>20</sup> For the report on the situation of fundamental rights in the EU in 2009, see <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0483&language=EN&ring=A7-2010-0344>.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Whether this shall lead to the establishment of a permanent monitoring of the situation of fundamental rights in the EU Member States, in the hands either of the European Commission or of the European Parliament, remains to be seen. When the European Commission had proposed such a permanent monitoring system in a communication of 2003,<sup>21</sup> the Parliament rejected the idea. This vote however was taken on the eve of the accession of ten new Member States to the EU.<sup>22</sup> This may have influenced the position of the Parliament against a kind of human rights monitoring which some could see as a gesture of non-confidence, that could be misinterpreted in the context in which it was proposed. In contrast with the position adopted in 2004, the resolution adopted by the European Parliament in December 2010 on the situation of fundamental rights in the EU (2009)- effective implementation following the entry into force of the treaty of Lisbon, "calls for follow-up to the 2003 Communication on Article 7 of the Treaty on European Union to define a transparent and coherent way to address possible violations of human rights and make relevant use of Article 7 TEU on the basis of the new fundamental-rights architecture".<sup>23</sup> And the European Commission itself refers to its 2003 communication on the implementation of Article 7 of the EU Treaty in its 2010 communication setting out its strategy for the implementation of the Charter of Fundamental Rights.<sup>24</sup> It cannot be excluded, therefore, that further developments shall take place in this regard, effectively leading the European Parliament or/and the European Commission to develop a practice of systematically assessing whether the EU Member States are not acting in violation of the values on which the Union is founded, even in situations that are not related to the implementation of EU law and to which, therefore, the EU Charter of Fundamental Rights does not apply.

## 2.2. The European Commission

The role of fundamental rights in the exercise by the European Commission of its powers, particularly in drafting legislative proposals and in policy-making, has developed in three directions : first, the Commission has gradually strengthened its verification of the compatibility of its legislative proposals with the requirements of fundamental rights ; second, it has integrated fundamental rights into its practice of impact assessments; third, it has moved to a more proactive approach to fundamental rights, through the preparation of an annual report on the implementation of the Charter of Fundamental Rights.

*Assessment of compatibility of legislative proposals with the Charter.* The European Commission announced its intention to verify the compatibility of its proposals with the Charter at an early stage : the first statement in this regard dates from March 2001, at a time when the Charter had been proclaimed but was not formally binding and was not invoked in judicial proceedings.<sup>25</sup> In 2005, moving one step further, the Commission adopted a Communication clarifying the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals.<sup>26</sup> In 2009, the Commission published a Report containing an appraisal of this methodology and announcing different improvements.<sup>27</sup>

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<sup>21</sup> Communication of the Commission to the Council and to the European Parliament on Article 7 of the EU Treaty. Respect and promotion of the values on which the Union is founded, COM(2003) 606 final, of 15.10.2003, p. 6.

<sup>22</sup> See the resolution adopted by the European Parliament on 20 April 2004, Respect and promotion of the values on which the Union is founded, EP doc. P5\_TA(2004)0309.

<sup>23</sup> Resolution on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (rapp. K Gal) (2009/2161(INI)), para. 17.

<sup>24</sup> COM(2010) 573 final, of 19.10.2010, at para. 1.3.3.

<sup>25</sup> SEC(2001) 380/3.

<sup>26</sup> Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

<sup>27</sup> See COM(2009) 205 final on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights.

*Impact assessments.* In parallel to such assessments of the compatibility of the draft legislative proposals submitted by the European Commission, the practice of impact assessments also was improved in order to better take into account the requirements of fundamental rights. The preparation of such impact assessments has become a standard practice since 2002.<sup>28</sup> When they were revised in 2005, the guidelines for the preparation of impact assessments paid greater attention to the potential effects of different policy options on the guarantees listed in the Charter.<sup>29</sup> The new guidelines are still based, as the former impact assessments, on a division between economic, social and environmental impacts, and the Commission has repeatedly stated that it was unwilling to perform separate human rights impact assessments, distinct from the assessment of economic, social and environmental impacts : this is most likely to be explained by the fact that the results of human rights impact assessments would be more difficult to ignore than if such results are part of a broader assessment, in which positive impacts at various levels (including, e.g., on economic growth and social cohesion) can compensate for other, negative impacts (such as a narrowing down of civil liberties or of the provision of certain public services). Nevertheless, the role of fundamental rights in impact assessments as practiced by the European Commission has been gradually enhanced. The most recent guidelines on impact assessments further strengthen the role of fundamental rights in such assessments in comparison to the 2005 version of the guidelines,<sup>30</sup> and the Commission has recently pledged, in its "smart regulation" communication of 2010, to make further progress on this dimension.<sup>31</sup>

*Ensuring the implementation of the Charter of Fundamental Rights.* In 2010, invoking the fact that the recognition by the Treaty of Lisbon of the binding nature of the Charter, the European Commission published a communication exposing its strategy for the implementation of the Charter of Fundamental rights.<sup>32</sup> In this communication, the Commission pledges to remind the authorities in charge of the implementation of EU law about their obligation to comply with fundamental rights. It also commits to improve the information of citizens about their rights. It commits to maintain its current practice of accompanying all new legislative proposals with a fundamental-rights impact assessment . It pledges to oversee the legislative process to ensure that emerging final texts comply with the Charter, and to apply a 'zero tolerance' policy on violations of the Charter, conducting in-depth investigations and initiating infringement procedures when Member States are in breach of their human rights obligations in implementing EU law. But probably the most important innovation of the communication is that the Commission offers to prepare an annual report on the implementation of the Charter, with the aim both to increase transparency about the progress made in the implementation of the Charter through the action of the institutions, and to promote a debate with the European Parliament and the Council of the EU. This, in time, could develop into a tool to review developments within the EU Member States and identify areas in which the EU could take measures, within the limits of its competences, to strengthen the protection of human rights in the EU.

### **2.3. The Council of the EU**

The Stockholm Programme adopted by the European Council of 11-12 December 2009 invited the institutions of the EU and the Member States to "ensure that legal initiatives are and remain consistent throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the [European Convention on Human Rights]

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<sup>28</sup> Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

<sup>29</sup> See SEC(2005)791, 15.6.2005. Indeed, a specific report was commissioned by the European Commission (what was then DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment*. Final Report, December 2004, 61 pages.

<sup>30</sup> SEC(2009) 92 of 15.1.2009.

<sup>31</sup> See COM(2010) 543 final of 8.10.2010, at 7.

<sup>32</sup> See European Commission, *Communication on the implementation of the Charter of Fundamental Rights* (COM(2010) 573 final of 19.10.2010). On this communication, see, inter alia, the UK Parliament's briefing note *The European Charter for Fundamental Rights: the Commission's Strategy for Implementation* (5 May 2011 (authored by Vaughne Miller)), available on: <http://www.parliament.uk/briefing-papers/SN05963> (last consulted 30 June 2011).

and the rights set out in the Charter of Fundamental Rights".<sup>33</sup> As already noted above, following the entry into force of the Treaty of Lisbon and the recognition of the legal authority of the Charter of Fundamental Rights, the institutions will be encouraged to scrutinize more carefully their role in ensuring that the provisions of the Charter are adhered to in the exercise of their powers.

The latest to do so was the Council of the EU. Since December 2009, the Council of the EU on Justice and Home Affairs has decided to establish a permanent Working Party on fundamental rights and citizenship (FREMP) in charge of fundamental rights, citizenship of the Union and free movement of persons, which originally was set up only on a temporary basis in order to discuss the proposals of the Commission related to the establishment of the Fundamental Rights Agency. The Council also adopted on 24-25 February 2011 conclusions on the integration of fundamental rights in its working methods: a new methodology was endorsed by the Committee of Permanent Representatives (COREPER) in May 2011, to ensure that fundamental rights would be complied with by the Council, both in its legislative and in its non-legislative actions.<sup>34</sup>

### **3. The integration of the Charter of Fundamental Rights in law- and policy-making : the next steps**

Invoking fundamental rights within the EU thus became routine in the work of the institutions, now that a document exists, which lists the said rights, and that was prepared under conditions which guaranteed it a high degree of legitimacy. The current system could be further strengthened, however.

First, there is currently no systematic guidance provided to the EU Member States as to how they should implement EU legislation in compliance with the requirements of non-discrimination, *inter alia*, on grounds of sexual orientation and gender identity. While the Fundamental Rights Agency may be well positioned to provide such guidance in the future, and while the European Commission has committed to monitor the compatibility of measures implementing EU law with the requirements of fundamental rights, organisations working in this area could also contribute to this, by preparing model impact assessments to help national authorities assess the impact on the rights of LGBTI people of any legislation or policy measure implementing EU law that may affect such rights.

This would be particularly important since there is currently no requirement imposed under EU law that the instruments adopted by the EU prevent the risk of fundamental rights being violated in their implementation by the Member States : all that is imposed is that these instruments do not, as such, result in such violation. Indeed, according to the European Court of Justice, while EU law 'could... not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights',<sup>35</sup> an instrument of EU law will be considered valid provided it leaves to the EU Member States a 'margin of appreciation, ... sufficiently wide to enable them to apply [the instrument's] rules in a manner consistent with the requirements flowing from the protection of fundamental rights'.<sup>36</sup> Thus, secondary legislation would be compatible with the requirements of fundamental rights insofar as it does not compel the Member States to violate such rights, even where it does not establish clear safeguards against such risk.<sup>37</sup> The implication is

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<sup>33</sup> See Conclusions of the European Council, 11-12 December 2009, and The Stockholm Programme – An open and secure Europe serving and protecting the citizens, EU doc. 17024/09, point 2.1., p. 12.

<sup>34</sup> Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the European Union, 3092nd General Affairs Council meeting, Brussels, 23 May 2011, para. 9. For the text of the methodology, see Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies, presented by the General Secretariat of the Council of the EU to the Committee of Permanent Representatives (COREPER), Council of the EU, doc. 10140/11 of 18 May 2011.

<sup>35</sup> Case C-540/03, *Parliament v Council*, [2006] ECR I-5769, para. 23.

<sup>36</sup> Para. 104.

<sup>37</sup> See also, in this regard, the opinion expressed by AG Kokott in the case concerning the action for annulment filed by the European Parliament against the 2003 Family Reunification Directive. Her view (as expressed in paras. 79-82 of the opinion) was that the contested provisions of the Family Reunification Directive must be examined 'in order to determine *whether there is sufficient scope for them to be applied in conformity with human rights.*' Otherwise put 'Community provisions are compatible with fundamental rights if they are *capable of being interpreted in a way which produces the outcome which*

that there is no requirement that EU law deny scope to a Member State to exercise its discretion under EU legislation in such a way as to violate human rights standards. This is consistent with the general approach of the Court of Justice of the EU, according to which it was for the national authorities to ensure that they did not adopt an interpretation of EU law that conflicted with the general principles of law, but that the instrument of EU secondary law in question is not invalid merely because it allows a Member State discretion which could be exercised in this manner.<sup>38</sup> Strengthening the monitoring of implementation measures adopted at the level of each EU Member State is therefore essential. And this should be done, to the fullest extent possible, preventively rather than *post hoc*.

Second, the current system fails to distinguish clearly between the respective functions of the assessment of compliance with the Charter of Fundamental Rights (and other fundamental rights binding in the EU) and human rights impact assessments. Both of course are performed in different ways in the current decision-making procedure, and by different actors. But, for the most part, they are conceived in the same way: both are devices to ensure, under the responsibility of the European Commission, that legislative proposals or policies shall not infringe upon fundamental rights. This suffers from two limitations : first, it underestimates the importance of the participatory dimension of impact assessments, in order to allow the administration to benefit from the views of grassroots organisations and from the views of those directly affected by the adoption of certain measures; second, it underestimates the fact that certain measures, while not directly infringing upon a fundamental right and creating a risk of violation, may create obstacles to its further realisation, a problem that is particularly relevant to the fulfilment of economic and social rights.

In future impact assessments and compatibility checks, one main area of contention is likely to be whether the prohibition of discrimination on grounds of sexual orientation shall extend to differences in treatment between married couples and non-married couples, in the EU Member States where marriage is not open to same-sex couples. It is clear that differences of treatment between opposite-sex couples (whether married or not) and same-sex couples cannot be tolerated, since such differences in treatment are considered to amount to discrimination on grounds of sexual orientation in the case-law of the European Court of Human Rights.<sup>39</sup> However, at present at least, States remain free to choose whether or not to allow same-sex partners to marry : this is the position adopted by the European Court of Human Rights in its judgment of 24 June 2010 adopted in the case of *Schalk & Kopf v. Austria*,<sup>40</sup> where the applicants unsuccessfully challenged the refusal of the Austrian authorities to allow them to marry, founding their application Articles 12 (right to marry) and 14 (non-

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*those rights require. [...] [What] matters is not what rules Member States might be minded to adopt in order to take full advantage of the latitude which the contested provisions afford, but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights'.*

<sup>38</sup> Case C-101/01, *Lindqvist* [2003] ECR I-12971, paras. 84-88.

<sup>39</sup> In a judgment of 2 March 2010 adopted in the case of *Kozak v. Poland* (application No. 13102/02), the European Court of Human Rights found that a same-sex partner should be able to succeed to a tenancy held by their deceased partner. In line with the judgment it delivered on 24 July 2003 in the case of *Karner v. Austria* (Appl. N° 40016/98), the Court unanimously held that the blanket exclusion of persons living in same-sex relationships from succession to a tenancy was in breach of the Article 14, taken in conjunction with Article 8 (the right to respect for private and family life). It rejected the government's argument that the discriminatory treatment was necessary to protect the family founded on a "union of a man and a woman", as stipulated in Article 18 of the Polish Constitution. The Court stated that there is a need for governments to recognise "developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life". Furthermore, it asserted that laws adversely affecting the "intimate and vulnerable sphere of an individual's private life" need strong justifications, which had not been satisfied in this case. The position affirmed by the Court is further reiterated in Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, cited above, which provides that 'Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights' (Appendix, para. 23), and that 'Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation' (para. 24).

<sup>40</sup> Eur. Ct. HR, *Schalk & Kopf v. Austria* (Appl. N° 30141/04) judgment of 24 June 2010.

discrimination in the enjoyment of the rights and freedoms of the ECHR) of the European Convention of Human Rights.<sup>41</sup>

To which extent is the resulting difference of treatment between opposite-sex couples (who may have access to marriage) and same-sex couples (who are denied such access) compatible with the principle of equality? Although the recognition of same-sex marriage may not at this point in time be required under European human rights law, international human rights law requires that same-sex couples either have access to an institution such as registered partnership which provides them with the same advantages as those they would be recognized if they had access to marriage ; or that, failing such official recognition, the *de facto* durable relationships they enter into leads to extending to them such advantages.<sup>42</sup> Indeed, where differences in treatment between married couples and unmarried couples have been recognized as legitimate, this has been justified by the reasoning that opposite-sex couples have made a deliberate *choice* not to marry. Since such reasoning does not apply to same-sex couples which, under the applicable national legislation, are prohibited from marrying, it follows *a contrario* that advantages recognized to married couples should be extended to unmarried same-sex couples either when these couples form a registered partnership, or when, in the absence of such an institution, the *de facto* relationship presents a sufficient degree of permanency : any refusal to thus extend the advantages benefiting married couples to same-sex couples should be treated as discriminatory.

In the view of this author, the impacts on same-sex couples of legislation or policies that recognize "marriage" (as defined by the respective domestic laws of the EU Member States) or that grant certain advantages to "married couples", shall have to be scrutinized, and shall have to be considered as a prohibited form of discrimination unless same-sex couples may benefit from the same degree of recognition or be granted the same advantages, for instance under legislation recognizing legal partnerships or similar forms of civil unions. Indeed, this may constitute the main value of the integration of fundamental rights in the practice of the EU institutions, since the prohibition of discrimination on grounds of sexual orientation is otherwise well understood -- if not always complied with.<sup>43</sup>

As regards the prohibition of differences of treatment against same-sex couples as well as in other areas, any proposal to further strengthen compliance with the requirements of fundamental rights in the law- and policy-making of the EU or to ensure appropriate assessment of the impact on fundamental rights or measures adopted by the EU institutions or by the Member States should take into account developments within the Council of Europe. The adoption on 31 March 2010 by the Committee of Ministers of the Council of Europe of Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity<sup>44</sup> demonstrates the emergence of a strong European consensus regarding the need to combat discrimination on grounds of

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<sup>41</sup> While acknowledging that the institution of marriage had undergone 'major social changes' since the Convention was adopted, the Court considered that it had 'deep-rooted social and cultural connotations' that differ largely between societies and that, with only six of the forty-seven contracting states allowing same-sex marriage, there was 'no European consensus' on the issue. While recognizing for the first time that 'family life' under Article 8 ECHR applied to *de facto* relationships between two persons of the same sex, the Court also concluded that there was no obligation to grant access to marriage to same-sex couples based on Art. 14 in combination with Art. 12. Because the Convention must be read as a whole, and its articles construed in harmony with one another, given the conclusion that Art. 12 did not impose an obligation to grant access to marriage to same sex-couples, it could not be implied from Art. 14 taken in conjunction with Art. 8.

<sup>42</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity states on this point : 'Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live' (para. 25).

<sup>43</sup> Indeed, the debate in recent years has been increasingly focused on this issue -- recognition of same-sex partnerships and access to marriage for same-sex partners, and non-discrimination against same-sex couples --, even more so than on other forms of discrimination on grounds of sexual orientation. It is perhaps telling in this regard that, in its most recently adopted resolution of the European Parliament on the situation of fundamental rights in the EU, the Parliament refers to its past resolutions on "discrimination against same sex marriages and civil-partnership couples", rather than referring to discrimination on grounds of sexual orientation. Resolution on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (rapp. K Gal) (2009/2161(INI)), para. 2.

<sup>44</sup> Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

sexual orientation and gender identity. This recommendation – adopted by consensus by the Delegates of the Foreign Affairs Ministers of the 47 Member States of the Council of Europe – asks the Council of Europe Member States to examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity (op. para. 1); to ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and trans persons and to promote tolerance towards them (op. para. 2); and to ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination (op. para. 3). The Recommendation also contains an appendix detailing the measures to be taken in various fields, which the Member States are encouraged to take into account and to disseminate as widely as possible.

This recommendation and other developments within the Council of Europe (including, but not limited to, the case-law of the European Court of Human Rights) matter for the development of legislation in the EU. Indeed, it has become agreed standard practice for the European Union to legislate in the area of human rights taking as departure point the standards developed by the Council of Europe.<sup>45</sup> This practice was systematized in a Memorandum of Understanding concluded on 23 May 2007 between the two organisations, which provides that "co-operation shall take due account of the comparative advantages", and that both organisations "will acknowledge each other's experience and standard-setting work, as appropriate, in their respective activities".<sup>46</sup> In May 2010, the Committee of Ministers of the Council of Europe (which of course includes the 27 Delegates of the Foreign Affairs Ministers of the EU Member States) further noted that "the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights on 1 December 2009 has created new opportunities to enhance further the values-based partnership between the Council of Europe and the European Union, with a view to achieving a strong and coherent system of human rights protection in Europe" (para. 2), and they recalled that such co-operation "should also ensure coherence in the drafting of Council of Europe standards and European Union legislation, through consultations at an early stage" (para. 3).<sup>47</sup> While none of these documents require that the EU seek inspiration from the Council of Europe's standards in strengthening the protection of LGBTI rights in the European Union, they nevertheless establish a strong presumption that any initiative of the EU in this area should take such standards as their departure, and in principle at least provide a similar standard of protection where the EU decides to take action.

#### **4. The significance of the accession of the EU to the European Convention on Human Rights and the future relationships with the Council of Europe instruments**

As already noted, the entry into force of the Treaty of Lisbon provided the legal basis required for the accession of the EU to the European Convention on Human Rights. On 17 March 2010, the European Commission proposed negotiation directives to the Council.<sup>48</sup> The JHA Council mandated the Commission to negotiate on behalf of the EU Member States on 4 June 2010. In parallel within the

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<sup>45</sup> This practice was encouraged, although not explicitly required, by the Guidelines on the relationships between the Council of Europe and the European Union, included as an Appendix to the Declaration and Plan of Action adopted at the Council of Europe Summit held in Warsaw in May 2005. See, for a comprehensive description of the various cooperations existing between the Council of Europe and the European Union, the overview compiled by the Council of Europe (DER (2009) 1, 30 September 2009) (available on: [http://www.coe.int/t/der/docs/DER.2009.1\\_En.pdf](http://www.coe.int/t/der/docs/DER.2009.1_En.pdf) (last accessed on 25 June 2011)).

<sup>46</sup> At para. 12 (see:

<https://wcd.coe.int/wcd/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1555975&SecMode=1&DocId=1104084&Usage=2> (last accessed 25 June 2011)). The 2008 Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe (JO L 186 of 15.7.2008, p. 7) also provides, in the same spirit, that the Agency "shall take due account of the judgments and decisions of the European Court of Human Rights concerning the areas of activity of the Agency and, where relevant, of findings, reports and activities in the human rights field of the Council of Europe's human rights monitoring and intergovernmental committees, as well as those of the Council of Europe's Commissioner for Human Rights" (para. 8).

<sup>47</sup> Decision adopted by the Committee of Ministers of the Council of Europe on 11 May 2010.

<sup>48</sup> IP/10/291.

Council of Europe, the Committee of Ministers of the Council of Europe mandated the Steering Committee on Human Rights to pursue the negotiations with the EU. The negotiations were officially launched on 7 July 2010, and they should be completed during the second half of 2011 in order for the procedure of adoption of the Treaty providing for the accession of the European Union to the European Convention on Human Rights to be launched by the end of 2011.<sup>49</sup> The entry into force of the Treaty may not intervene before many months, since the adoption of the Treaty will require not only unanimous agreement within the Council of the EU, as well as the approval by each Member State in accordance with the respective constitutional requirements; it shall also require approval by the European Parliament.<sup>50</sup>

It is unlikely that the accession of the EU to the European Convention on Human Rights will represent a significant advance for the protection of LGBTI rights in the EU. There are two reasons for this. First, the Court of Justice of the EU already protects fundamental rights within the limits of its jurisdiction, *de facto* applying the European Convention on Human Rights as if this instrument were already part of the EU legal order, and interpreting the ECHR in accordance with the case-law of the European Court of Human Rights. Second, it is primarily in the implementation by the EU Member States of measures adopted by the EU that the risk of violations of LGBTI rights occur. And in such situations, in addition to the possibility for the Court of Justice of the EU to address fundamental rights in the framework of the referral procedure, the European Court of Human Rights may receive applications filed against the EU Member State which has adopted measures of implementation of EU law that are alleged to result in a violation of the ECHR. The accession of the EU to the ECHR shall therefore not bring about the sea change that has sometimes be anticipated : although the institutional consequences are significant, and although this may lead the Court of Justice of the European Union to be even more zealous in its application of human rights law, it shall not represent an important advance in the level of protection of LGBTI rights.

## **II. The law- and policy-making in the EU following the Treaty of Lisbon**

### **1. The competences of the EU in the area of fundamental rights and non-discrimination**

Under the current definition of the competences of the EU, the rights of LGBTI persons can be protected through a number of means. A more proactive policy in the area of LGBTI rights could result in these competences being exercised once the need for legislative action shall have been identified. While the annual reports prepared by the European Commission on the implementation of the Charter of Fundamental Rights or the reports of the European Parliament on the situation of fundamental rights in the EU can support this -- both were discussed above --, the contribution of the Fundamental Rights Agency of the European Union, which is formally in existence since 1 March 2007,<sup>51</sup> could also be significant.<sup>52</sup> Here, the main areas where further initiatives are identified, and the legal bases recalled.

It will be noted from the outset that the Treaty of Lisbon further strengthens the role of the European Parliament in the legislative procedure of the EU, essentially by generalizing, to a large extent, what was formally known as the co-decision procedure under which the Council of the EU (representing the governments of the EU Member States) and the European Parliament (representing the citizens of the

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<sup>49</sup> An informal working group, composed of 14 experts of the Member States of the Council of Europe (including 7 from EU Member States and 7 from non-EU Member States), has been established to draft the legal instruments for accession ; the Committee of Ministers of the Council of Europe should be presented with a draft by 30 June 2011.

<sup>50</sup> Article 218, § 6 a) and 10, of the Treaty on the Functioning of the European Union.

<sup>51</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1.

<sup>52</sup> On the role of the Fundamental Rights Agency and the dynamizing impact it could have on the exercise of the EU's competences in the area of fundamental rights, see O. De Schutter, 'The EU Fundamental Rights Agency: Genesis and Potential', in Kevin Boyle (ed.), *New Institutions of Human Rights Protection*, Oxford University Press, Collected Courses of the Academy of European Law (European University Institute, Florence), Oxford University Press, Oxford, 2009, pp. 93-135; and Gabriel N. Toggenburg, 'The role of the new EU Fundamental Rights Agency: Debating the 'sex of angels' or improving Europe's human rights performance?', *Eur. L. Rev.*, vol. 33, n° 3 (2008), pp. 385-398.

EU) must agree in order for an instrument to be adopted : it is this "co-decision" that the Treaties now refer to as the ordinary legislative procedure.<sup>53</sup> Furthermore, qualified majority voting becomes the rule within the Council of the EU<sup>54</sup> : previously, unanimity was more frequently required.

### 1.1. Combating discrimination on grounds of sexual orientation

Article 19 TFEU corresponds to the the former Article 13 EC. It provides that the Council of the EU may take appropriate action, in particular by the adoption of directives, to combat discrimination based *inter alia* on sexual orientation. The Council of the EU should decide unanimously, acting in accordance with a special legislative procedure and after obtaining the consent of the European Parliament (under former Article 13 EC, the Parliament only had to be consulted). The Treaty on the European Union (Art. 48 § 7) provides, however, that the European Council (the Heads of States and Governments, acting unanimously and with the consent of the European Parliament) may decide in such a case that the requirement of unanimity can be waived, or/and that the normal legislative procedure shall apply, in order to facilitate reliance on this legal basis for the adoption of new legislative instruments.

It is already on the basis of Article 13 EC that Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive)<sup>55</sup> was adopted. This instrument prohibits both direct and indirect discrimination in employment, broadly understood as including conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions; access to vocational guidance and vocational training; employment and working conditions, including dismissals and pay; and membership of, and involvement in, organisations of workers or employers.<sup>56</sup>

The Employment Equality Directive is a hugely important piece of legislation, that provides in principle a strong protection of workers against discrimination on grounds on sexual orientation in recruitment and promotion procedures, in the organisation of the workplace, or in their relationships with unions. However, a number of EU Member States have failed to adequately implement the directive, or they have attached very variable levels of sanctions to the violations of its provisions.<sup>57</sup> And important questions of interpretation remain concerning the implications of the directive for same-sex couples, at least where specific advantages are reserved to married couples in States where same-sex marriage is not recognized.<sup>58</sup> Finally, the protection afforded under the Employment

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<sup>53</sup> Articles 289 and 294 of the Treaty on the Functioning of the European Union. Since the initial proposal for a legislative instrument must emanate from the European Commission, in practice, these three institutions must agree for an act to be adopted under the ordinary legislative procedure, although unanimous agreement within the Council allows to circumvent a negative opinion of the European Parliament on amendments adopted by the Parliament to a position of the Council. The European Commission also takes part in the discussions of the Conciliation Committee which may be convened in order to seek agreement between conflicting positions of the Council and of the European Parliament.

<sup>54</sup> Article 16 § 5 of the Treaty on the European Union. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union. This means that the proposal must be agreed by at least 15 of 27 EU Member States, or 16 of 28 after the access of Croatia, providing the States in favor represent a sufficiently large percentage of the total population of the Union. However, a blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. Thus, if a sufficiently large number of States agree on a proposal (24 out of 27 or 25 out of 28), the fact that the population requirement is not attained is not an obstacle to the decision being adopted. On qualified majority voting, see Art. 238 of the Treaty on the Functioning of the European Union.

<sup>55</sup> OJ L 303 of 2.12.2000, p. 16.

<sup>56</sup> Art. 3(1) of the Employment Equality Directive.

<sup>57</sup> See for a review Fundamental Rights Agency, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity*, 30 November 2010 (based on information available on 1 June 2010) (available on : [http://www.fra.europa.eu/fraWebsite/research/publications/publications\\_per\\_year/pub-LGBTI-2010-update\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-LGBTI-2010-update_en.htm) (last accessed 25 June 2011)).

<sup>58</sup> On this question, see the comments above.

Equality Directive only applies to the sphere of employment (broadly conceived as described above), and it is thus less ambitious in scope than the first directive adopted on the basis of Article 13 EC protecting all persons from discrimination on grounds of race or ethnic origin.<sup>59</sup> The adoption of a new Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,<sup>60</sup> as has been proposed by the European Commission, also on this legislative basis, should bridge this gap.

## 1.2. Combating discrimination on grounds of gender identity

The right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure.<sup>61</sup> The view of the European Court of Justice is that the instruments implementing the principle of equal treatment between men and women -- including, in particular, the 2006 Gender Equality Recast Directive<sup>62</sup> and the 2004 directive on access to goods and services without discrimination<sup>63</sup> -- should be interpreted widely in order to afford a protection against discrimination to trans persons.<sup>64</sup>

It follows that the various legislative bases allowing the EU legislature to adopt measures implementing the principle of equal treatment without discrimination on grounds of sex could be used to adopt measures protecting trans persons from discrimination. This includes not only Article 19 TFEU, referred to above, but also Article 157 TFEU. Article 157 TFEU corresponds to the former Article 141 EC. It provides that the EU Member States shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied, and that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

## 1.3. Freedom of movement

Article 20(2) a) of the Treaty on the Functioning of the EU provides that citizens of the Union shall have "the right to move and reside freely within the territory of the Member States". While this right is reiterated in Article 21 TFEU (and it is, indeed, also mentioned in the Charter of Fundamental Rights), Article 21(2) TFEU adds that "If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights" to move and reside freely in the territories of the Member States. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004

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<sup>59</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22. The Racial Equality Directive obliges the Member States to protect all persons from discrimination on grounds of race or ethnic origin in employment and occupation, but also in social protection (including social security and health care), social advantages, education, and access to and supply of goods and services which are available to the public, including housing.

<sup>60</sup> COM(2008) 426 final, 2.7.2008.

<sup>61</sup> Case 149/77, *Defrenne* [1978] ECR 1365, paragraphs 26 and 27, and Case C-13/94, *P. v S. and Cornwall City Council* [1996] ECR I-2143, paragraph 19.

<sup>62</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23.

<sup>63</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37.

<sup>64</sup> Case C-13/94, *P. v. S. and Cornwall City Council* judgment of 30 April 1996, [1996] ECR I-2143 ; Case C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, judgment of 7 January 2004, [2004] ECR I-541 ; Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, judgment of 27 April 2006, [2006] ECR I-3585.

on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive)<sup>65</sup> defines the conditions under which the citizens of the Union and their family members may move and reside freely within the territory of the Member States. In the next few years, questions will increasingly emerge as to whether the directive also benefits same-sex couples, allowing them to benefit from the family reunification provisions of the directive.<sup>66</sup>

The Free Movement Directive grants a number of rights of free movement and of temporary or permanent residence to a) the citizens of the Union who move to or reside in a Member State other than the State of which they have the nationality, and to b) their family members (Art. 3). A 'family member', for the purposes of the directive, is a) the 'spouse', b) 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State', and c) certain descendants or dependent ascendants of either the citizen of the Union who has exercised his or her right to free movement or of his/her spouse or partner (Art. 2). The Free Movement Directive could be made more hospitable to same-sex couples, however. In its current form, it raises three separate questions.

A first question that arises under the directive is whether the same-sex married person (whose marriage with another person of the same sex is valid under the laws of Belgium, the Netherlands, Portugal, Spain or Sweden<sup>67</sup>) should be considered a 'spouse' of the citizen of the Union having moved to another EU Member State for the purposes of this Directive, by the host Member State, thus imposing on this State to grant the spouse an automatic and unconditional right of entry and residence. This author considers that any refusal to do so would constitute a direct discrimination on grounds of sexual orientation, in violation of Article 21 of the Charter of Fundamental Rights. However, despite this requirement of non-discrimination on grounds of sexual orientation, some EU Member States still appear hostile to the recognition of same-sex marriage concluded abroad, and might refuse to consider as 'spouses', for the purposes of family reunification, the same-sex married partner of a citizen of the Union having exercised his/her free movement rights in the forum State. A clarification of the obligations of the EU Member States under the Free Movement Directive, as regards the recognition of same-sex married couples, may therefore be required.

A second question is raised in the situation where a couple, formed of two persons of the same sex, although they cannot marry in their State of origin, has access to registered partnership, or to some equivalent form of civil union, and where such an institution has been entered into. In this case, the Free Movement Directive states that only when the host State 'treats registered partnerships as equivalent to marriage' in its domestic legislation, it should treat registered partnerships concluded in another member State as equivalent to marriage for the purposes of family reunification. The same rule would seem to be imposed on host member States where same-sex couples may marry. In total, 11 EU Member States are in this situation at the time of writing : six Member States have established forms of registered partnership in their domestic legislation with effects equivalent to marriage – i.e., with consequences identical to those of marriage with the exception of the rules concerning filiation

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<sup>65</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

<sup>66</sup> See generally on the question of the free movement of same-sex couples in the European Union, *inter alia*, E. Guild, 'Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC', in R. Wintemute and M. Andenaes (eds), *Legal Recognition of Same-Sex Partnerships*, cited above, at 678-689; K. Waaldijk, 'Towards Equality in the Freedom of Movement of Persons', in K. Krickler (ed), *After Amsterdam: Sexual Orientation and the European Union* (Brussels, ILGA-Europe, 1999); A. Elman, 'The Limits of Citizenship: Migration, Sex Discrimination and Same-Sex Partners in EU Law', 28 *Journal of Common Market Studies* 729 (2000); Helen Toner, *Partnership Rights, Free Movement, and EU Law*, Hart Publ., 2004, 286 pages.

<sup>67</sup> This list may soon come to include Luxembourg and Slovenia, where legislative processes are currently launched to open up marriage to same-sex couples.

and adoption<sup>68</sup>—, and five Member States (Belgium, Spain, the Netherlands, Portugal and Sweden) allow for same-sex marriage. In the other Member States, either there exists no registered partnership equivalent to marriage, or whichever institution does exist does not produce effects equivalent to marriage : the only obligation imposed on the host Member State is then to ‘facilitate entry and residence’ of the partner, where the partners share a same household (Art. 3(2), a)), or because the existence of a registered partnership establishes the existence of a ‘durable relationship, duly attested’ (Art. 3(2), b)). In this respect, the Free Movement Directive may have to be further improved to ensure full equality of treatment between same-sex couples and opposite-sex couples in the enjoyment of freedom of movement.

A third question arises in the hypothesis where no form of registered partnership is available to the same-sex couple in the State of origin, and where the relationship between two partners of the same sex therefore is purely *de facto*. In this case, the obligation of the host member State is to ‘facilitate entry and residence’ of the partner, provided either the partners share the same household (Art. 3(2), a)), or there exists between them a ‘durable relationship, duly attested’ (Art. 3(2), b)). Such ‘durable relationship’ is generally considered to be established ipso facto where a registered partnership has been concluded. This obligation, which requires from the host State that it carefully examines the personal circumstances of each individual seeking to exercise his or her right to family reunification, is not conditional upon the existence, in the host member State, of a form of registered partnership considered equivalent to marriage. In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven. While this may be explained by the need not to artificially restrict such means, the risk is that the criteria relied upon by the administration may be arbitrarily applied, and lead to discrimination against same-sex partners, which have been cohabiting together or are engaged in a durable relationship. Here again, further guidance on how these provisions should be implemented would facilitate the task of national administrations, contribute to legal certainty, and limit the risks of arbitrariness and discrimination against same-sex households or relationships.

#### **1.4. Family reunification**

Article 79 § 1 of the Treaty on the Functioning of the EU provides that the Union "shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". Article 79 § 2 TFEU adds that measures can be taken in order to implement this objective in a series of areas, together by the European Parliament and Council, acting according to the ordinary legislative procedure. It is on the basis of these provisions, in the version that pre-existed to the Treaty of Lisbon,<sup>69</sup> that Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification was adopted.<sup>70</sup> The instrument, commonly referred to as the ‘Family Reunification Directive’, ensures in principle that the spouse will benefit from family reunification (Art. 4(1)a). It is for each Member State to decide whether it shall extend this right also to unmarried or registered partners of the sponsor. However, although they are recognized a margin of appreciation in this regard, the Member States should take into account, in implementing the directive, their obligations under Articles 7 and 21 of the Charter of Fundamental Rights, that guarantee the right to respect for private and family life and prohibit any discrimination, inter alia, on grounds of sexual orientation. In addition, the recent case-law of the European Court of Human Rights recognizes that same-sex couples form a "family life" in the meaning of this expression that appears in Article 8 of the European Convention on Human Rights<sup>71</sup> : this cannot be ignored in the interpretation of the fundamental rights protected by the Court of Justice of the EU, and in the reading of Article 7 of the Charter of Fundamental Rights in particular.

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<sup>68</sup> These are Austria, the Czech Republic, Denmark, Finland, Hungary, and (with civil partnership) the United Kingdom.

<sup>69</sup> Articles 63(3) and (4) of the EC Treaty.

<sup>70</sup> OJ L 251 of 3.10.2003, p. 12.

<sup>71</sup> Eur. Ct. HR (1st sect.), *Schalk and Kopf v. Austria* (Appl. N° 30141/04) judgment of 24 June 2010.

A number of implications follow. It is clear that where, by denying the possibility for the partner to join the sponsor, a State does not allow a durable partnership to continue, this would result in a disruption of the right to respect for private life such that this would constitute a violation of Article 8 ECHR or Article 7 of the Charter of Fundamental Rights where the relationship could not develop elsewhere, for instance due to harassment against homosexuals in the countries of which the individuals concerned are the nationals or where they could establish themselves, or simply because of the disruption having to change his/her place of residence might mean to the sponsor. In addition however, the directive should be implemented without discrimination on grounds of sexual orientation.

A first implication is that the same-sex 'spouse' of the sponsor (where the marriage between two persons of the same sex has been validly concluded) should be granted the same rights as would be granted to an opposite-sex 'spouse'. A second implication is that if a State decides to extend the right to family reunification to unmarried partners living in a stable long-term relationship and/or to registered partners (an option chosen currently by 13 EU Member States<sup>72</sup>), this should benefit all such partners, and not only opposite-sex partners. In addition, while the Family Reunification Directive implicitly assumes that it is not discriminatory to grant family reunification rights to the spouse of the sponsor, without extending the same rights to the unmarried partner of the sponsor, even where the country of origin of the individuals concerned does not allow for two persons of the same sex to marry, the result of this regime is that family reunification rights are more extended for opposite-sex couples, which may marry in order to be granted such rights, than it is for same-sex couples, to whom this option is not open. In the view of this author, this solution may be questioned, although it corresponds to the explicit terms of the directive : even though, in the current state of development of international human rights law, it is acceptable for States to restrict marriage to opposite-sex couples, reserving certain rights to married couples where same-sex couples have no access to marriage may be seen as a form of discrimination on grounds of sexual orientation. A third implication is that, if an EU member State decides to grant the benefits of the provisions of EU law on the free movement of persons to the partners of a third-country national residing in another member State (and which that other Member State treats as family members), this may not be restricted to opposite-sex partners. While these are implications that may be seen to derive from the requirement that the EU Member States implement the Family Reunification Directive in compliance with the requirements of non-discrimination and the right to respect for family life, the existing text could be improved in order to remove any doubt that could remain in this regard.

### **1.5. Combating homophobia through the use of criminal law**

Reliance on the criminal law may not be excluded for combating certain forms of homophobia and transphobia, particularly hate crimes motivated by homophobia and transphobia or hate speech directed against LGBTI persons. A consensus has been recently affirmed within the Council of Europe concerning the need to step up efforts towards combating hate crimes and hate speech.

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity recommends that the Member states of the Council of Europe should 'ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity' (Appendix, para. 1). They should also ensure that 'when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance' (para. 2). Victims and witnesses of sexual orientation or gender identity

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<sup>72</sup> 3 States restrict this possibility to partners united under a registered partnership or an equivalent institution : these are the Czech Republic, Germany, and Luxembourg. 10 other States allow for family reunification on the basis of any durable relationship, even not authenticated by official registration : they are Austria, Belgium, Bulgaria, Denmark, Finland, France, the Netherlands, Sweden, Spain and the United Kingdom.

related hate crimes and other hate-motivated incidents should be encouraged to report these crimes and incidents, for which purpose States 'should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses' (para. 3). The same recommendation also contains paragraphs on the need to 'ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons', and on the collection and analysis of relevant data on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on hate crimes and hate-motivated incidents related to sexual orientation or gender identity.

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity also recommends that the Member states of the Council of Europe should 'take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and trans persons. Such "hate speech" should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court'. The Member states are asked to 'raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination'. And public officials and other state representatives should be encouraged to 'promote tolerance and respect for the human rights of lesbian, gay, bisexual and trans persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities' (Appendix, paras. 6-8).

Article 83 § 1 of the TFEU provides that the European Parliament and the Council "may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". While homophobic hate crimes and hate speech directed against LGBTI persons are not listed among the criminal offences that present these characteristics,<sup>73</sup> the Treaty provides for a flexibility clause insofar as it allows the Council acting unanimously, "on the basis of developments in crime, [to] adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph".<sup>74</sup> Although there exists an interesting precedent in this regard in the context of the right against racism and xenophobia,<sup>75</sup> it is however very unlikely that this provision shall be relied upon in order to achieve an approximation of the laws of the EU Member States in the definition of hate crimes and homophobic hate speech, and of the minimum sanctions that should be imposed to such crimes. The unanimity requirement within the Council, in addition to the need to obtain the consent of the European Parliament, for this flexibility clause to be relied upon, represent for the moment insurmountable barriers.

However, in order to allow EU instruments to be sanctioned through criminal law, Article 83 § 2 of the TFEU also provides that "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". If it were to appear that the instruments adopted on the basis of Article 13 EC (now Article 19 of the Treaty on Functioning of the European Union) or Article 141 EC (now Art. 157 TFEU), respectively to combat discrimination on grounds of sexual orientation or on grounds of sex/gender identity, are ineffective because of the failure of the Member States to provide for sanctions that are sufficiently dissuasive and proportionate

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<sup>73</sup> See Art. 82 § 1, al. 2, TFEU.

<sup>74</sup> Art. 82 § 1, al. 3, TFEU.

<sup>75</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55–58).

to the seriousness of discriminatory conduct, Article 83 § 2 TFEU thus could make it possible for the Council of the EU to require that discrimination be defined as a criminal offence in domestic legislation. Reliance on this clause would be justified insofar as these are fields (combating discrimination on grounds of sexual orientation or on gender identity) that have been subjected to harmonization measures in the EU. It would not be transposable to attempts to impose legislating through criminal law against homophobia or transphobia, which have not been harmonized under EU law. In addition, Article 83 § 2 TFEU also provides that the adoption of directives for the approximation of the criminal laws of the EU Member States should take place through the same procedures than for the adoption of the harmonization measures themselves : as regards the criminalization of discrimination on grounds of sexual orientation therefore, in accordance with Article 19 TFEU, this requires the Council of the EU to act unanimously, with the consent of the European Parliament.

## 2. Mainstreaming the principle of equal treatment

Article 3 § 3 of the EU Treaty now lists the fight against discrimination as one of the objectives of the European Union. Article 10 of the Treaty on the Functioning of the EU provides that "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Adapting the definition of mainstreaming used by the European Commission in the context of gender mainstreaming,<sup>76</sup> we may define the requirement to mainstream non-discrimination on grounds of sexual orientation or gender identity as "the systematic integration of [non-discrimination on grounds of sexual orientation or gender identity] in all policies [...] with a view to promoting [non-discrimination on grounds of sexual orientation or gender identity] and mobilising all general policies and measures specifically for the purpose of [realising equality of treatment without discrimination on grounds of sexual orientation or gender identity] by actively and openly taking into account, at the planning stage, their [impact on equality of treatment without discrimination on grounds of sexual orientation or gender identity]".<sup>77</sup>

What does this add to the more traditional role that the prohibition of discrimination has played in the EU? The definition cited above<sup>78</sup> highlights what is novel about mainstreaming, and how it complements the more classic forms of monitoring of compliance with the requirement of non-discrimination. First, mainstreaming implies, at its core, that the fight against discrimination on grounds of sexual orientation should not be pursued only via ear-marked, distinct policies, but must be incorporated in all the fields of law- and policy-making: the requirement thus, should be seen as 'an integral part of all public policy making and implementation, not something that is separated off in a policy or institutional ghetto.'<sup>79</sup> Mainstreaming is thus transversal, or horizontal. Second, it should also be seen as operating *ex ante* rather than *post hoc*: it influences the way legislations and public policies are conceived and different alternative paths compared to one another; it does not simply require that such legislations and policies do not violate fundamental rights. It is pro-active, rather than reactive. Third and finally, mainstreaming means that the fight against discrimination on grounds of

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<sup>76</sup> Gender mainstreaming was given prominence at the United Nations World Conference on Women held at Beijing in 1995 (see *Report of the Fourth World Conference on Women*, UN doc A/Conf.177/20 (1995) (objective H2)). See in particular on this idea F. Beveridge, S. Nott and K. Stephen, 'Mainstreaming and the engendering of policy making : a means to an end ?' (2000) 7.3 *Journal of European Public Policy* 385-405 ; S. Nott, 'Accentuating the Positive : Alternative Strategies for Promoting Gender Equality' in F. Beveridge, S. Nott and S. Stephen (eds), *Making Women Count. Integrating Gender into Law and Policy-making* (Ashgate, Dartmouth, 2000) pp 247-276 ; T. Rees, *Mainstreaming Equality in the European Union* (London, Routledge, 1998) ; M. Pollack and E. Hafner-Burton, 'Mainstreaming gender in the European Union' (2000) 7.3 *Journal of European Public Policy* 432-457; A. Woodward, 'Gender Mainstreaming in European Policy : Innovation or Deception ?' Discussion paper FS I 01-103, Wissenschaftszentrum Berlin für Sozialforschung, 2001 ; M. Verloo, 'Another Velvet Revolution ? Gender Mainstreaming and the Politics of Implementation' IWM Working Paper No 5/2001, Institut für die Wissenschaften vom Menschen, Vienna, 2001.

<sup>77</sup> See Commission of the European Communities, *Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*, COM(96) 67 final of 21 February 1996, p. 2.

<sup>78</sup> For an extensive discussion of the different definitions of mainstreaming which have been proposed, see A. Woodward, 'Gender Mainstreaming in European Policy : Innovation or Deception ?', cited above, pp 5-10.

<sup>79</sup> Ch McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland', *Fordham International Law Journal*, vol. 22 (1996), pp. 1696-1775, p 1699.

sexual discrimination should not be left in hands of a few experts knowledgeable about its requirements, but that it should instead lead to participatory processes allowing representatives of LGBTI people to be involved in decision-making, at the design stage of policies and legislation. Christopher McCrudden captures these different components of mainstreaming when he writes: "Mainstreaming approaches are intended to be anticipatory, rather than essentially retrospective, to be extensively participatory, rather than limited to small groups of the knowledgeable and to be integrated into the activities of those primarily involved in policy-making".<sup>80</sup>

Mainstreaming, as understood thus, potentially presents a number of advantages, at least if it is accompanied by an action plan ensuring that measurable and concrete progress is made towards realising the objective of equal treatment:

1) *It is an incentive to develop new policy instruments.* Mainstreaming displaces questions which were sectorialised from the vertical to the horizontal, from the policy margins to their centre. It therefore requires from policy-makers that they ask new questions about old themes. It is a lever for political imagination. For instance, the mainstreaming of disability issues within the European Commission has led it to pay attention to these issues in all its socio-economic policies, programmes and projects, leading it to include provisions in favor of the professional integration of persons with disabilities in the regime of State aids, in the adoption of the guidelines under the European Employment Strategy, or in the revision of the rules relating to public procurement.<sup>81</sup> Mainstreaming disability issues has thus obliged the policy-makers to identify how, in their particular sector, they could contribute to the social and professional integration of persons with disabilities: rather than remedying the exclusion from employment of persons with disabilities, mainstreaming seeks to combat such exclusion by tackling the phenomenon at its root, in the market mechanisms which produce it. An obligation imposed on all policy-makers to identify how they could facilitate the realization of the objective which is mainstreamed, in this sense, is a first step towards identifying means by which the mechanisms producing undesirable outcomes may be modified : it rewards imagination above the reproduction of routine solutions.<sup>82</sup>

<sup>80</sup> Ch McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland,' *cited above*, at p. 1769.

<sup>81</sup> On the mainstreaming of the objective of integrating persons with disabilities, see the Communication of the Commission, Equal Opportunities for People with Disabilities. A European Action Plan, COM(2003)650 final, 30.10.2003, and Resolution of the Council of 15 July 2003 on promoting the employment and social integration of people with disabilities, OJ C 175 of 24.7.2003, p. 1 (calling upon the Member States to reinforce 'the mainstreaming of the disability perspective into all relevant policies at the stages of policy formulation, implementation, monitoring and evaluation', and insisting on the need for statistical information for such monitoring and evaluation as well as for the need of cooperation with bodies and civil society organisations concerned with people with disabilities). The mainstreaming of disability led the EU to include provisions in favor of the professional integration of persons with disabilities in the regime of State aids (Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, OJ L 337 of 13.12.2002, p. 3 (determining that certain categories of State aid schemes which seek to favor employment, and especially employment of target groups, including workers with disabilities, may be considered compatible with the common market within the meaning of Article 87(3) EC and be exempted from the notification requirement of Article 88(3) EC)), in the adoption of the guidelines under the European Employment Strategy (Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States, OJ L 197 of 5.8.2003, p. 13), or in the revision of the rules relating to public procurement (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134 , 30.4.2004, p. 114) (which provides that contract performance conditions may seek to favor the employment of people experiencing particular difficulty in achieving integration). More recently, see Communication of the Commission, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010)636 final of 15.11.2010.

<sup>82</sup> See also, inter alia: the comments of the Committee on the Rights of the Child, stating that it 'has [...] found it necessary to encourage further coordination of government to ensure effective implementation [of the Convention on the Rights of the Child]: coordination among central government departments, among different provinces and regions, between central and other levels of government and between Government and civil society. The purpose of coordination is to ensure respect for all of the Convention's principles and standards for all children within the State jurisdiction; to ensure that the obligations inherent in ratification of or accession to the Convention are not only recognised by those large departments which have a substantial impact on children - education, health or welfare and so on - but right across Government, including for example departments concerned with finance, planning, employment and defence, and at all levels.' (General comment No 5, *General measures of implementation of the Convention on the Rights of the Child* (arts 4, 42 and 44, para 6), adopted at the thirty-fourth session of the Committee (2003), in *Compilation of the general comments or general recommendations adopted by human rights treaty bodies*, UN doc HRI/GEN/1/Rev7, 12 May 2004, p 332, at par 18).

2) *Mainstreaming is a source of institutional learning.* A group of experts commissioned by the Council of Europe defines gender mainstreaming as :

the reorganisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.<sup>83</sup>

This definition presents the advantage of laying the accent on one of the important virtues of mainstreaming, which is to oblige policy-makers to identify issues which are present in the policies they pursue or the sectors these policies impact upon, but which would otherwise be obliterated and marginalised. As they get acquainted with the new tools mainstreaming requires, these actors will learn about these implications which previously may have gone unnoticed. They will progressively gain an expertise in the issues mainstreaming requires them to consider. The objective is that, in time, the institutional culture within the organisation will evolve, and that both awareness to fundamental rights issues and the capacity to address them will augment.

3) *It improves the implication of civil society organisations in policy-making.* In most cases, the requirement to identify the policies which best take into account the objective to be mainstreamed, imposed on policy-makers who have no specialised knowledge in the issue, will require them to consult externally. They may of course limit that consultation to experts. But they may also be incentivised to consult more widely, within the community of stakeholders, in order not only to better evaluate the impact the proposed policies may have – as such an impact may be difficult to anticipate and often will be impossible to measure – but also to stimulate the formulation of alternative proposals, better suited to the conciliation of the different objectives pursued and, therefore, more satisfactory in a mainstreaming perspective.

4) *It improves transparency and accountability.* The obligation to formulate policies or legislative proposals by referring to the impact they may have on the realization of fundamental rights not only will incentivise the policy-makers to develop alternatives they may have had no good reason previously to consider, but the adverse impact of which on fundamental rights may be less important, and to consult more widely with a view both to identifying such alternatives and to measuring such impacts. It also will lead the proposals to be more richly justified, as the policy-maker will have to explain why a particular route was chosen and preferred above alternative possibilities, after having examined those possibilities and evaluated their potential impact. It is in that sense that impact assessment, one of the two tools of the strategy for mainstreaming human rights which is proposed here – the other tool being the formulation of action plans by the different services concerned – reinforces participation, to which it gives meaning and which it serves to better inform, thus equipping the stakeholders participating with the informational resources they require for their participation to be effective.

5) *It improves coordination between different services.* The sectoralization of policies, although inevitable in any large organisation, may lead to the development of policies effectively contradicting one another. For instance, the Member States are encouraged to promote diversity in business, yet at the same time the rules relating to the protection of personal data may constitute an obstacle for employers seeking to develop such diversity policies by monitoring the representation of ethnic groups in the workforce.<sup>84</sup> Because it is transversal and creates horizontal bridges between vertical sectors, mainstreaming may serve to identify such tensions, in order to remedy them. It is a way to restore

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<sup>83</sup> Council of Europe, Gender mainstreaming : Conceptual Framework, Methodology and Presentation of Good Practices. Final Report of the Activities of the Group of Specialists on Mainstreaming (EG-S-MS (98)2), Strasbourg 1998, p 6.

<sup>84</sup> See EU Network of Independent Experts on Fundamental Rights, Report on the situation of fundamental rights in the European Union in 2003, January 2004, pp 97-100, and the reference to a study completed in October 2003, 'The Costs and Benefits of Diversity : A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises' report drawn up by the Centre for Strategy and Evaluation Service (CSES) on behalf of the European Commission. Available at : [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/prog/studies\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm).

communication between different services or departments, as one of its tools may consist in the organisation of common meetings with representatives from different services to compare the schemes they are proposing and identify potential conflicts or redundancies, or other failures in coherence.

6) *It aims at the causes of the problems identified rather than at their surface manifestations.* Mainstreaming addresses the definition of policies at their initial stages and throughout their implementation. Therefore its transformative character is much more powerful than that of *post hoc* monitoring, where the impact of policies is measured. But mainstreaming is also much more powerful even than ‘impact-analysis,’ as usually conceived and as currently practiced. Indeed, although impact assessment may be a tool of mainstreaming and does operate *ex ante*, ie, in the initial stages of policy-selection, mainstreaming goes one step further in that it imposes on authorities a positive duty to identify how they may contribute to achieving the objective pursued. It therefore obliges them not only to examine whether the policy they have been pursuing or which they intend to pursue adversely impacts upon that objective, as if this objective, although an objective of the community as a whole, would not be for them to pursue : instead, once it is identified, the objective is one they are requested to consider as their own, and they are to take that objective as part of the set of objectives they are pursuing and which, in combination with other objectives, will dictate the shape of policies. Again, the mainstreaming of disability may serve to illustrate this : it is one thing to measure the impact of certain policies on persons with disabilities, and choose the policy which appears to have the least adverse impact on them – for instance, where policies are devised which seek to create incentives to work and therefore to raise the level of activity of the active segment of the population ; it is quite another to consider that employment policies should contribute actively to the professional integration of persons with disabilities, and that the absence of adverse impact on persons with disabilities – or the adoption of measures mitigating any adverse impact there may be – is therefore necessary, but not sufficient.

The extent to which these different virtues are realised depends on the institutional devices in which mainstreaming gets translated. In particular, the implication of civil society organisations and the greater accountability of the policy-makers – the third and fourth virtues listed above – will only result from the adoption of a ‘participative-democratic’ model of mainstreaming, in the vocabulary proposed by S. Nott.<sup>85</sup> By way of contrast, a purely ‘expert-bureaucratic’ model of mainstreaming would consist in an expertise being provided to the policy-maker about how to include the particular objective to be mainstreamed in his or her approach, without any ‘external’ consultation otherwise taking place with the affected stakeholders. It is important however to emphasise that these models are not necessarily mutually exclusive.<sup>86</sup> On the contrary, they are complementary. Indeed, it may be useful not only to ensure that the policy-maker will consult with the interested stakeholders, and on the basis of those consultations perhaps modify his or her proposal if it appears that certain dimensions of the problem have been ignored or their importance underestimated – but also to provide both the policy-maker and the stakeholders concerned with the expert knowledge they require to ensure that their dialogue is fully informed. We should not see the kind of deliberation which a mainstreaming approach should encourage as a zero-sum game, as if the power to influence decision-making existed in a fixed quantity, so that all the particles of power which are given to the ‘experts’ or the ‘stakeholders’ which are consulted are subtracted from the ‘policy-maker,’ and so that the ‘stakeholders’ and the ‘experts’ are competing for influence. Rather, in a truly deliberative process, the position of each actor is reinforced by the presence of all the others. That co-existence represents a net gain in both legitimacy and in understanding: if, under the influence of either the experts or the stakeholders, the policy-maker is led to modify the position he or she initially adopted, the position finally taken will be stronger – better informed, better reasoned, more legitimate – than it otherwise might have been. Governance may gain in reflexivity.<sup>87</sup> It is this gain which the requirement of mainstreaming may offer. As noted

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<sup>85</sup> S. Nott, ‘Accentuating the Positive : Alternative Strategies for Promoting Gender Equality,’ cited above, pp 269-270. See also : T. B. Donaghy, ‘Mainstreaming : Northern Ireland’s participative-democratic approach’ (2004) 32 *Policy and Politics* 49-62, especially pp 51-52.

<sup>86</sup> See especially S. Nott, ‘Accentuating the Positive : Alternative Strategies for Promoting Gender Equality,’ cited above, p. 270.

<sup>87</sup> For developments concerning this view of the contribution civil society organisations can make to governance, see Olivier De Schutter, ‘Europe in Search of its Civil Society’, *European Law Journal*, vol. 8 (2002), pp. 198-217.

in the Communication from the Commission on consultation, 'both the Commission and outside interested parties will benefit from understanding the perspective of the other.'<sup>88</sup>

### **3. The role of civil society organisations in the decision-making process within the EU in the areas of fundamental rights and non-discrimination**

Since about a decade, important efforts aim to make governance in the EU more open and participatory, in order to improve transparency and accountability. Like the effort to increase the visibility of fundamental rights in the EU, this second effort was launched as part of a series of initiatives in order to improve European governance. A White Paper on European Governance was adopted in July 2001, which proposes a number of ways to improve the involvement of stakeholders in the shaping of the policy and legislation of the Union, as well as the openness and accountability of the institutions<sup>89</sup>. In two later communications, the Commission examined how legislation making could be improved and be made more responsive to the diversity of contexts in which it is to apply,<sup>90</sup> and defined the general principles of impact assessment, which is seeks to impose, since 2003, to all major initiatives.<sup>91</sup> Following one of the proposals made in the White Paper on European Governance, the Commission also adopted a communication defining the general principles and minimum standards for the consultation of interested parties by the Commission.<sup>92</sup>

The latest in a series of reforms aiming at improving the conditions in which consultation takes place in the EU is the recent adoption of a new joint Commission and Parliament register of interest representatives in the EU, known as the "Transparency Register", the aim of which is to make the consultation processes within the EU more transparent and to improve compliance with certain ethical principles, "avoiding undue pressure, illegitimate or privileged access to information or to decision makers".<sup>93</sup> While registration remains optional, the new register provides a strong incentive for registration, since it is now a condition for obtaining a long term access badge to the European Parliament. As a result of the introduction of this new system of registration of organisations lobbying the EU, transparency shall be significantly increased. In order to seek registration, the organisations must indicate the legislative proposals being lobbied on, as well as their sources of funding from the EU.<sup>94</sup> A code of conduct is introduced for all lobbyists, and certain sanctions may be imposed in cases of non-compliance.<sup>95</sup> Lobbyists that are registered commit to regularly updating the information they provide.<sup>96</sup>

While these advances are notable, they remain short of ensuring a systematic consultation of non-governmental organisations working in the areas of non-discrimination and fundamental rights, and of LGBTI rights in particular. In contrast, this author has proposed a more structured form of participation, accompanied by a clear definition of the rights of the organisations that are considered to be representative at the EU level, and corresponding obligations of the European Commission in its role as responsible for the preparation of legislative proposals.<sup>97</sup>

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<sup>88</sup> Communication from the Commission, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission* COM(2002) 704 final, of 11 December 2002, at p 18.

<sup>89</sup> COM(2001) 428 final, of 25.7.2001.

<sup>90</sup> Communication from the Commission, *European Governance : Better Lawmaking*, COM(2002) 275 final of 5.6.2002.

<sup>91</sup> Communication from the Commission, *Impact Assessment*, COM(2002) 276 final of 5.6.2002. This communication has been completed a few months later by a set of practical guidelines relating to impact assessment.

<sup>92</sup> Communication from the Commission, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704 final, of 11.12.2002.

<sup>93</sup> See <http://europa.eu/transparency-register/> (last consulted on June 25th, 2011).

<sup>94</sup> See Annex 2 of the Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, available on [http://europa.eu/transparency-register/about-register/official-documents/text-of-references/index\\_en.htm](http://europa.eu/transparency-register/about-register/official-documents/text-of-references/index_en.htm) (last consulted on July 30th, 2011).

<sup>95</sup> See Annex 3 of the Agreement cited in the preceding footnote. Annex 4 includes the set of sanctions that could be imposed in cases of non-compliance with the code of conduct.

<sup>96</sup> See code of conduct, para. d).

<sup>97</sup> Olivier De Schutter, 'Europe in Search of its Civil Society', cited above.

In order to understand the added value of this proposal and the background against which it has been made, it is useful to recall the various forms that the implication of the organisations of the civil society in the institutional system of the European may take. First, CSOs can simply be granted rights of participation. In its opinion on “Organised civil society and European governance”, the Economic and Social Committee defines “participation” as “providing the opportunity [to the organisations of the civil society] to help shape an opinion-forming and decision-making process in accordance with democratic principles”<sup>98</sup>. Beyond mere participation, the same opinion defines “consultation” as including “all initiatives that enable whoever is affected by a measure to express their views at the earliest possible stage”<sup>99</sup>. There are other mechanisms of involvement which are located at equal distance from “participation” and from simple “consultation”. Certain forms of consultation in particular may lead to impose obligations on the institution which consults. In its resolution of 10 December 1996 on the participation of citizens and social players in the European Union’s institutional system, the European Parliament “stresses the importance of a general principle (to be written into the Treaty) proclaiming the right of every citizen and every representative organisation to *draw up and promote their opinions and to receive replies directly or indirectly, without that right however implying direct participation in decision-making*”<sup>100</sup>. Although, if extended to “every citizen”, such a right to voice an opinion and to receive an answer could appear unmanageable, it would be plausible to grant such a right to organisations recognised as representative in a particular field, and thus to guarantee to such organisations a right to be heard, to receive an answer, and if it feels that the answer is not satisfactory, to apply for a judicial review of the quality of the grounds given in response to objections made in the course of the consultation procedure<sup>101</sup>. Such a right to be heard, backed by the possibility of judicial review, would not be reducible to simple consultation, where no control whatsoever exists on what is answered or not to the organisation consulted. Nor would it amount to participation in the decision-making procedure, for it remains perfectly possible for the competent institutions to decide against the point of view expressed by the organisation.

Such a form of involvement of the organisations of the civil society, which we may call “committed consultation”, seems more promising than both participation and simple consultation. Participation implies accentuating further the lack of accountability of European institutions, which already suffer from what is perceived as the opacity of the decisional procedure, and from the number of actors involved. It risks depoliticizing further the decision mechanisms within the Union, whilst what is required is, instead, their repoliticization. As to simple consultation, although this seems the avenue privileged by the *White Paper on European Governance*<sup>102</sup>, it risks remaining purely formal, at best, a way of legitimizing decisions which depend on other parameters, at worst, if it is not paired with the

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<sup>98</sup> Opinion on “Organised civil society and European governance: the Committee’s contribution to the drafting of the White Paper”, CES 535/2001, 25.4.2001, point 3.4, p. 5.

<sup>99</sup> Opinion on “Organised civil society and European governance: the Committee’s contribution to the drafting of the White Paper”, CES 535/2001, 25.4.2001, point 3.5., p. 6.

<sup>100</sup> Resolution adopted on the basis of the report on participation of citizens and social players in the Union’s institutional system (A4-0338/96, PE 218.253/déf.) (Herzog Report), point 24 (my emphasis). The resolution calls such a right a “right to freedom of expression”. The explanatory memorandum thus defines consultation as “the possibility of delivering opinions and receiving answers. The decision-making power delegated to the central institutions in not being called into question (...). A clear distinction, however, needs to be made between consultation, a very broadly based procedure, and dialogue and negotiation, in which representative social players confer with governing bodies” (p. 11).

<sup>101</sup> Of course, the quality of the answer to be provided to the organisation which has put forward its arguments in such a form of consultation would depend on the weight of these arguments, some of which may appear of little value. Comp., in the context of an article of the ECSC Treaty which required the Commission “to give the party concerned the opportunity to submit its comments” before imposing a penalty, Case 9/83, *Eisen und Metall AG v Commission* (1984) ECR 2071, at p. 2086 (para. 32).

<sup>102</sup> In its most explicit paragraph on this matter, the *White Paper* states: “Creating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of ad hoc consultations. These standards should improve the representativity of civil society organisations and structure their debate with the Institutions” (p. 17).

possibility to seek a judicial control of the quality of the answers offered to the objections put forward by the organisations concerned.

There are different channels through which such a right to "committed consultation" could be implemented. One scenario would be the following. First, the questions of general interest on which the organisations of the civil society could usefully contribute should be identified and listed. These questions could be those affecting interests which are widely diffused but fragmented, and thus possibly underrepresented in the democratic process; those affecting fragilized interests, which risk being ignored or underprotected – for instance, those of minorities or future generations -; those calling for very specialized or local knowledge, because of the need to contextualize the regulatory solutions adopted. Clearly, matters related to the LGBTI persons would form part of such questions for which democracy failures can be expected and where extensive consultations with representative organisations would be justified. On matters such as gender equality, environment, consumer protection, the status of third country nationals, or poverty – to name just a few where the consultation of the organisations of the civil society could truly add value to the public deliberation -, a number of fora, one per area of concern, could be constituted. In each of these fora, would be invited to participate the “most representative organisations” of the field. The criteria of representativity should vary from forum to forum, although some criteria of representativeness could be common to all the organisations enjoying such a “consultative status”.

These fora should perform at a minimum two tasks. First, they should be consulted on the legislative proposals which, it is suspected, may affect the interests they represent, or which they believe might do so. Such a consultation should lead to the definition of an harmonized position of the representative organisations within each forum. These organisations, after an internal deliberation, should thus come forward with a coordinated position, which will have the advantage of both facilitating the task of the institutions (they are not to arbitrate, between the different views presented by the organisations speaking for the same collective interest, which views to afford the most weight to) and of justifying the imposition on these institutions of an obligation: either to take into account the position thus expressed by a consulted forum, or to explain, by an adequate motivation, the refusal to take into account this position. This mode of “committed consultation” means, for example, that when a particular measure has potentially significant impacts on LGBTI rights, the relevant forum will be asked to take position. Once such a position is made known to them, the institutions entrusted with the decisional power would be obliged to act in accordance with the concerns expressed in that position, or if they refuse to do, explain why – with the possibility that, if the concerned forum is unsatisfied by the explanation, it will challenge the decision before the Court of Justice.

This would also be the most effective way of ensuring that impact assessments are conducted, as proposed above, on the basis of participatory processes; and that the requirement of non-discrimination on grounds of sexual orientation is effectively mainstreamed, as required under Article 10 of the TFEU. Indeed, besides their consultative role, these fora should be entrusted with the evaluation of the policies of the European Union, by examining the impact of these policies on the fulfilment of the values for the preservation of which the forums of the organised civil society are set up. Such a systematic evaluation is crucially needed in the present context, as is explicitly recognised by the *White Paper on European Governance*. It would introduce a reflexivity in the development of European policies, which would have to permanently revise themselves in view of their consequences. It would immensely contribute to progressively building the knowledge of the actors involved in the process of evaluation, thus constituting one of the self-learning mechanisms the *White Paper* calls for<sup>103</sup>. A virtuous cycle can be expected to result from these evaluation processes: the more these processes are considered seriously and develop into learning processes, the more the representative organisations of the civil society will acquire the capabilities required to effectively exercise their participatory rights, the more weight will be afforded to the positions they feed into the decisional process, and the more their consultation will be seen as adding quality to the decision-making, rather than as burdening it.

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<sup>103</sup> See COM(2001) 428 final, 25.7.2001, p. 26.

#### **4. The new tools of participatory democracy in the Treaty of Lisbon**

The Treaty of Lisbon introduced in the EU's decision-making system the new mechanism of the "citizen's initiative", intended as a tool for participatory democracy in the EU. Article 11(4) of the Treaty on the European Union provides that 'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'.

In accordance with Article 24 of the Treaty on the Functioning of the European Union, the European Parliament and the Council adopted Regulation (EU) No. 211/2011 of 16 February 2011 on the citizens' initiative.<sup>104</sup> The European Citizens' Initiative (ECI) will allow 1 million citizens from at least one quarter of the EU Member States (7 Member States) to invite the European Commission to bring forward proposals for legal acts in areas where the Commission has the power to do so. The organisers of a citizens' initiative, a citizens' committee composed of at least 7 EU citizens who are resident in at least 7 different Member States, will first have to obtain from the European Commission that the initiative be registered, which the Commission is obliged to do unless one or more of the conditions imposed for a citizens' initiative to be validly presented are not satisfied.<sup>105</sup> The organizers then have 1 year to collect the necessary statements of support, which may be done online. The number of statements of support has to be certified by the competent authorities in the Member States. Under Article 10 of the Regulation, the obligations of the European Commission when it received a ECI that has collected the required number of statements of support are to : "(a) publish the citizens' initiative without delay in the register; (b) receive the organisers at an appropriate level to allow them to explain in detail the matters raised by the citizens' initiative; (c) within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action". Between the reception of the ECI and the adoption by the European Commission of its position (as provided under (c) above), the organizers of the ECI shall have the possibility to present their initiative at a public hearing organized at the European Parliament.<sup>106</sup>

### **III. A strategy for LGBTI rights in the EU**

LGBTI rights in the EU could be further strengthened by following a triple-track strategy. A first track consists in improving the communication between the European Commission and organisations representative of LGBTI persons. A second track consists in integrating the requirement of non-discrimination in the interpretation and implementation of all EU legislation and policies. A third track consists in strengthening the organisation of representatives of LGBTI rights across the EU, in order to improve the ability for them to weigh upon the future orientations of the EU. The three tracks are mutually supportive, but they can be pursued separately : none of them is a condition for any other to make progress.

#### **1. Improving the communication between the European Commission and organisations representative of LGBTI persons.** With a few exceptions, the European Commission is responsible

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<sup>104</sup> JO L 65 of 11.3.2011, p. 1.

<sup>105</sup> These conditions are that (a) a citizens' committee has been formed comprising at least seven persons who are residents of at least seven different Member States, and contact persons have been designated (comprising one representative and one substitute), who shall liaise between the citizens' committee and the institutions of the Union throughout the procedure and who shall be mandated to speak and act on behalf of the citizens' committee (Article 3(2)); (b) the proposed citizens' initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties; (c) the proposed citizens' initiative is not manifestly abusive, frivolous or vexatious; and (d) the proposed citizens' initiative is not manifestly contrary to the values of the Union as set out in Article 2 TEU. See Article 4(2) of the Regulation. If the Commission considers that it cannot register the initiative, it shall "inform the organisers of the reasons for such refusal and of all possible judicial and extrajudicial remedies available to them" (Art. 4 § 3).

<sup>106</sup> Art. 11 of the Regulation.

for taking the initiative of preparing new legislation. Because it is also the main guardian of EU law and of the Member States' compliance with their obligations under EU law, the Commission also has a key role in the interpretation of the existing legislative framework. Following the entry into force of the Treaty of Lisbon, the Treaty of the EU now defines combating discrimination as one of its objectives (art. 3 § 3 of the TEU), and the Treaty on the Functioning of the EU mainstreams the fight against discrimination in all its laws and policies (art. 10 TFEU). This should be seized upon as an opportunity to request the establishment of a permanent platform between organisations representing LGBTI rights and the European Commission, consistent with the commitments of the Commission towards more openness and dialogue with civil society. Representatives of the main DGs responsible, within the European Commission, for the policies that may have an impact on LGBTI rights, would be part of this platform, and would thus become permanent interlocutors of the organisations representing LGBTI rights at EU level. The platform should serve as a channel to ensure the adequate mainstreaming of the prohibition of discrimination on grounds of sexual orientation and gender identity in all the legislative activities and policies of the EU.

**2. Integrating the requirement of non-discrimination in the interpretation and implementation of all EU legislation and policies.** Progress could be made in the following areas :

a) Guidance could be provided to the European Commission, to the European Council, and to the European Parliament, in order to ensure that the requirement of non-discrimination on grounds of sexual orientation and gender identity is well understood, particularly as regards the impacts of this requirement on references to the 'spouse', to 'family', to 'couples', or to 'marriage'. Specifically, ILGA-Europe could prepare a memorandum describing the concepts of sexual orientation and gender identity and detailing the non-discrimination requirement, with the aim of ensuring that in the preparation of impact assessments by the European Commission, and in the assessments that the European Commission, the European Parliament, and the Council of the EU make of the compatibility of the measures they propose to adopt with the Charter of Fundamental Rights, this requirement is fully taken into account.

b) This memorandum could also serve within each EU Member State, to ensure that the implementation at national level of EU laws and policies adequately takes into account the requirement of non-discrimination. Provided such a memorandum is sufficiently well known not only to the national governments, but also to the parliamentarians and to the national human rights institution within the Member State (in the States where such a national institution exists), this could also facilitate the gradual development of an 'early warning system', allowing ILGA-Europe to be alerted when an intended national measure would appear not to comply with the non-discrimination requirement as set forth in the memorandum. This would be encouraged by giving a wide publicity to the memorandum, and by giving it a denomination that clearly reflects its aim (such as 'A tool for LGBTI rights-proofing'). Situations where LGBTI rights appear to be violated or threatened should be immediately denounced to the European Commission, which pledged a 'zero-tolerance' policy on violations of the Charter of Fundamental Rights.

c) Preferably through a structure such as the platform mentioned in the preceding paragraph, which would allow a permanent and structured dialogue with the European Commission, organisations advocating LGBTI rights in the EU could ask to be involved more actively in the preparation of the annual report of the European Commission on the implementation of the Charter of Fundamental Rights. Thanks to the inputs of national organisations fighting for LGBTI rights, they could identify both the emerging best practices, and the situations where there are strong discrepancies between the Member States, that might call for an initiative at EU level in order to avoid an insufficiently uniform implementation of EU law, a fragmentation of the internal market, or a breach in the mutual trust on which the Area of freedom, security and justice is built. The information thus collected could also serve to strengthen the quality of the annual report of the European Parliament on the situation of fundamental rights in the European Union.

d) For the most part, the instruments adopted by the EU that have an impact on LGBTI rights are not discriminatory on their face. But they may be vague in their formulation and thus leave the door open to various interpretations, particularly by the Member States at the implementation level, that may not be in compliance with the requirement of non-discrimination on grounds of sexual orientation and gender identity. For this reason, the European Commission could be asked to adopt an interpretative communication of the Free Movement Directive (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) as well as of the Family Reunification Directive (Directive 2003/86/EC of 22 September 2003 on the right to family reunification). Apart from the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, it is unclear at this stage whether, taking into account both the competences attributed to the EU and the political realities, a new legislative proposal should be called for.

**3. Strengthening the organisation of representatives of LGBTI rights across the EU.** The entry into force of the Lisbon Treaty creates a strong incentive for civil society organisations working at EU level to move beyond their position as expert organisations seeking to influence the development of the EU from Brussels, towards organizing themselves into broad-based movements with a strong membership at national level. First, the role of national parliaments will increase in the future, as national parliaments have increased powers to question whether legislation proposed at EU level complies with the requirements of subsidiarity and proportionality. Second, the European Citizens' Initiative may in the future become a powerful tool in the hands of civil society organisations who are sufficiently well organized at national level to mobilize the required degree of support among the public, to put certain issues on the agenda of the EU.