



Combatting discrimination of trans and non-binary persons in EU law

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Funded by
the European Union

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Structure

- Terminology and prevalence of discrimination
- Protection against discrimination in EU law

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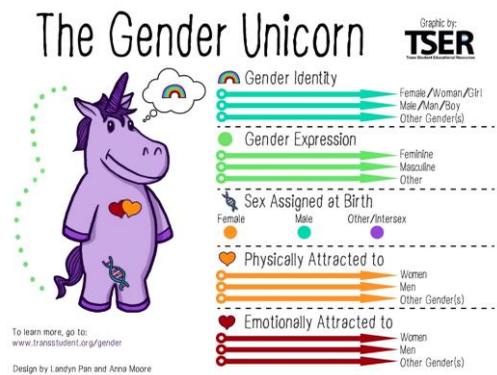
Terminology and prevalence of discrimination

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Terminology

- Sexual identity consists of 4 elements
 - Sex (characteristics)
 - Gender identity
 - Gender expression
 - Sexual orientation
- Trans and non-binary persons challenge socially constructed gender norms

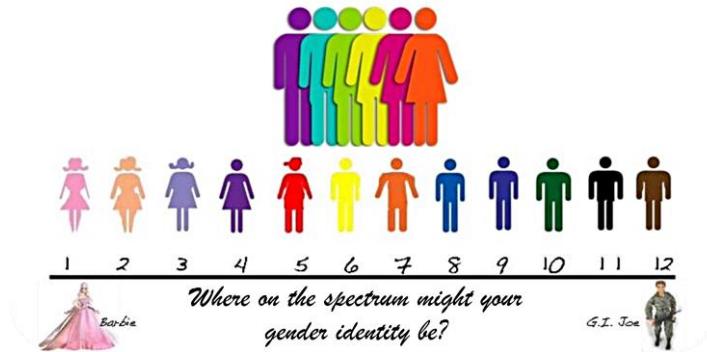


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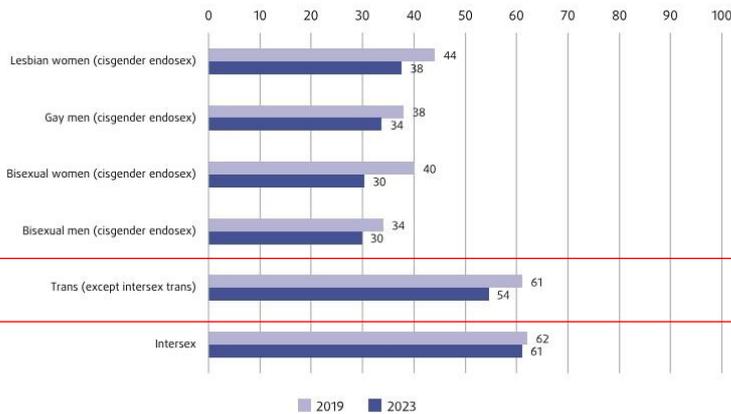
Terminology

The Gender Spectrum



Transphobia – discrimination

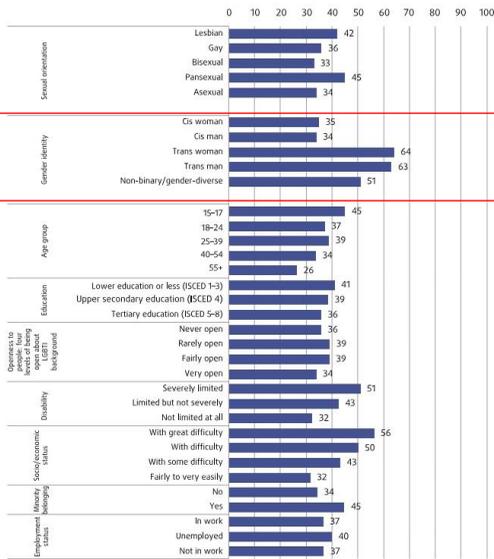
FIGURE 1B: DISCRIMINATED AGAINST BECAUSE OF BEING LGBTIQ IN AT LEAST ONE AREA OF LIFE IN THE YEAR BEFORE THE SURVEY IN ALL COUNTRIES SURVEYED, BY LGBTIQ CATEGORY, 2019 AND 2023 (%)



Sources: FRA, EU LGBTI Survey II (2019) and EU LGBTIQ Survey III (2023).

Transphobia – discrimination

FIGURE 4: DISCRIMINATION BECAUSE OF BEING LGBTIQ IN THE 12 MONTHS BEFORE THE SURVEY, BY SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS AND SELECTED SOCIO-DEMOGRAPHIC CHARACTERISTICS (%)

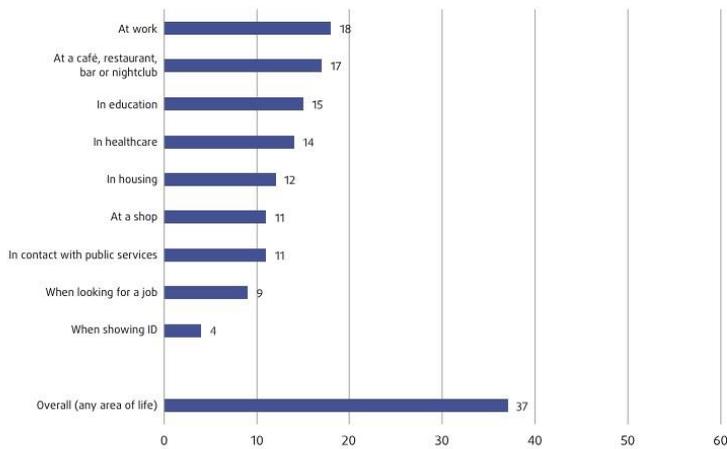


Source: FRA, EU LGBTIQ Survey III (2023).

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Transphobia – discrimination

FIGURE 5: DISCRIMINATION IN KEY AREAS OF LIFE BECAUSE OF BEING LGBTIQ IN THE 12 MONTHS BEFORE THE SURVEY (%)

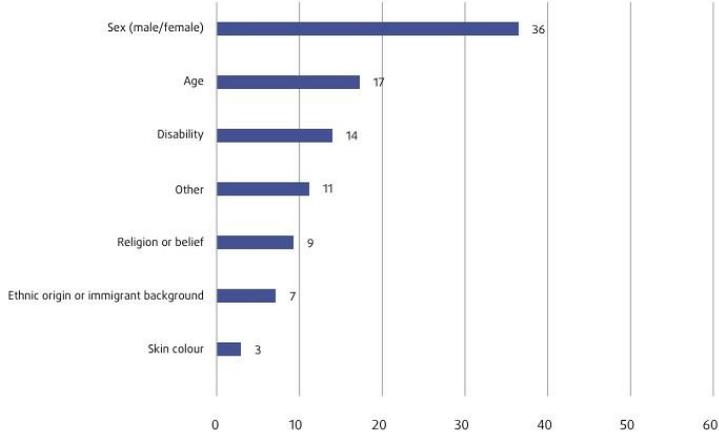


Source: FRA, EU LGBTIQ Survey III (2023).

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Transphobia – discrimination

FIGURE 9: DISCRIMINATED AGAINST ON GROUNDS OTHER THAN 'BEING LGBTIQ' IN THE 12 MONTHS BEFORE THE SURVEY (%)



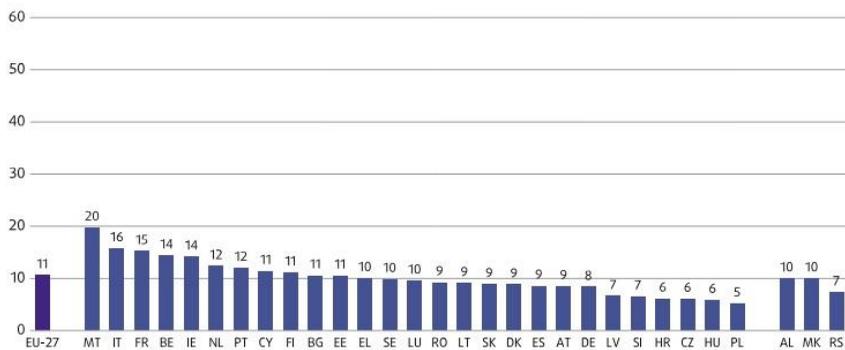
Source: FRA, EU LGBTIQ Survey III (2023).

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Transphobia – discrimination

FIGURE 11: REPORTING THE LAST INCIDENT OF DISCRIMINATION BECAUSE OF BEING LGBTIQ, BY COUNTRY (%)



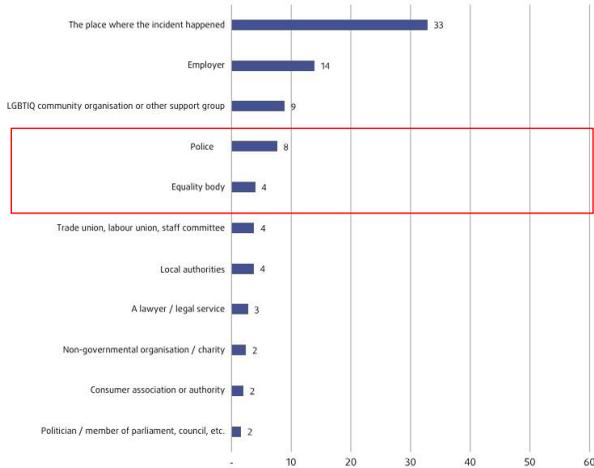
Source: FRA, EU LGBTIQ Survey III (2023).

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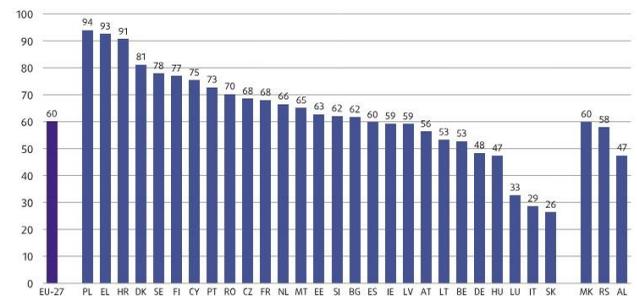
Transphobia – discrimination

FIGURE 13: PLACE OF REPORTING THE LAST INCIDENT OF DISCRIMINATION EXPERIENCED BECAUSE OF BEING LGBTIQ (%)



Source: FRA, EU LGBTIQ Survey III (2023).

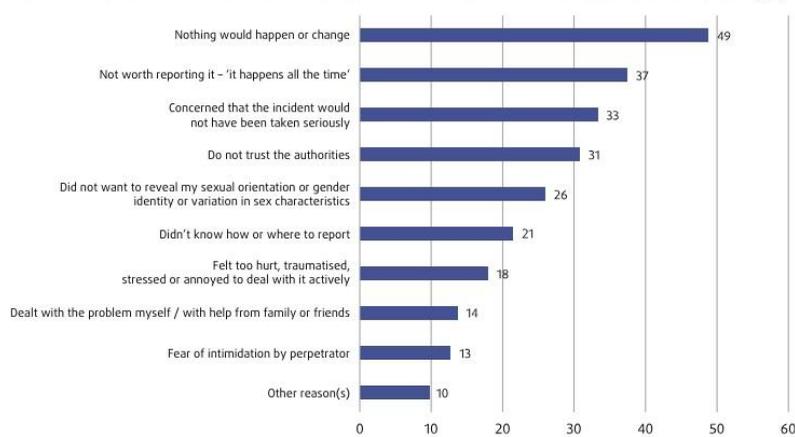
FIGURE 15: AWARENESS OF AT LEAST ONE NATIONAL EQUALITY BODY, BY COUNTRY (%)



Source: FRA, EU LGBTIQ Survey III (2023).

Transphobia – discrimination

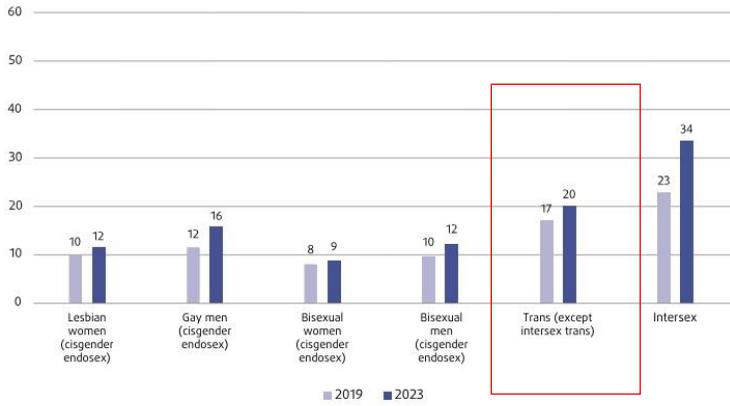
FIGURE 14: REASONS FOR NOT REPORTING THE LAST DISCRIMINATION INCIDENT EXPERIENCED BECAUSE OF BEING LGBTIQ (%)



Source: FRA, EU LGBTIQ Survey III (2023).

Transphobia – violence

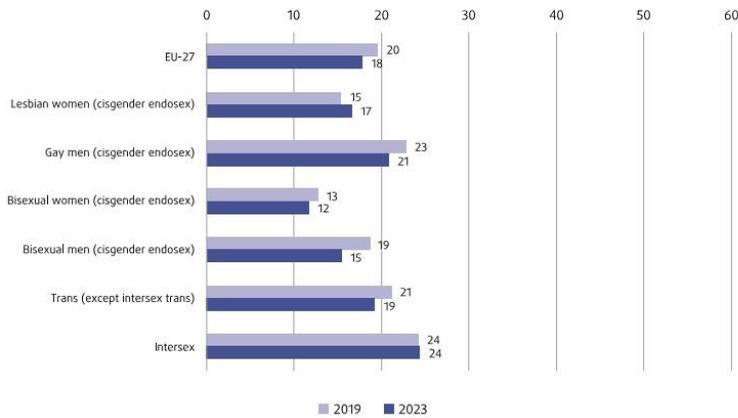
FIGURE 16B: EXPERIENCING A PHYSICAL AND/OR SEXUAL ATTACK FOR BEING LGBTI, IN THE 5 YEARS BEFORE THE 2019 AND 2023 SURVEYS, BY LGBTI CATEGORY (%)



Source: FRA, EU LGBTIQ Survey III (2023).

Transphobia – violence

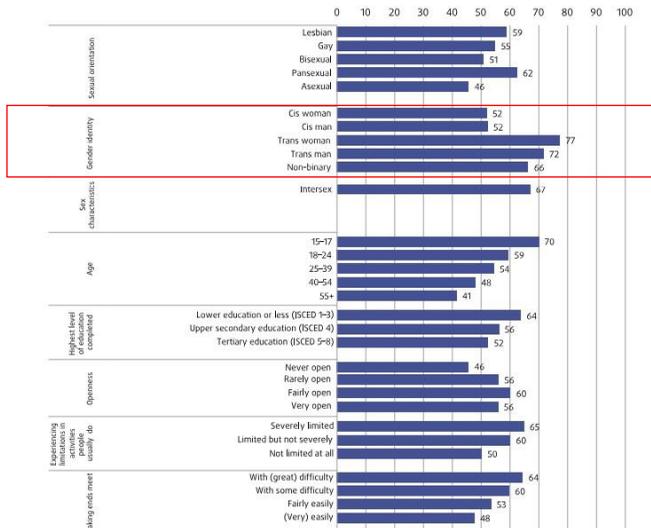
FIGURE 18: REPORTED THE MOST RECENT HATE-MOTIVATED VIOLENT INCIDENT THEY EXPERIENCED, BY LGBTI CATEGORY, 2019 AND 2023 (%)



Sources: FRA, EU LGBTI Survey II (2019) and LGBTIQ Survey III (2023).

Transphobia – harassment

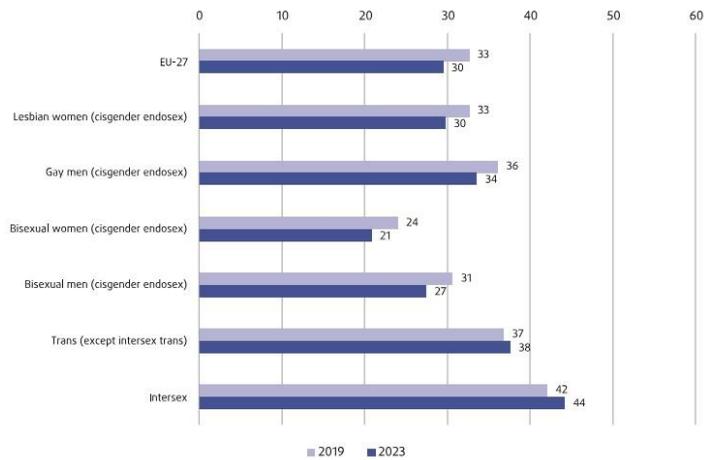
FIGURE 27: HATE-MOTIVATED HARASSMENT IN THE 12 MONTHS BEFORE THE SURVEY, BY SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS AND BY SELECTED SOCIO-DEMOGRAPHIC CHARACTERISTICS, EU-27 (%)



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Transphobia – violence and harassment

FIGURE 21: AVOID CERTAIN PLACES OR LOCATIONS FOR FEAR OF BEING ASSAULTED, THREATENED OR HARASSED, 'OFTEN' OR 'ALWAYS', BY LGBTI CATEGORY, 2019 AND 2023 (%)



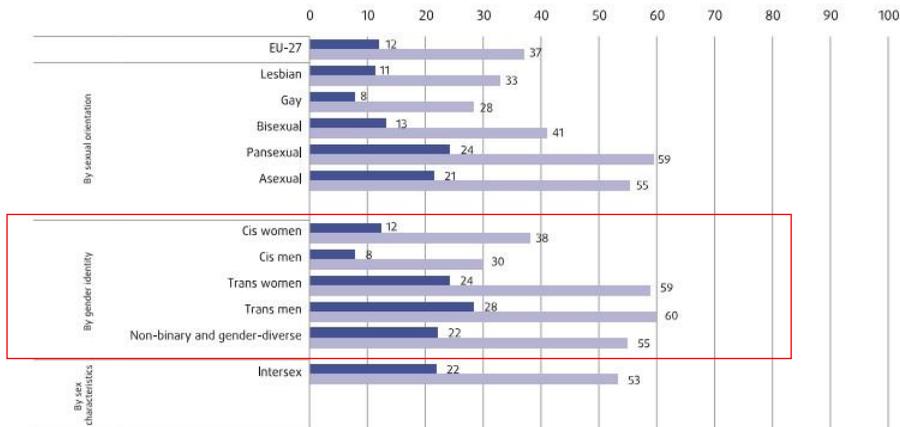
Sources: FRA, EU LGBTI Survey II (2019) and EU LGBTIQ Survey III (2023).

▲ Notes:

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Transphobia – Impact

FIGURE 37: SUICIDAL THOUGHTS IN THE YEAR BEFORE THE SURVEY, RARELY, OFTEN OR ALWAYS, BY SEXUAL ORIENTATION, GENDER DIVERSITY AND SEX CHARACTERISTICS AND SOCIO-DEMOGRAPHIC CHARACTERISTICS (%)

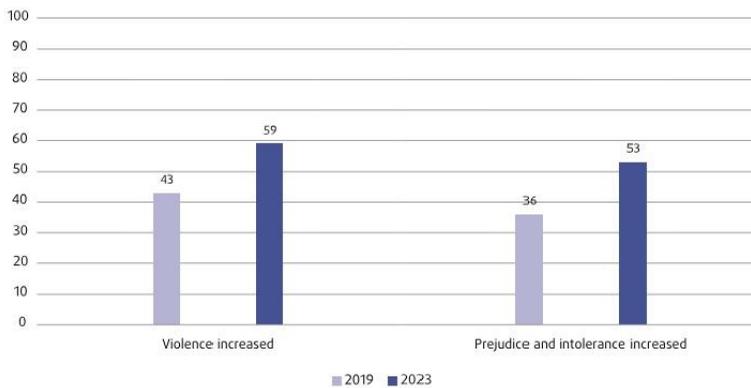


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Transphobia – violence and harassment

FIGURE 23: VIOLENCE OR PREJUDICE AND INTOLERANCE AGAINST LGBTIQ PEOPLE HAS INCREASED IN THE COUNTRY THEY LIVE IN, OVER THE PAST 5 YEARS, EU-27 AVERAGE, 2019 AND 2023 (%)



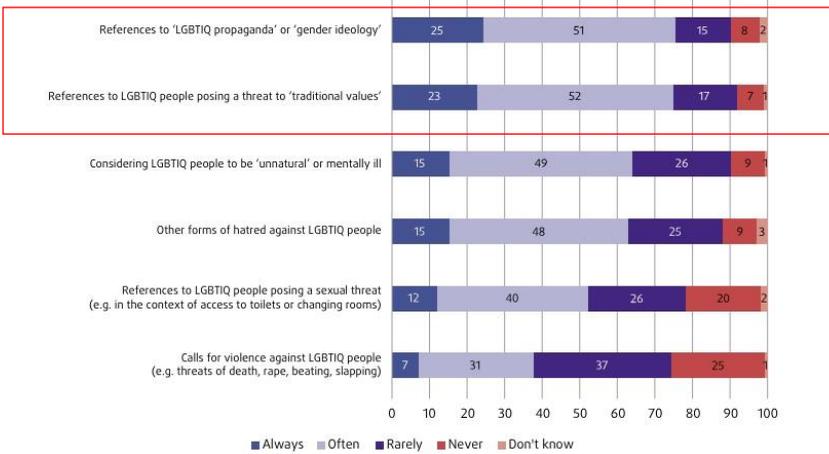
Source: FRA, EU LGBTIQ Survey III (2023).

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Transphobia – violence and harassment

FIGURE 28: FREQUENCY OF ENCOUNTERING OR SEEING SELECTED STATEMENTS ABOUT LGBTIQ PEOPLE ONLINE, EU-27 (%)

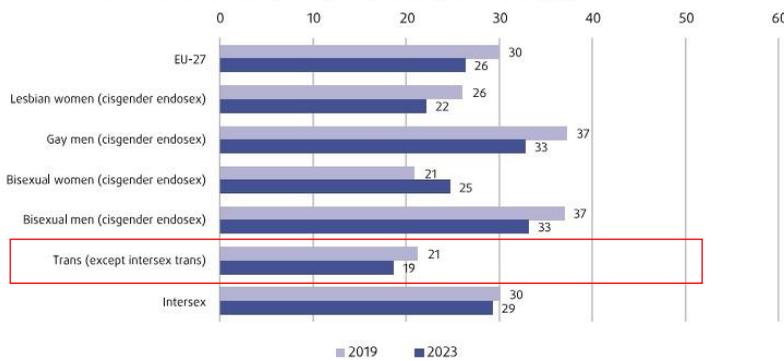


Source: FRA, EU LGBTIQ Survey III (2023).

Notes:

Transphobia – violence and harassment

FIGURE 30B: GOVERNMENT IN THEIR COUNTRY 'DEFINITELY' OR 'PROBABLY' EFFECTIVELY COMBATS PREJUDICE AND INTOLERANCE AGAINST LGBTIQ PEOPLE, BY LGBTIQ GROUP, 2019 AND 2023 (%)

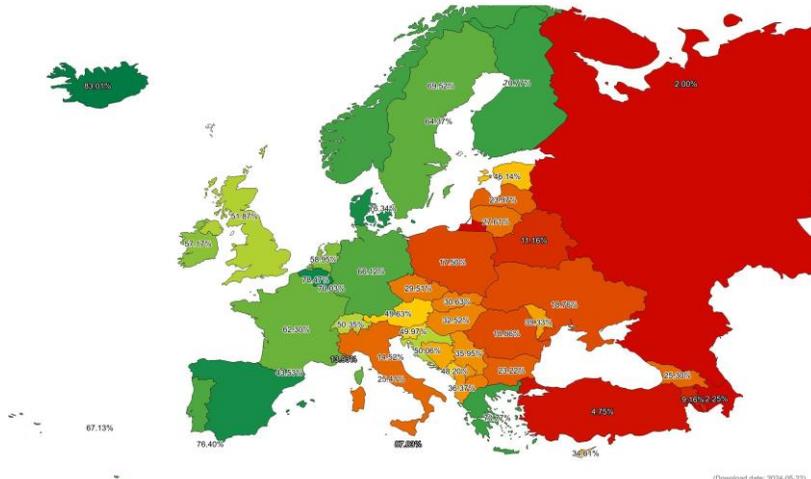


Source: FRA, EU LGBTIQ Survey III (2023).

Transphobia

RAINBOWMAP

2024 Rainbow Map Scores



(Download date: 2024-05-22)

Transphobia

- PACE Resolution 2417 (2022) Combating rising hate against LGBTI people in Europe

Resolution 2417 (2022)

Author(s): Parliamentary Assembly
Origin: Assembly debate on 23 January 2022 (3rd sitting) (text Doc. 15425, report of the Committee on Equality and Non-Discrimination rapporteur: M Fournier Ben Chikhal, text adopted by the Assembly on 25 January 2022 (3rd sitting) See also Recommendation 2025 (2022).

1. Over the past few decades, significant progress has been achieved towards making equal rights a reality for lesbian, gay, bisexual, transgender and intersex (LGBTI) people throughout Europe. While the picture is chequered and varies widely from State to State, overall, hate crime and anti-discrimination laws have been strengthened, legal gender recognition procedures have been simplified, the bodily integrity of intersex people has started to be better protected and the rights of rainbow families have increasingly been recognised. This substantial progress is welcome, albeit insufficient.

2. Recent years have however also seen a marked increase in hate speech, violence and hate crime against LGBTI people, communities and organisations across many member States of the Council of Europe. The Parliamentary Assembly notes with deep concern that a significant proportion of hate speech, vilification and scapegoating of LGBTI people, as well as brutal attacks on the exercise of their civil rights, have come from political figures and leaders, including government representatives, and from religious leaders.

3. The Assembly deplores these phenomena, which can be observed throughout Europe regardless of the extent of protection already afforded to the human rights of LGBTI people in any given country. It moreover condemns with particular force the extensive and often violent attacks on the rights of LGBTI people that have been occurring for several years in, among other countries, Hungary, Poland, the Russian Federation, Turkey and the United Kingdom.

4. The rising hatred we are witnessing today is not simply an expression of individual prejudice, but the result of sustained and often well-organised attacks on the human rights of LGBTI people throughout the European continent. Individual expressions of homophobia, biphobia, transphobia and interphobia occur in a broader context in which highly conservative movements seek to erode the identities and realities of all those who challenge the cisnormative and heteronormative social constructs which perpetuate gender inequalities and gender-based violence in our societies, and which affect women as well as LGBTI people.

5. The Assembly condemns the highly prejudicial anti-gender, gender-critical and anti-trans narratives which reduce the struggle for the equality of LGBTI people to what these movements deceptively mis-characterise as 'gender ideology' or 'LGBTI ideology'. Such narratives deny the very existence of LGBTI people, delegitimise them and often falsely portray their rights as being in conflict with women's and children's rights, or societal and family values in general. All of these are deeply damaging to LGBTI people, while also hampering women's and children's rights and social cohesion.

6. The Assembly deplores the fact that such discourse is leading to stagnation and even backsliding in progress towards LGBTI equality, sexual and reproductive rights and women's and children's rights – and in so doing, it poses a direct challenge to democracy and the rule of law. In many countries, legislative processes aimed at improving the protection of the rights of LGBTI people have stalled, and in some, progress previously achieved has been undone.

7. The significant advances achieved in recent years are today under threat. It is crucial to react quickly in order to prevent further backsliding, and to work actively to promote full respect for the rights of LGBTI people.

Transphobia

- PACE Resolution 2417 (2022) Combating rising hate against LGBTI people in Europe
 - Recommendations include calls for
 - Hate crime legislation covering gender identity, gender expression
 - Anti-discrimination legislation covering gender identity, gender expression
 - Training of enforcement authorities
 - LGBTI equality strategy
 - ...

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Emerging trans rights

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Emerging trans rights

- Development of right to gender self-determination in soft law instruments
 - [Yogyakarta Principles +10](#)
 - [PACE Resolution 2048 \(2015\)](#)
 - [PACE Resolution 2191 \(2017\)](#)
 - UN SOGI Independent Expert
- State practice: Argentina, Brazil, Belgium, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, New Zealand, Norway, Pakistan, Portugal, Spain, Switzerland, Uruguay (+ parts of Australia, Canada, USA ...)
- International case law: IACtHR and ECtHR

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Conditions for legal gender recognition

- *Hämäläinen v. Finland* (2014): requirement of divorce and conversion of marriage in registered partnership = okay (no right to same-sex marriage)
- *A.P., Garçon, Nicot v. France* (2017): prohibition of sterility, yet condition of medical diagnosis + expert assessment = okay (protection of inalienability of civil status)
- *X. v. FYR Macedonia* (2019): 'quick, accessible, transparent procedure for legal gender recognition'
- *X and Y v. Romania* (2021): prohibition of mandatory gender affirming surgery
- *Y v. Poland* (2022): LGR through annotation of original birth certificate = okay

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Conditions for legal gender recognition

- IACtHR: Opinion 24/17
 - Only self-determination for LGR
 - Medical requirements are discriminatory

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Recognising non-binary persons

- Self-evidence of M/F in most legal systems
- Cautious developments around the globe (Global South and Global North) towards recognition of non-binary sex/gender markers (Argentina, Belgium, Colombia, Iceland, Uruguay, Malta, Tasmania, India, Nepal, Pakistan, Germany, Austria, USA, Canada ...)
- However: no clear line in developments
 - Differences in material scope (birth certificate, ID-card, passport, driver's licence)
 - Differences in personal scope (intersex people, non-binary people, all people)
 - Differences in non-binary options (X, diverse, other, open option ...)
- ECtHR, *Y. v. France* (2023): no positive obligation to introduce non-binary sex/gender option under Article 8 ECHR
- Towards abolishing sex/gender registration?

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Protection against discrimination in EU law

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(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

Gender Identity and EU Law

(6) In some Member States, it is currently possible for persons to legally register as having a third, often a neutral, gender. This Directive does not affect relevant national rules giving effect to such recognition as regards matters of employment and pay.

- Discrimination of trans and non-binary people: gender identity, gender expression
- Starting point: no reference to trans or non-binary persons in primary or secondary equality and non-discrimination law
 - 2 exceptions in preamble to Recast Directive 2006/54/EC + Pay Transparency Directive 2023 (~ gender reassignment + reference to 'third, neutral' gender)
 - Other directives: Recast Qual. Directive, Recast Proc. Directive, Victims' Rights Directive
- However: framework of sex discrimination is well developed

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Gender identity and EU law

- Prohibition of sex discrimination
 - Articles 2 and 3(3) TEU: equality *between women and men* = fundamental EU value
 - Article 10 TFEU: EU aims to combat sex discrimination
 - Article 19 TFEU: EU competence to adopt directives to combat sex discrimination
 - Article 157 TFEU: Principle of equal pay for equal work for *male and female* workers
 - Article 21(1) Charter: prohibition of discrimination based on sex or any other ground

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Gender identity and EU law

- Prohibition of sex discrimination / discrimination between men and women
 - Sex/gender equality directives
 - **Directive 79/7/EEC: social security**
 - Directive 92/85/EEC: pregnant workers directive
 - **Recast directive 2006/54/EC: employment and occupation**
 - **Directive 2004/113/EC: access to and supply of goods and services**
 - Directive 2010/41/EU: self-employed activity

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Gender identity and EU law

Question: Do
include discrim



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Gender identity and EU law

- **Does 'sex' based discrimination also include discrimination based on gender identity or gender expression?**
 - CJEU case law
 - P v S and Cornwall County Council
 - Recast Directive 2006/54
 - KB v NHS and Secretary of State for Health
 - Article 157 TFEU
 - Richards v Secretary of State for Work and Pensions
 - Directive 79/7/EEC
 - MB v Secretary of State for Work and Pensions
 - Directive 79/7/EEC

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Gender identity and EU law

- **Does 'sex' based discrimination also include discrimination based on gender identity or gender expression?**
 - CJEU case law
 - Sex = 'gender reassignment' (people intending to undergo, having undergone or undergoing gender-affirming surgery)
 - Absence of gender recognition of person having undergone gender-affirming surgery (e.g. due to absence of procedure or marital requirements) may not hinder access to right covered by EU law
 - Influence of EU law on procedures of gender recognition: no absolute denial of gender transition when EU law is affected
 - Cfr. Coman and V.M.A cases

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Gender identity and EU law

- **Does 'sex' based discrimination also include discrimination based on gender identity or gender expression?**
 - Limited protection
 - Not all material contexts (no case law on goods and services (!))
 - No case law on article 21(1) CFR despite open ground
 - Only one reference in recital 3 of Recast Directive 2006/54/EC
 - Binary wording of directives (men and women, pregnant women, female worker etc)
 - Medicalised and binary perspective to trans people: gender reassignment

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Gender identity and EU law

Question
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Gender identity and EU law

- **Could** 'sex' based discrimination also include discrimination based on gender identity or gender expression?
 - Expansive interpretation: all discrimination of trans and non-binary persons is sex-based (including pregnancy)
 - Addition of new grounds: unanimity requirements!
 - (Symbolic) visibility, monitoring, harmonisation, competence of equality bodies
 - Not included in LGBTI Strategy 2020-2025
 - Clarification in recital: acceptable middle ground?
 - Addition of open ground: cfr. article 21(1) CFR

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Gender identity and EU law

- Varying practices among EU Member States
 - Many (but not all) MS have gone beyond 'sex' in national non-discrimination legislation: gender identity, gender expression, gender reassignment
 - Protection against discrimination in employment
 - 21 of 27 EU countries protect against discrimination on grounds of gender identity in employment (cfr. Recital 3 Recast Directive 2006/54/EC)
 - Protection against discrimination in access to goods and services
 - 18 of 27 EU countries protect against discrimination in access to goods and services (no clear obligation under EU law)
- LGBTI Equality Strategy 2020-2025: support of MS to ensure legal protection against discrimination

Source: 2024 [TGEU Trans Index](#)

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Gender identity and EU law

Hot topic

- Sex/gender segregation in services and infrastructure
 - E.g.: sanitary facilities, health care settings, prisons, sports
 - Allowed by EU law (legitimate aim, means are appropriate and necessary)
 - Problem: gender identity/expression might not match sex characteristics
 - In/exclusion appropriate and necessary?
 - Protection of trans persons in their own right?

(16) Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities.

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Gender identity and EU law

Hot topic

- Impact of reforms in legal gender recognition and sex/gender registration
 - Would gender self-determination make it impossible to exclude trans people (especially trans women), if it would even be possible?
 - Affirmative action?
 - Evidence of structural gender discrimination?
 - Discrimination law without categories?

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Gender identity and EU law

- Ongoing developments:
 - Commission proposal on recognition of parenthood between Member States (2022)
 - Directives on standards for equality bodies (2024)
 - Pending case before CJEU on recognition of LGR between Member States (C-4/23)
 - AG (May 2024): refusal to recognise changes of forename and gender in another MS is violation of right to free movement and respect for private life of EU citizens
 - However: MS remain competent to decide on consequences of recognition in relation to marriage and parentage
 - Pending case before CJEU on (absence of non-binary) gender markers in online train ticket purchase (C-394/23)
 - Preliminary question by Conseil d'Etat (France)
 - Based on GDPR: principle of data minimisation and accuracy

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Questions?

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Thank You.



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