

Third Party Intervention



**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

**Applications nos. 58828/12, 40795/17, 55306/18, 55321/18
Katarzyna FORMELA and Sylwia FORMELA v. Poland and 3 other applications,**

**11454/17, 11810/17, 15273/17, 16898/17, 24231/17, 24351/17, 25891/17, 25904/17, 30128/18,
30340/18**

Cecylia PRZYBYSZEWSKA v. Poland and 9 other applications,

**11560/19
Antoni MESZKES v. Poland**

Introduction

1. On 11 September 2020, the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') informed the European Court of Human Rights (hereinafter: 'the Court') of her decision to intervene as a third party in the Court's proceedings, in accordance with Article 36, paragraph 3, of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations concerning the cases of *Katarzyna FORMELA and Sylwia FORMELA against Poland and 3 other applications* (nos. 58828/12, 40795/17, 55306/18, 55321/18); *Cecylia PRZYBYSZEWSKA against Poland and 9 other applications* (nos. 11454/17, 11810/17, 15273/17, 16898/17, 24231/17, 24351/17, 25891/17, 25904/17, 30128/18, 30340/18) and *Antoni MESZKES against Poland* (no. 11560/19). These cases concern the absence in Polish law of a legal framework for persons of the same sex either to marry or to have their stable relationships legally recognised. They also raise allegations of discrimination on the basis of sexual orientation in several sets of civil and administrative proceedings relating, for example, to private donations, tax returns, social benefits, health insurance, inheritance and the failure by the Polish authorities to recognise marriages contracted abroad.
2. According to her [mandate](#), the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.
3. The protection of the human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people is a priority issue for the Commissioner. This intervention is based on country monitoring conducted by the Commissioner's Office in several countries. It also builds on thematic work carried out by the Commissioner's Office over the years.
4. Section I of the present submission sets out the Commissioner's views on the importance of legal recognition for same-sex relationships and past recommendations to member states in this regard. Section II illustrates the everyday consequences of a lack of legal recognition on the private and family life of same-sex couples. Section III highlights recent trends, at the national and international level, with regard to the legal recognition of stable same-sex relationships. In Section IV, the Commissioner stresses that legal recognition of same-sex relationships must be effective and non-discriminatory. These sections are followed by the Commissioner's conclusions.

I. Commissioner's recommendations regarding the legal recognition of same-sex relationships

5. Commissioner Dunja Mijatović has devoted considerable attention to the human rights of LGBTI people. Her work so far has [mainly focused](#) on issues related to rising discrimination, hate speech and violence against LGBTI people, as well as difficulties faced by LGBTI human rights defenders, across Europe. After several decades of considerable progress towards achieving equal rights for LGBTI people in Europe, including the enactment of anti-discrimination and anti-hate crime legislation at national level, as well as increased recognition of same-sex unions, the Commissioner observes a worrying backlash, which has resulted in increased stigmatisation of LGBTI people and renewed opposition preventing LGBTI people from accessing and enjoying their human rights.
6. Rights related to private and family life under the Convention enable all individuals to have and maintain family relationships and to ensure that these established family links are respected in daily life. In practice, however, it can be particularly difficult for LGBTI people to enjoy respect for their rights related to private and family life. The Commissioner's Office first examined

issues faced by LGBTI people in the field of family life in an Issue Paper published in 2011, entitled "[Discrimination on grounds of sexual orientation and gender identity in Europe](#)".

7. The paper provides an overview of the situation regarding legal recognition of same-sex couples in Council of Europe member states at the time, finding that seven member states had given same-sex couples access to civil marriage, while 15 others had introduced some form of registered partnership or cohabitation open to same-sex partners.¹ The paper also provides several examples of the impact of non-recognition for same-sex partners. On the basis of these findings, the then Commissioner recommended that Council of Europe member states "*enact legislation recognising same-sex partnerships by granting such partnerships the same rights and benefits as different-sex partnerships or marriage, for example in the areas of social security, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.*"²
8. The Commissioner's predecessor examined the issue of legal recognition of same-sex partnerships in a number of country reports.³ In member states that did not offer such partnerships, the Commissioner's predecessor repeatedly called on the authorities to introduce legal protection for same-sex couples, at a minimum in the form of a civil union or registered partnership capable of providing for the needs of a couple in a stable committed relationship. When doing so, the Commissioner's predecessor drew the attention of the authorities of the countries visited to the Court's *Oliari v. Italy* judgment⁴ and to the growing trend in Europe towards recognition of same-sex partnerships.
9. In 2017, the Commissioner's predecessor published a Human Rights Comment entitled "[Access to registered same-sex partnerships: it's a question of equality](#)". In this text, he recalled that civil marriage, civil unions or registered partnerships represent benefits, rights and obligations that the state grants to a couple in a stable relationship. He argued that "providing access to legal recognition to same-sex couples boils down to a simple concept: equality before the law". He called on Council of Europe member states to work towards eliminating discrimination based on sexual orientation in the area of family rights, by enacting legislation providing legal recognition to same-sex couples and ensuring that this legislation provides the same rights and benefits as for married or registered different-sex couples.
10. In the Comment, the Commissioner's predecessor also expressed the view that "it is difficult to read the *Oliari* judgment, and concurring opinion, as anything else than placing a positive obligation on states parties to the Convention to provide legal recognition to same-sex couples as a way to protect their right to family life". Finally, he discussed access to civil marriage for same-sex couples, opining that, even if there is currently no obligation in international human rights law for states to allow same-sex couples to marry, "a genuine commitment to full equality requires states to seriously consider opening up civil marriage to same-sex couples".
11. In keeping with these positions, Commissioner Mijatović has welcomed the adoption of legislation on registered partnerships in [San Marino](#) (2018) and [Montenegro](#) (2020). She also welcomed the entry into force of same-sex marriage in [Northern Ireland](#) in 2019, calling this an important step forward for human rights protection and a momentous day for equality for LGBTI people. Lastly, the Commissioner recently submitted her written observations to the European Court of Human Rights on the case of *Florin Buhuceanu and Victor Ciobotaru v. Romania and*

¹ Council of Europe Commissioner for Human Rights, "Discrimination on grounds of sexual orientation and gender identity in Europe (2nd edition)", 2011, p. 91.

² *Ibid.* p.13.

³ Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, "[Report](#) following the visit to San Marino from 9 to 10 June 2015"; "[Report](#) following the visit to the Slovak Republic from 15 to 19 June 2015"; "[Report](#) following the visit to Latvia from 5 to 9 September 2016"; "[Press release](#) following the visit to Monaco from 18 to 19 January 2017".

⁴ *Oliari and others v. Italy*, Application Nos 18766/11 and 36030/11, 21 July 2015.

12 other applications concerning the absence of a legal framework for the recognition of stable same-sex relationships, in which she drew similar conclusions as in the present submission.⁵

II. The importance of legal recognition in the daily lives of same-sex couples

12. The Commissioner notes that there have been numerous attempts, in the forms of bills, popular initiatives and litigation, to introduce legal recognition of same-sex couples in most Council of Europe member states that do not yet provide such recognition. While these attempts have not been successful so far, the Commissioner is of the view that they demonstrate a clear need and demand for legal recognition of same-sex partnerships.
13. Whether they enjoy legal recognition from the state or not, same-sex couples and their families exist. Same-sex couples form the founding unit of a family, which, like for different-sex couples, may or may not include children. In its 2019 survey of LGBTI people in the European Union (EU), North Macedonia and Serbia, the EU Fundamental Rights Agency (FRA) found that 67% of all respondents live with a partner and 14% of these respondents are raising a child.⁶ As the Court found in its judgment *Schalk and Kopf*, “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships”. The Court also stated that same-sex couples are “in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship”,⁷ and have “the same needs in terms of mutual support and assistance as different-sex couples”.⁸
14. Without the possibility to access legal recognition, same-sex couples are denied rights that seem obvious to different-sex partners or spouses with such status and are left to face serious problems in their everyday lives, as also shown in the country monitoring conducted by the Commissioner’s Office. Indeed, private and public institutions will usually assume a different-sex couple, or a mother and a father, when devising services, benefits and procedures. Same-sex partners who cannot demonstrate their family link on the basis of a legal recognition may thus be denied access to the partner’s health insurance, family allowances or other employer’s benefits, as well as favourable rules with respect to taxation. They will not be entitled to take care leave for the partner or the partner’s child in case of sickness, disability or a new birth. They will typically not enjoy the same rights and responsibilities for children in their care, which can create hurdles with day-care and medical institutions, as well as schools.
15. The Commissioner further notes that partners may also be unable to make medical decisions for their partner in the event of sickness or an accident, or even be denied visiting rights in medical institutions. Having no possibility to obtain legal recognition as next-of-kin means that a person may not be entitled to a survivor’s pension or to continue living in the common home after the partner’s death. Same-sex couples may lack access to inheritance rights, even after a lifetime of acquiring and sharing property together. In the absence of legal recognition, there is no framework to regulate maintenance rights and duties of the partners toward each other or the children in the event of separation.
16. One essential tenet of family life is the ability for members of a family to enjoy each other’s company,⁹ which implies that family members should be able to reside together and reunite. If they lack access to legal recognition, same-sex couples may be restricted in their freedom of

⁵ Third party [intervention](#) by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, Application No. 20081/19, *Florin Buhuceanu and Victor Ciobotaru v. Romania and 12 other applications*, 14 September 2020.

⁶ EU Fundamental Rights Agency, “[A long way to go for LGBTI Equality](#)”, 14 May 2020, p. 30.

⁷ *Schalk and Kopf* para. 99; *Vallianatos v. Greece*, Applications Nos 29381/09 and 32684/09, 7 November 2013, para. 78.

⁸ *Vallianatos*, para. 81.

⁹ *Olsson v. Sweden (no. 1)*, Application No 10465/83, 24 March 1988, para. 59; see European Court of Human Rights, [Guide on Article 8 of the European Convention on Human Rights](#), last updated 12 December 2019.

movement across and beyond Europe as they may not be able to obtain residency rights or family reunification for all family members in another country. This, for instance, has led the Commissioner's predecessor to recommend that the definition of family members eligible for family reunification should be appropriately broad to include established long term same-sex partnerships.¹⁰

17. The COVID-19 pandemic has amplified the vulnerability of same-sex couples without access to legal recognition. On 14 May, the Commissioner published a [joint statement](#) on the impact of COVID-19 on the human rights of LGBT people, together with the United Nations (UN) [Independent Expert on Sexual Orientation and Gender Identity](#), the Inter-American Commission on Human Rights and numerous other human rights experts. This statement underscored that LGBT people's "experiences of inequality and discrimination [were] compounded by [...] marital status", among several other factors. For instance, ILGA-Europe [documented](#) four cases in Bulgaria and Romania where one non-national partner in a same-sex couple was not able to cross borders and re-join their partner because of the non-recognition of the partnership.
18. The Commissioner acknowledges that different-sex partners who are not married or in a registered partnership may also be confronted with many of the problems identified in this section. She takes note of current trends towards reducing the differences in treatment in terms of access to privileges and rights between married or legally registered different-sex couples on the one hand, and cohabiting different-sex couples on the other. However, the key issue -- and the heart of the matter for this submission -- is that, in some contexts, including in Poland, different-sex couples have the choice to have their relationships recognised or not, while same-sex partners are barred from accessing legal recognition and the legal consequences attached to it.
19. The Commissioner wishes to stress that access to legal recognition of same-sex partnerships is not a mere technicality, nor a matter of principle only. As demonstrated in this section, it is about the human rights and dignity of real persons who experience hardships in their daily lives because of the failure of the state to legally recognise them as living as a couple and protect them. As established in the Court's case-law, Article 8 of the Convention not only protects individuals from arbitrary state interference in their private and family life, but it can also require the state to take positive measures to ensure respect for these rights.¹¹

III. Trends in the legal recognition of same-sex relationships

20. In the *Oliari v. Italy* judgment, which concerned a similar question of lack of access to legal recognition for same-sex couples, the Court observed that "the movement towards legal recognition of same-sex couples [...] ha[d] continued to develop rapidly in Europe since the Court's judgment in *Schalk and Kopf* (2010)", adding that the "same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia."
21. The Commissioner observes that these trends have continued to develop along the same lines. In the *Oliari* judgment, the Court found that 24 of the 47 Council of Europe member states had enacted legislation permitting same-sex couples to have their relationship recognised as a civil marriage or as a form of civil union or registered partnership. The number has now further grown to 30 member states providing one form of legal recognition or another, with a significant increase in the number of states allowing same-sex marriage.

¹⁰ Commissioner for Human Rights of the Council of Europe, "Realising the right to family reunification for refugees in Europe", 2017, p. 7.

¹¹ [Guide on Article 8 of the European Convention on Human Rights](#), p.8-10 for a discussion on positive obligations.

22. At the time of writing, 16 member states provide for same-sex marriage.¹² Austria, Finland, Germany, Ireland and Malta, as well as Northern Ireland in the United Kingdom, have introduced legislation on same-sex marriage since the *Oliari* judgment. For some of these 16 states, same-sex marriage has replaced registered partnerships, which are no longer available. New laws on same-sex marriage are at an advanced stage of examination in the parliaments of Andorra and Switzerland and are expected to be voted in the coming weeks. 24 Council of Europe member states provide for some form of registered partnership, in addition to or instead of civil marriage.¹³ Cyprus, Estonia, Greece, Italy, Monaco, Montenegro, and San Marino have introduced such registered partnerships or civil unions since 2015. Draft legislation on civil partnerships is pending in the parliaments of Latvia, Lithuania and Poland. Most recently, the government of Kosovo* put forward a bill for the recognition of same-sex partnerships. Among the existing registered partnerships, some grant the same legal rights as civil marriage, while others offer fewer rights.¹⁴
23. Considering that the first registered partnership for same-sex couples was made available in Denmark in 1989 and that only 20 years ago not one single member state recognised same-sex marriage, this is a truly remarkable evolution. While the consensus on legal recognition in Europe is unambiguously increasing, some exceptions remain. Among the 27 member states of the EU, six do not yet provide for any legal recognition of same-sex relationships. All six have defined civil marriage as solely the union of a man and a woman in the constitution and/or in other laws.¹⁵
24. Beyond Europe, a similar trend towards the recognition of same-sex partnerships can be observed, with 29 countries altogether allowing for same-sex marriage at present.¹⁶ A recent [Organisation of Economic Co-operation and Development \(OECD\) report](#) shows that 71% of OECD countries allow same-sex marriage in 2019, while none did in 1999. 83% of OECD states provide some form of legal recognition for same-sex partners.
25. Council of Europe institutions and human rights monitoring mechanisms have called on states to provide some means of legal recognition for same-sex couples. In its [fifth monitoring cycle](#), the European Commission against Racism and Intolerance (ECRI) recommended that Bosnia and Herzegovina, Latvia, Lithuania, Monaco, North Macedonia, Romania, the Russian Federation, San Marino and Serbia “provide a legal framework that affords same-sex couples, without discrimination of any kind, the possibility to have their relationship recognised and protected in order to address the practical problems related to the social reality in which they live.” In July 2018, the Parliamentary Assembly of the Council of Europe adopted [Resolution 2239\(2020\)](#) on “Private and family life: achieving equality regardless of sexual orientation”, in which it recommended that states “ensure that same-sex partners have available to them a specific legal framework providing for the recognition and protection of their unions”.

¹² Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

¹³ Andorra, Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Montenegro, the Netherlands, San Marino, Slovenia, Spain, Switzerland, the United Kingdom.

* All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

¹⁴ See ILGA-Europe, [Rainbow Europe 2020](#), 14 May 2020 (consulted on 8 September 2020).

¹⁵ Bulgaria (since 1991), Latvia (since 2006), Lithuania (since 1992), Poland (since 1997), the Slovak Republic (since 2014) and Romania (since 2011). See Martijn Mos, “The anticipatory politics of homophobia: explaining constitutional bans on same-sex marriage in post-communist Europe”, op. cit. footnote 6. Poland’s 1997 Constitution, in its Article 18, affords protection to “marriage as a union of woman and man”.

¹⁶ Pew Research Centre, [Same-sex marriage around the world](#), updated May 2020 (consulted on 8 September 2020). Australia, Colombia, Costa Rica, Ecuador and Taiwan have legalised same-sex marriage since the *Oliari* judgment. Same-sex marriage bills are pending in the parliaments of Guatemala and Thailand, and court cases are ongoing in multiple countries.

26. At the United Nations (UN) level, treaty-based committees have recommended the adoption of legal frameworks for the recognition of same-sex partnerships and equality between same-sex and different-sex couples. For instance (looking at European countries only), the CESCR recommended to [Bulgaria](#) (2012), [North Macedonia](#) (2016), the [Russian Federation](#) (2017), and [Slovakia](#) (2019) to provide a protection equivalent to that of married couples for those in same-sex relationships. CEDAW recommended that [Lithuania](#) (2019) recognise “non-traditional forms of family relations other than marriage, including same-sex unions”; to [Serbia](#) (2013) and to [Estonia](#) (2016) that they complete pending regulations on the recognition of same-sex partnerships; and to [Andorra](#) (2019) that it eliminate any discriminatory difference between marriage and civil unions. The need for equality between same-sex and different-sex recognition arrangements was also emphasised in CEDAW’s concluding observations on [Liechtenstein](#) (2017) and [Luxembourg](#) (2018). An individual complaint against Albania concerning the lack of legal recognition for same-sex relationships is [pending before the Human Rights Committee](#).
27. Other regional courts have issued relevant decisions since the *Oliari* judgment. In June 2018, the Court of Justice of the European Union (ECJ) found in the [Coman v. Romania](#) case that EU member states have an obligation to recognise same-sex marriages or partnerships contracted abroad for the purpose of deriving a residency right for a third country national and thus preserving the freedom of movement of EU citizens. Another notable decision is the [2017 Advisory Opinion of the Inter-American Court of Human Rights \(IACtHR\)](#) on gender identity and equality and non-discrimination of same-sex couples, responding to questions from Costa Rica. A few points in particular deserve mention: first, the IACtHR found a positive obligation for states parties to the [American Convention on Human Rights](#) to protect the right to family life of same-sex couples, emphasising that this must go beyond issues related to patrimonial rights to encompass “all types of rights – whether civil, political, economic or social – applicable to the family relationships of heterosexual couples”.¹⁷ The Court observed that states can choose between several mechanisms to recognise same-sex partnerships, noting that expanding existing institutions, including civil marriage, may be the most simple and effective way. It further opined that “there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them.”¹⁸

Observations on Poland

28. In recent years, Poland has fallen to 42nd place in ILGA-Europe’s 2020 [annual “Rainbow index”](#), which measures the level of respect for LGBTI people’s human rights in 49 European countries. Having ranked 33rd in the 2015 edition of the index, Poland now has the lowest standing of all the members of the European Union. The [2019 FRA survey](#) of LGBTI people found that Poland (alongside Romania) had the highest rates of hate-motivated physical or sexual attacks against LGBTI people among the then 28 member states of the EU, as well as the highest share of respondents (79 %) who avoid certain places for fear of being assaulted, threatened or harassed.¹⁹ According to [ECRI’s 2015 report on Poland](#), homosexuality is still seen as a disease by a large section of the population.²⁰ It is therefore hardly surprising that the above-mentioned FRA survey found that 73% of Polish respondents are either never or only rarely open about their sexual orientation and gender identity.²¹ At the same time, it also found that

¹⁷ Inter-American Court of Human Rights, [Advisory Opinion OC-24/17 of November 24, 2017](#), requested by the Republic of Costa Rica, Gender Identity and Equality and Non-Discrimination of same-sex couples, para. 198.

¹⁸ *Ibid.*, para. 224.

¹⁹ “A long way to go for LGBTI equality”, *op.cit.*, p. 41.

²⁰ ECRI report on Poland (fifth monitoring cycle), CRI(2015)20, adopted on 20 March 2015.

²¹ “A long way to go for LGBTI equality”, *op. cit.*, p. 24.

50% of Polish LGBTI respondents were in stable and committed relationships, with 31% of respondents living together with their partner, and 10% raising children.²²

29. While Article 18 of the Polish Constitution grants protection to “marriage as a union of woman and man, the family, motherhood and parenthood”, Polish law does not currently provide for any legal recognition of same-sex relationships. Several bills have been tabled in the Polish parliament to that end – the earliest being in 2003 – but so far they have been to no avail. Every year between 2011 and 2015, and again in 2018, groups of MPs tried to get restricted legal rights granted to unmarried same-sex and different-sex couples through the establishment of civil unions, but ultimately all these attempts were unsuccessful.²³ Another attempt is under way, with two bills tabled in July 2020 by a group of MPs – [one](#) on legal partnerships and [another](#) on marriage equality – currently under examination in the lower house of the Polish Parliament.²⁴
30. The last two years, and especially the last parliamentary and presidential election campaigns in Poland, have seen a plethora of stigmatising and discriminatory comments targeting LGBTI people, including comments by high-ranking state officials, representatives of the clergy, and public TV. Such statements have been criticised by the Commissioner, notably in the press release following her visit to Poland in March 2019. In particular, the President of Poland repeatedly resorted to anti-LGBTI rhetoric when running for re-election in 2020.²⁵ As well as using antagonising language, he made a campaign pledge to defend the notion of “marriage” understood solely as the union of a man and a woman, and stated his firm rejection of the possibility of homosexual couples being authorised to adopt children.
31. Although Polish society’s attitudes towards LGBTI people has continued to improve gradually but steadily over the last decade, this trend appears to have slowed down or even reversed in recent times. The above-mentioned 2019 FRA survey found that 68% of LGBTI respondents – by a wide margin, the highest ratio among all EU countries – believed that prejudice and intolerance against LGBTI people had increased in Poland over the past five years.²⁶ Survey results published in 2019 by the Polish public opinion survey centre, the CBOS, found that although public acceptance of homosexuality had been growing slowly for a number of years, it had decreased since 2017, and public aversion to displaying homosexuality in public in particular rose from 62% to 67% in that two-year period.²⁷ The Commissioner considers that this can be accounted for at least in part by the growing climate of intolerance and the stigmatising comments made by certain officials and opinion-makers.

²² “A long way to go for LGBTI equality”, op.cit., Data Explorer, Country detail > Poland > Socio-demographics > Current family or partnership situation, <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results> (consulted on 26 October 2020).

²³ For a chronological review of the legislative initiatives to introduce same-sex partnerships into Polish law (in Polish), see <https://mnw.org.pl/zwiazki-partnerskie/#historia> (consulted on 26 October 2020).

²⁴ Bill EW-020-191/20 setting out the principles governing the conclusion and termination of a legal partnership (understood as a formalised relationship of two persons, regardless of their gender), the mutual rights and duties of partners, and their property relations; Bill EW-020-193/20 introducing into Polish law the possibility for two persons to marry, regardless of their gender. Both bills are available on the Sejm website, <http://sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=PROJNOWEUUST&NrKadencji=9&Kol=D&Typ=UST> (consulted on 26 October 2020).

²⁵ See, e.g., “Polish election: Andrzej Duda says LGBT 'ideology' worse than communism”, BBC, 14 June 2020, <https://www.bbc.com/news/world-europe-53039864>; “Attacking LGBT life helped the right-wing Polish president win re-election — barely”, the Washington Post, 21 July 2020, <https://www.washingtonpost.com/politics/2020/07/21/attacking-lgbt-life-helped-right-wing-polish-president-win-reelection-barely/> (both articles consulted on 26 October 2020).

²⁶ “A long way to go for LGBTI equality”, op. cit., Country detail > Poland > Social attitudes and government response > Perception of increase of decrease of prejudice and intolerance against LGBTI people in the past five years.

²⁷ Centrum Badań Opinii Społecznej (CBOS), Komunikat z badań, Nr 90/2019, July 2019, ISSN 2353-5822, available (in Polish) at https://www.cbos.pl/SPISKOM.POL/2019/K_090_19.PDF

32. However, it cannot be denied that over the past two decades Poland has seen major progress overall in the level of public acceptance for LGBTI rights. While the [2006 Eurobarometer](#) survey found that 17% of Polish respondents agreed with the statement “same-sex marriages should be allowed across Europe” (compared to a 44% EU average), this figure increased to 45% in the 2019 [special Eurobarometer](#) on social acceptance of LGBTI people (the EU average being 69%). The same 2019 survey found that 49% of Polish respondents agreed with the statement “gay, lesbian and bisexual people should have the same rights as heterosexuals” (compared to a 76% EU average). Surveys of the level of public acceptance for same-sex partnerships carried out in 2017 and 2019 by independent polling companies Ipsos and Kantar found that it stood at 52% in 2017 and between 57% and 60% in 2019.²⁸ More than a third of Poles (36%) – and as many as 49%-55% among the youngest people in the age groups 18-34 – say that they know an LGBTI person, a ratio which has been growing consistently over the past decade and which could be interpreted as a sign of an improving social climate allowing LGBTI people to come out.²⁹ A positive attitude towards LGBTI persons and greater approval of their rights are clearly more frequent among people who say that they personally know such a person.³⁰

IV. Legal recognition of same-sex partnerships must be effective and non-discriminatory

Effective protection of same-sex couples

33. States have sometimes argued that a specific legal framework for legal recognition of same-sex partners is not necessary because they can access a range of rights and benefits available in law through processes such as court proceedings, administrative declarations, notarial acts and private contracts.³¹ In this regard, the Commissioner recalls the Court’s findings in the *Oliari* judgment that such approaches are not only likely to “lack in content”, in so far as not all needs of same-sex couples are covered, but that they also are not “sufficiently stable” and represent a “not-insignificant hindrance to the applicants’ efforts to obtain respect for their private and family life.”

34. The Commissioner underscores that, to be truly effective, legal recognition of same-sex couples must therefore offer a clear and predictable framework. It must also be comprehensive, to cover all aspects of life in a committed, stable relationship. Member states may have varying approaches regarding the requirements of a couple in a committed relationship, which will usually be captured in the way they codify civil marriage. Legal research conducted in a sample of 21 European countries shows that existing registered partnerships mostly include the same legal consequences as marriage, but there are exceptions, usually in areas that concern parenting, migration laws, citizenship and/or surnames, income tax, inheritance, care leave and survivor’s pensions.³² In previous cases dealing with particular aspects of the right to family life, the Court has consistently found no valid justification to deny a specific right to same-sex

²⁸ See OKO.press, „Polki i Polacy gotowi na związki partnerskie i równość małżeńską”, 25 September 2019, available (in Polish) at <https://oko.press/polki-i-polacy-gotowi-na-zwiazki-partnerskie-i-rownosc-malzenska-sondaze-i-eurobarometr/>, and Gazeta Wyborcza, „Spora większość Polaków chce związków partnerskich”, 24 September 2019, available (in Polish) at <https://wyborcza.pl/7,75398,25227626,spora-wiekszosc-polakow-chce-zwiazkow-partnerskich-to-reakcja.html> (consulted on 26 October 2020).

²⁹ CBOS, Komunikat, op.cit., p.1.

³⁰ Ibid., p.10.

³¹ See, for example, submissions of the government of Italy, in the *Oliari* case; [comments by the government of Latvia](#) on the “Report of Nils Muižnieks following his visit to Latvia from 5 to 9 September 2016”.

³² Families and Societies, [Working Paper 75\(2017\)](#), “More and more together, legal family formats for same-sex and different-sex families in European countries, comparative analysis of data in the Lawsandfamilies database”, pp. 28-40, consulted on 8 September 2020; also see Balkan Insight, “[Czech activists bang their heads against rainbow wall](#)”, 18 March 2020, indicating that same-sex registered partnerships in the Czech Republic do not include adoption, taxation and property issues.

couples when it is available to different-sex couples in the same situation.³³ The Commissioner concurs with this approach and with the finding of the IACtHR in the Advisory Opinion mentioned above that “all types of rights” applicable to the family relationships of different-sex couples should be extended to same-sex couples.

Legal recognition of same-sex relationships and consensus

35. As discussed above, the consensus on legal recognition of same-sex relationships is undoubtedly consolidating in Europe, and public attitudes on equal rights of LGBTI people are improving. This is also true in Poland, although considerable resistance remains in public opinion there. In this connection, the Commissioner is of the view that, while this state of affairs must be acknowledged, it should also not be given undue weight.
36. The interest of same-sex couples in seeing their stable relationships recognised is clearly established. When examining the margin of appreciation of states parties to the Convention, the Court balances this interest against the interest of the community. The Court has repeatedly stressed that the state’s margin of appreciation is narrow when a difference of treatment is based on sexual orientation³⁴ and that such differential treatment based solely on considerations of sexual orientation is unacceptable.³⁵ In the Commissioner’s opinion, it is difficult to envision a situation in which a legitimate community interest could prevail to deny same-sex couples legal recognition of their relationships – even in countries where there is strong opposition to same-sex marriage or partnerships.
37. A key argument usually invoked to deny rights to same-sex couples is the need to protect the “traditional family”, which is understood to mean the union of a man and a woman with children. The Court has repeatedly found that this is not a reason capable of justifying different treatment on grounds of sexual orientation in the granting of rights to LGBTI people.³⁶ Protecting diverse types of families does not undercut or disadvantage traditional families. Indeed, ensuring that same-sex couples can effectively enjoy their rights related to family life does not harm different-sex couples in any way, as they already have – and continue to have - access to these same rights. Rights are not weaker or less valid because more people enjoy them. Furthermore, the Commissioner observes that there have been important societal changes regarding the structures of families in the past 50 years,³⁷ which makes the very legitimacy of protecting one type of family over others questionable. In her view, if states intend to promote the family as the fundamental unit to ensure support and care between members of society, then they should take a positive view of increased demand for arrangements promoting stable and committed relationships.
38. Another argument relies on a “societal consensus” against the recognition of same-sex relationships based on a sense of morals, tradition, or religious views shared by the majority of the population. In this regard too, the case-law of the Court is clear and constant. The Court has refused to endorse policies and decisions that express bias on the part of a heterosexual

³³ See for example *E.B. v. France*, Application No 43546/02, 22 January 2008; *X and others v. Austria*, Application No 19010/07, 19 February 2013; *Pajić v. Croatia*, Application No 68453/13, 23 February 2016; *P.B. and J.S. v. Austria*, Application No 18984/02, 22 July 2010.

³⁴ *Kozak v. Poland*, Application No 13102/02, 2 March 2010, para. 92; *Karner v. Austria*, Application No 40016/98, 24 October 2003, para. 41).

³⁵ *E.B. v. France* [GC], Application No 43546/02, 22 January 2008, paras 93 and 96; *Salgueiro da Silva Mouta v. Portugal*, Application No 33290/96, 21 December 1999, para. 36; *X and Others v. Austria* [GC], Application No 19010/07, 19 February 2013, para. 99.

³⁶ [Guide](#) on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No 12 to the Convention, 31 December 2019.

³⁷ See, for example, UN Women, “[Families in a changing world](#)”, May 2020 (consulted on 8 September 2020); Livia Sz Oláh, “[Changing families in the European Union](#)”, 2015 (consulted on 8 September 2020).

majority against a homosexual minority.³⁸ In its *Bayev v. Russia* judgment,³⁹ the Court reiterated that “it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority”, underscoring that the enjoyment of the rights in the Convention would be merely theoretical if that was the case.⁴⁰

39. The Latvian Ombudsman addressed this matter in a [2018 Opinion](#) submitted to parliament. He stated: “public opinion polls in Latvia show that the majority of Latvian society does not support the legal recognition of same-sex families. However, human rights, especially when it comes to determining the core of a specific right or basic protection, are not values that can be limited by the attitude of the public.” In the Costa Rica Advisory Opinion mentioned above, the IACtHR also acknowledged the lack of consensus on legal recognition of same-sex partnerships and same-sex marriage in some countries, but found that: “[it] cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such [sexual] minorities have suffered.”⁴¹ The Commissioner agrees entirely that the lack of consensus on legal recognition of same-sex partnerships and same-sex marriage in some countries cannot be considered a valid argument to deny or restrict the human rights of LGBTI people. While this applies in general, the Commissioner submits that it would be particularly unfortunate to lend credence to this argument where links can be detected between such lack of consensus and policy actively promoted by public authorities.

Legal recognition, discrimination and status of same-sex couples in society

40. States protect the family life of committed couples and their children by granting them specific rights, benefits and duties. If these benefits can only be accessed through civil marriage, but marriage is not open to same-sex couples, then an entire group of people is, in effect, excluded from these legal protections on the basis of their sexual orientation. This is particularly clear in Poland where, as mentioned above, same-sex couples are not legally allowed to marry.
41. The Commissioner observes that some European countries which have defined civil marriage as solely the union of a man and a woman have subsequently created registered partnerships for same-sex couples (Croatia, Hungary, Montenegro). The Commissioner stresses that these registered partnerships constitute an important step forward in protecting the rights of same-sex couples. She also stresses that, eventually, states should ensure that the various types of legal recognition of couples available in their legal framework – including civil marriage – are equally open to different-sex and same-sex couples. This is the best way to ensure equal rights and equal treatment between different-sex and same-sex couples. In this regard, she notes that the IACtHR stated in its Costa Rica Advisory Opinion: “the establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a de facto marital union or a civil marriage – does not pass the strict test of equality because, in the Court’s opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate.”⁴²
42. In the Commissioner’s view, denying same-sex couples the legal recognition of their relationships marginalises them and contributes to perpetuating perceptions that their relationships are less worthy than those of different-sex couples. It offends the dignity of persons in same-sex relationships.

³⁸ *Smith and Grady v. United Kingdom*, Applications Nos 33985/96 and 33986/96, 25 July 2000, para. 102; *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, 21 December 1999, para. 34-36; *L. and V. v. Austria*, Applications Nos. 39392/98 and 39829/98, 9 January 2003, para. 51-52.

³⁹ *Bayev and Others v. Russia*, Applications Nos 67667/09, 44092/12, 56717/12, 20 June 2017.

⁴⁰ *Ibid.* para 70.

⁴¹ Inter American Court of Human Rights Advisory Opinion OC-24/17, footnote 19, para 83.

⁴² Inter American Court of Human Rights Advisory Opinion OC-24/17, footnote 19, para 220.

43. In closing, the Commissioner would like to draw the Court's attention to recent studies that have drawn a clear link between the availability of legal recognition for same-sex couples (in the form of partnerships or same-sex marriage) and the social acceptance of LGBTI people. A broad 2018 sociological study based on European Social Survey data collected between 2002-2016 among 325,000 people in 32 European countries found that the introduction of legal recognition of same-sex partnerships in 15 of these countries was associated with significantly improved attitudes toward LGBTI people.⁴³ Another [study published in April 2019](#) focusing on the United States (US), where same-sex marriage was introduced incrementally by different states, found that although anti-LGBTI bias had already decreased overall over time between 2006 and 2016, legalisation of same-sex marriage noticeably accelerated the reduction. In states having introduced same-sex marriage, anti-LGBTI bias decreased twice as fast. The [latest publication](#) linked to the European Social Survey data, in August 2019, found conversely that acceptance of LGBTI people has *decreased* by an average 14 points over the 2002-2016 period in European countries that do not legally recognise same-sex relationships, including Russia, Bulgaria, Lithuania, Poland and Ukraine.

Conclusions

44. The Commissioner emphasises that stable same-sex couples with or without children are part of the rich diversity of families that make up our societies – regardless of whether a state recognises them or not. In the absence of such recognition, however, they are barred from fully enjoying their right to private and family life guaranteed under the Convention.

45. In conclusion, the Commissioner is of the opinion that:

- In line with the Court's well-established case-law, according to which ensuring respect for private and family life under Article 8 may require states to take positive action, states should provide effective and non-discriminatory legal recognition to same-sex couples, in the form of same-sex marriage, civil unions or registered partnerships;
- Such recognition must offer a clear and predictable framework and be comprehensive to cover the needs of a couple in a stable relationship in all aspects of life;
- Trends in Europe and elsewhere continue to point towards the consolidation of a consensus in favour of providing legal recognition to same-sex couples; at the same time, the absence of consensus at the national level should not be considered as a valid argument to deny legal recognition to same-sex couples;
- Rather, the principle of equality before the law requires that legal recognition should be available to same-sex partners;
- The absence of legal recognition for same-sex couples constitutes discrimination on grounds of sexual orientation;
- Excluding same-sex couples from legal recognition contributes to perpetuating prejudices about same-sex relationships, while, conversely, access to such recognition has been shown to diminish intolerance against LGBTI people.

⁴³ Institute of Labour Economics IZA, Discussion papers series, "[Do laws shape attitudes? Evidence from same-sex relationship recognition policies in Europe](#)", August 2018 (consulted on 8 September 2020).