

**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. 40792/10, 30538/14 and 43439/14
Irina Borisovna Fedotova and Irina Vladimirovna Shipitko
and 2 other applications v. Russia**

Introduction

1. On 9 February 2022, 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 case of *Irina Borisovna FEDOTOVA and Irina Vladimirovna SHIPITKO and 2 other applications v. Russia*. These cases concern the absence of a legal arrangement under Russian law for persons of the same sex to marry or have their stable relationships otherwise legally recognised.
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 has been a priority issue for the Commissioner. This intervention is based on country monitoring conducted by the Commissioner’s Office in several member states of the Council of Europe. It also builds on thematic work carried out by the Commissioner’s Office over the years on this issue.
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 by her Office to member states in this regard. In section II, the Commissioner discusses the difficulties faced by same-sex couples whose relationships are not recognised by the state. She also provides examples of regional and international human rights bodies that have urged states to provide some form of legal recognition to same-sex couples to protect their right to respect for family life, and stresses that such legal recognition must be effective and comprehensive. Section III offers some considerations related to the member states’ margin of appreciation, notably on the notion of European consensus and balancing public interests with LGBTI people’s right to respect for private and family life. In Section IV, the Commissioner discusses the interplay between access to legal recognition for same-sex couples and discrimination against LGBTI people. These sections are followed by the Commissioner’s conclusions.

I. The Commissioner’s work and 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 stagnation or even regression in some countries, 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 of 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, civil

union or cohabitation open to same-sex partners.¹ The paper also provides several examples of the impact of non-recognition for same-sex partners. Based on 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 several country reports.³ In member states that did not offer such a legal framework, the Commissioner’s predecessor consistently 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 providing a legal framework for the recognition of same-sex couples.
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 field 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 Human Rights 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 under 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 welcomed the entry into force of same-sex marriage in [Northern Ireland](#) in 2019, qualifying this development as an important step forward for human rights protection and a momentous day for equality for LGBTI people. In December 2020, the Commissioner also welcomed the new law introducing same-sex marriage in [Switzerland](#) after a referendum concerning this issue in the country.
12. Lastly, Commissioner Mijatović submitted written observations to the Court in the cases of *Florin BUHUCEANU and Victor CIOBOTARU and 12 other applications v. Romania*⁵ and in several cases against Poland including the cases of *Katarzyna FORMELA and Sylwia FORMELA and 3 other applications v. Poland*,⁶ in which she drew similar conclusions as in the present submission.

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 the Slovak Republic from 15 to 19 June 2015”; “[Report](#) following the visit to San Marino from 9 to 10 June 2015”; [Press release](#) following the visit to Monaco from 18 to 19 January 2017”; “[Report](#) following the visit to Latvia from 5 to 9 September 2016”.

⁴ *Oliari and others v. Italy*, Applications [Nos. 18766/11 and 36030/11](#), 21 July 2015.

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 in the case of *Buhuceanu and Ciobotaru v. Romania and 12 other applications*, Application No. 20081/19, 14 September 2020.

⁶ [Third party intervention](#) by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights in the cases of *Katarzyna FORMELA and Sylwia FORMELA v. Poland and 3 other applications*, Applications Nos. 58828/12, 40795/17, 55306/18, 55321/18; *Cecylia PRZYBYSZEWSKA v. Poland and 9 other applications*, Applications Nos. 11454/17, 11810/17, 15273/17,

II. The importance of legal recognition for the enjoyment of the right to respect for family life by same-sex couples

Daily-life violations of the right to respect for family life caused by the absence of legal recognition

13. At the time of writing, 17 Council of Europe member states did not provide any legal framework, either through civil marriage, civil unions or registered partnerships, for same-sex couples to be legally recognised by the state as living in a stable and committed relationship.⁷ In most of these countries, there have been attempts to secure such legal recognition, through public campaigns, bills, popular initiatives, and litigation in courts. While these attempts have not been successful so far, the Commissioner reiterates that they demonstrate a clear need and demand for such legal recognition by the persons concerned in those 17 states.
14. Whether they enjoy legal recognition from the state or not, same-sex couples and their families do exist. Same-sex couples form the founding unit of a family, which, like for different-sex couples, may or may not include children. In a 2019 survey by the EU Fundamental Rights Agency (FRA) polling LGBTI people in the European Union (EU), North Macedonia, and Serbia, 67% of respondents indicated that they currently live with a partner and 14% of all LGBTI respondents with a partner reported raising a child.⁸ Cohabiting same-sex couples and families are also a social reality in other member states.⁹ As the Court found in its judgment *Schalk and Kopf v. Austria*¹⁰, “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”,¹¹ and have “the same needs in terms of mutual support and assistance as different-sex couples”.¹²
15. Without the possibility to access legal recognition, either in the form of civil marriage or any other legal framework, same-sex couples are effectively denied rights that are acquired to different-sex partners with such status or spouses 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 based on 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. If they are not the birthing parent, they will typically not enjoy the same rights and responsibilities for the children in their care, which can create hurdles with day-care and medical institutions, as well as schools.
16. 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.

16898/17, 24231/17, 24351/17, 25891/17, 25904/17, 30128/18, 30340/18; and *Antoni MESZKES v. Poland*, Application No. 11560/19, 30 October 2020.

⁷ Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Latvia, Lithuania, North Macedonia, Poland, Slovak Republic, Republic of Moldova, Romania, Russia, Serbia, Turkey and Ukraine.

⁸ EU Fundamental Rights Agency, “[A long way to go for LGBTI Equality](#)”, 14 May 2020, p. 30.

⁹ See for example, The New Yorker, Masha Gessen, “[How LGBT couples in Russia decide whether to leave the country](#)”, 11 June 2019; Nash Mir Gay and Lesbian Centre, “[An investigation in to the status of same-sex partnerships in Ukraine](#)”, 2009.

¹⁰ *Schalk and Kopf v. Austria*, Application [No. 30141/04](#), 24 June 2010.

¹¹ *Schalk and Kopf*, op. cit., para. 99.

¹² *Vallianatos*, op. cit., para. 81.

17. Several medical studies over the years, notably in the United States, have shown that partners in same-sex relationships who are unable to obtain legal recognition, or equal legal recognition, experience emotional suffering because their families and relationships are branded as less worthy and inferior in society. Insecurity in the field of housing, finances and legal standing toward common children can cause stress and affect people's mental health. Conversely, legal recognition is shown to have had positive health outcomes for partners in same-sex relationships.¹³
18. One essential tenet of family life is the ability for members of a family "to enjoy each other's company",¹⁴ 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 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, led the Commissioner's predecessor to recommend that the definition of family members eligible for family reunification should be appropriately broad to include established same-sex partnerships.¹⁵
19. The COVID-19 pandemic has amplified the vulnerability of same-sex couples without access to legal recognition. On 14 May 2020, the Commissioner signed 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. Obtaining allowance to visit children living with the other parent under measures restricting travel within and between countries was similarly an issue.
20. The Commissioner acknowledges that different-sex partners who are not married or have not entered 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 benefits and rights between married or legally registered different-sex couples on the one hand and cohabiting different-sex couples on the other.¹⁶ However, the key difference -- and the heart of the matter for this submission -- is that, in 17 Council of Europe member states, different-sex couples are free to decide whether they want to have their relationships recognised or not, while same-sex partners are purposefully barred from accessing such protection of the state and the rights associated to it.

Legal recognition as means to ensure respect for the right to respect for family life

21. As ascertained 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.¹⁷ Furthermore, the principle that the Convention "is intended to protect not rights that are theoretical or illusory but rights that are practical and effective" is also well-established.¹⁸ As shown above, many aspects of the right to family life can only be accessed in an effective and concrete manner if a couple or a family are recognised as such by the state. The Commissioner thus contends that providing access to a legal framework for recognition by the state is one of the positive measures that is required to ensure respect for the rights to family life covered by Article 8.

¹³ For example, Journal of Marriage and Family, Allen J. LeBlanc, David M. Frost, Kayla Bowen, "[Legal marriage, unequal recognition and mental health among same-sex couples](#)", 8 January 2018; VOXeu, Shai Chen, Jan van Ours, "[In sickness and in health: the mental health effects of same-sex marriage legislation](#)", 24 July 2021.

¹⁴ *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.

¹⁵ Commissioner for Human Rights of the Council of Europe, "[Realising the right to family reunification for refugees in Europe](#)", 2017, p. 7.

¹⁶ For relevant comparative information, see for example, Kees Waaldijk, "[Same-sex partnership, international protection](#)", Oxford Public International Law, July 2021.

¹⁷ [Guide on Article 8 of the European Convention on Human Rights](#), p.8-10 for a discussion on positive obligations.

¹⁸ *Airey v. Ireland*, Application [No. 6289/73](#), 9 October 1979, para. 24.

22. The Commissioner further observes that civil marriage has been the legal framework through which states have organised this recognition. The right to civil marriage as protected in Article 12 of the Convention binds member states to organise a special recognition to stable couples who wish to access it. In the Commissioner's view, the right to civil marriage under the Convention is not a stand-alone right, but it is also one of the ways through which individuals obtain protection from the state of some of their rights to family life under Article 8.
23. If this medium is not accessible to same-sex couples, then the Commissioner is of the view that states must, at a minimum, provide an alternative. Failing to do so amounts to depriving LGBTI people in a relationship from enjoying many aspects of their right to respect for private and family life under article 8. According to the Commissioner, legal recognition of same-sex couples is thus not a "new" or "special" right that would be added to the Convention, as some have argued, but it is the necessary means to enjoy aspects of the well-established right to respect for family life. States that have joined international human rights treaties, including the Convention, have freely committed to upholding the right to respect for private and family life for everyone, irrespective of their personal characteristics, including sexual orientation.
24. As mentioned above, the Court found in 2015 in the *Oliari v. Italy* case that Italy had a positive obligation to provide a means for same-sex couples to obtain legal recognition of their relationships.¹⁹ The Commissioner emphasises that several organs of the Council of Europe, as well as regional and international human rights bodies, have similarly called on states to make a legal framework available to same-sex couples in order to guarantee their family rights. 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 its sixth monitoring cycle, ECRI found, in relation to Albania,²⁰ that "the absence of recognition of same-sex partnerships can lead to various forms of discrimination in the field of social rights". In its report on the Czech Republic,²¹ ECRI encouraged the authorities to review existing arrangements for same-sex couples in order to ensure legal equality with heterosexual couples. The Parliamentary Assembly of the Council of Europe adopted in July 2018 [Resolution 2239\(2018\)](#) 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".
25. At the United Nations (UN) level, treaty-based bodies have recommended equality between same-sex and different-sex couples and the adoption of legal frameworks for the recognition of same-sex partnerships. For instance (looking at European countries only), the CESCR recommended to [Bulgaria](#) (2012), [North Macedonia](#) (2016), the [Russian Federation](#) (2017) and [Slovakia](#) (2019) that they 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 [Luxembourg](#) (2018) and [Liechtenstein](#) (2017).
26. Other regional courts have issued relevant decisions on the issue. In June 2018, the Court of Justice of the European Union (ECJ) found in the [Coman v. Romania](#) case that the private and family life of same-sex couples is protected under Article 7 of the [EU Charter of Fundamental Rights](#) and 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, which found a

¹⁹ *Oliari and others v. Italy*, op. cit., paras 174 and 185.

²⁰ European Commission against Racism and Intolerance, "[Report on Albania \(sixth monitoring cycle\)](#)", June 2020.

²¹ European Commission against Racism and Intolerance, "[Report on the Czech Republic \(sixth monitoring cycle\)](#)", December 2020.

positive obligation for states parties to the [American Convention on Human Rights](#) to protect the right to family life of same-sex couples through legal recognition.

Legal recognition must provide effective and comprehensive protection for same-sex couples

27. 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 through processes such as court proceedings, administrative declarations, notarial acts and private contracts.²² 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." As is shown in the Court's own case-law, several specific rights attached to the family life of LGBTI people, for example in relation to adoption, custody of children, social rights and residence rights, have had to be litigated all the way to the Court, costing precious time and causing anguish and suffering in the lives of individuals in same-sex relationships in the meantime.²³ To be truly effective, legal recognition of same-sex couples should be governed under a clear legal framework, be easily accessible and clearly spell out the rights of those concerned.
28. The Commissioner considers that such legal recognition must also be comprehensive, to cover all aspects of life in a committed, stable relationship. She suggests that further guidance from the Court would be beneficial on the scope of rights to be included in legal recognition available to same-sex couples. Legal research conducted in a sample of 21 European countries shows that existing registered partnerships often include legal consequences that are similar to those of civil marriage, but that there are notable exceptions, usually in areas that concern parenting, migration laws, citizenship and/or surnames, income tax, inheritance, care leave and survivor's pensions.²⁴ In previous cases dealing with particular aspects of the right to respect for family life, the Court has consistently found no valid justification to deny a specific right to same-sex couples when it is available to different-sex couples in the same situation.²⁵ The Commissioner concurs with this approach and with the finding of the IACtHR in the Advisory Opinion mentioned above that states must protect the family life of same-sex couples beyond issues related to patrimonial rights, in a way that encompasses "all types of rights – whether civil, political, economic or social – applicable to the family relationships of heterosexual couples".²⁶

III. Some considerations related to the member states' margin of appreciation in providing legal recognition for same-sex couples

Strong European consensus

29. In the *Oliari v. Italy* judgment, the Court observed that "the movement towards legal recognition of same-sex couples [...] has 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."²⁷ The Commissioner observes that these trends have continued to develop along the same lines. At the time of the *Oliari* judgment,

²² See, for example, submissions of the government of Italy, in the *Oliari* case as summarised in the judgment, op. cit.; [comments by the government of Latvia](#) on the Commissioner for Human Rights' "Report following his visit to Latvia from 5 to 9 September 2016", op. cit.

²³ European Court of Human Rights, "[Guide on case-law of the Convention – LGBTI rights](#)", updated on 31 December 2021.

²⁴ 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 Laws and families database", pp. 28-40; 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.

²⁵ 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.

²⁶ 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, p. 75.

²⁷ *Oliari and others v. Italy*, op. cit., para. 178.

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 (17).²⁸

Community interests and societal consensus

30. The interests 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 orientation²⁹ and that such differential treatment based solely on considerations of sexual orientation is unacceptable.³⁰ 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.
31. A key argument usually invoked to deny rights to same-sex couples is the need to protect the “traditional family”, understood as a man and a woman married 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 same-sex couples.³¹ 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 interfere in any way with the rights of different-sex couples, who already have – and continue to have - access to these same rights. Furthermore, the Commissioner observes that there have been important societal changes regarding the structures of families in the past 50 years,³² which makes the very legitimacy of protecting one type of family above 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 view positively more demand for such arrangements.
32. Another argument relies on a “societal consensus” in the country concerned against the recognition of same-sex relationships based on a sense of morals, tradition, or religious views shared by the majority 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 majority against a homosexual minority.³³ In its *Bayev v. Russia* judgment,³⁴ 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.³⁵ The Court has, multiple times, found violations of various rights under the Convention involving LGBTI people in contexts where public opinion was hostile to them at the time of the judgments. This certainly characterises the early case-law of the Court in this area.³⁶

²⁸ At the time of writing, 17 member states provide for same-sex marriage: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. 24 Council of Europe member states provide for some form of registered partnership, in addition to or instead of civil marriage: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

²⁹ *Kozak v. Poland*, Application [No. 13102/02](#), 2 March 2010, para. 92; *Karner v. Austria*, Application [No. 40016/98](#), 24 October 2003, para. 41.

³⁰ *E.B. v. France* [GC], op. cit., 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], op. cit., para. 99.

³¹ [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.

³² See, for example, UN Women, “[Families in a changing world](#)”, May 2020; Livia Sz Oláh, “[Changing families in the European Union](#)”, 2015.

³³ *Smith and Grady v. United Kingdom*, Applications [Nos. 33985/96 and 33986/96](#), 25 July 2000, para. 102; *Salgueiro da Silva Mouta v. Portugal*, op. cit., para. 34-36; *L. and V. v. Austria*, Applications [Nos. 39392/98 and 39829/98](#), 9 January 2003, para. 51-52.

³⁴ *Bayev and Others v. Russia*, Applications [Nos. 67667/09, 44092/12, 56717/12](#), 20 June 2017.

³⁵ *Ibid.* para 70.

³⁶ For example: *Dudgeon v. United Kingdom*, Application [No. 7525/76](#), 22 October 1981; *Norris v. Ireland*, Application [No. 10581/83](#), 26 October 1988; *Christine Goodwin v. The United Kingdom*, Application [No. 28957/95](#),

33. The IACtHR, in the Costa Rica Advisory Opinion mentioned above, 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.”³⁷ The Commissioner cannot but strongly agree that the lack of consensus on legal recognition of same-sex partnerships and same-sex marriage among the population in some countries cannot be considered a valid argument by these countries to deny or restrict the human rights of LGBTI people.
34. The Commissioner finds it important to add that popular sentiment toward certain social groups, including LGBTI people, is not an independent phenomenon that is naturally evolving in a positive direction everywhere in Europe. It can also be negatively influenced by unscrupulous politicians. In a Human Rights Comment published in August 2021,³⁸ the Commissioner alerted member states to a concerning trend in Europe whereby some politicians and public officials are targeting LGBTI people for political gain, fuelling prejudice and hate against them. She cited examples drawn from her own work in [Armenia](#), [Moldova](#), [Poland](#), [Hungary](#), [Bulgaria](#), and [Turkey](#). In Russia, for the past several years, the authorities have contributed to the rise of hostile attitudes against LGBTI people under the guise of protecting “traditional values”, instead of encouraging understanding and acceptance of LGBTI people.³⁹ Examples of this approach include the adoption in June 2013 of a federal law banning the so-called “propaganda” of homosexuality among minors, the ensuing bans on Pride marches⁴⁰ and violations of freedom of expression of LGBTI people, and the stigmatisation of LGBTI activists and NGOs.⁴¹ Most recently, when attempting to liquidate a foundation providing funding to several LGBTI NGOs in the country, the Russian Ministry of Justice argued that the foundation’s activities run “against state policy, which is focused on the preservation, increase and evolution of human capital”.⁴²
35. Opinion polls in countries where there is a high level of stigmatisation of LGBTI people by public officials tend to show a decline in acceptance of LGBTI people among the majority population. For example, a recent survey released in Russia by the Levada centre, a non-governmental research organisation, indicated that the percentage of people who oppose same-sex relationships in the country increased from 60% in 2013 to 69% in 2021.⁴³ Similarly, in Poland, the Polish public opinion survey centre, the CBOS, found that public acceptance of homosexuality had decreased since 2017.⁴⁴ The Commissioner considers that these trends can be accounted for, at least in part, by anti-LGBTI policies and a climate of intolerance maintained by the authorities. The Commissioner considers that, in such circumstances, taking into consideration public opinion without caution when evaluating whether a member state has a positive obligation to provide legal recognition to same-sex couples (and how this should be provided) could have the negative effect of rewarding the state’s attempts to undermine the values of equal rights and human dignity that underly the Convention.

11 July 2002; *Bączkowski v. Poland*, [Application No. 1543/06](#), 3 May 2007; *Kozak v. Poland*, op. cit.; *Alekseyev v. Russia*, [Application No. 4916/07](#), 21 October 2010; *Genderdoc-M v. Moldova*, Application [No. 9106/06](#), 12 June 2012; *Identoba & Others v. Georgia*, [Application No. 73235/12](#), 12 May 2015.

³⁷ Inter American Court of Human Rights Advisory Opinion OC-24/17, op. cit., footnote 19, para 83.

³⁸ Council of Europe Commissioner for Human Rights, [“Pride vs. Indignity: political manipulation of homophobia and transphobia in Europe”](#), 16 August 2021.

³⁹ For example, Journal of Global Initiatives: Policy, Pedagogy, Perspective, Volume 12, Nikita Sleptcov, [“Political Homophobia as a State Strategy in Russia”](#), January 2018; Freedom House, [“Dismantling LGBT+ rights as a means of control in Russia”](#), April 2021; Human Rights Watch, [“License to Harm: violence and harassment against LGBT people and activists in Russia”](#), December 2014.

⁴⁰ Council of Europe Commissioner for Human Rights, [“Follow-up Memorandum on Freedom of Assembly in the Russian Federation”](#), September 2017.

⁴¹ Council of Europe Commissioner for Human Rights, [“Human Rights of LGBTI people in Europe: current threats to equal rights, challenges faced by defenders, and the way forward”](#), paras. 35, 42, 43, 48, December 2021.

⁴² Human Rights Watch, [“Russian government seeks closure of LGBT Rights Group”](#), 9 February 2022. This case is pending.

⁴³ The Moscow times, [“Most Russians Oppose Same-Sex Relationships”](#), 15 October 2021.

⁴⁴ 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.

IV. The interplay between legal recognition of same-sex couples (or its absence) and discrimination

Absence of legal recognition of same-sex couples as an expression of discrimination against LGBTI people

36. 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 based on their sexual orientation.
37. The Commissioner furthermore observes that many of the 17 member states that still do not provide legal recognition for same-sex partnerships have proceeded to modify their constitutions or laws to explicitly restrict civil marriage to the union of a man and a woman, without introducing any alternative for same-sex couples. Several have done so in recent years, for example the Slovak Republic in 2014, Armenia in 2015, Romania in 2016, Georgia in 2018, and most recently Russia in 2020. Given these legal changes, and the persistent refusal to provide any alternative framework, it appears that same-sex couples are purposefully excluded from any legal recognition in these countries, in the Commissioner's view.⁴⁵
38. The Commissioner emphasises the importance of examining the alleged violation of Article 14 in conjunction with Article 8 in the present case. As has been done with other rights under the Convention, it would be valuable to obtain clarification that member states not only have a positive obligation to ensure LGBTI people's access to their right to respect for family life, but also must protect the enjoyment of this right from wilful hinderance rooted in unfounded prejudices and bias based on sexual orientation.

Equality in the form of the legal recognition

39. The Commissioner observes that some of the member states that 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 acknowledges that these registered partnerships constitute an important step forward in protecting the rights of same-sex couples.
40. At the same time, she stresses that, eventually, member states should either have only one single legal framework for the recognition of all couples or should ensure that the various types of legal recognition – including civil marriage – are equally available 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.”⁴⁶ In 2017, the Austrian Constitutional Court ordered that civil marriage be open to same-sex couples and registered partnerships open to different-sex couples, finding that “the very existence of two separate legal institutions is an expression of the fact that individuals with a same-sex sexual orientation are not equal to those with a heterosexual orientation”.⁴⁷

Legal recognition and status of same-sex couples in society

41. 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

⁴⁵ East European Politics, Volume 36, Martijn Mos, “[The anticipatory politics of homophobia: explaining constitutional bans on same-sex marriage in post-communist Europe](#)”, February 2020.

⁴⁶ Inter American Court of Human Rights Advisory Opinion OC-24/17, footnote 19, para 220.

⁴⁷ Constitutional Court of Austria, “[Distinction between marriage and registered partnerships violates ban on discrimination](#)”, 5 December 2017.

325,000 people in 32 European countries found that the introduction of legal recognition of same-sex partnerships in 15 of these countries resulted in significantly improved attitudes toward LGBTI people.⁴⁸ Another [study published in April 2019](#) focusing on the United States, where same-sex marriage was introduced incrementally by different states, found that although anti-LGBTI bias had 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. A 2019 [publication](#) linked to the European Social Survey data 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

42. 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 respect for private and family life guaranteed under the Convention.
43. 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;
 - To be truly effective, such legal recognition should be governed under a clear legal framework, be easily accessible, and clearly spell out the rights of those concerned in a comprehensive manner in order to cover the needs of a couple 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, especially when state policies are working against respect, equality and acceptance of LGBTI people;
 - 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.

⁴⁸ 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).