

# LEGAL OPINION

## POLAND'S 2019-2022 LGBTQ+ FREEZONES



# INTRODUCTION

The present legal memo aims at providing an overview of the possible legal arguments underpinning an infringement procedure launched against Poland for failure to comply with its obligations under EU law when establishing or allowing the establishment of the so-called "LGBTQI<sup>1</sup>-free zones". This memo draws on the analysis and conclusions reached by *ILGA-Europe, Campaign Against Homophobia (Kampania Przeciw Homofobii), and the Równość.org.pl Foundation*. It is intended to complement the legal arguments that the Commission has recently put forward in its *infringement procedure against Poland* for failure to respond fully and appropriately to the inquiry regarding the "LGBTQI free zones".

In particular, the memo seeks to establish Poland's failure to comply with Article 4, paragraph 3, of the Treaty on the European Union (hereafter "TEU"), Article 21 of the Charter of Fundamental Rights of the European Union (hereafter "the Charter"), Articles 1 and 2, paragraphs 1-3, of Council Directive 2000/78/EC<sup>2</sup> (hereafter "Employment Directive") and Articles 2, paragraph 1, and 14 of Directive 2006/54/EC<sup>3</sup> (hereafter "Gender Equality Directive") by:

- a) **Establishing** that Member States are responsible for all State actors' actions liable to infringe EU law.
- b) **Determining** Poland's obligations under EU law as regards ensuring equal treatment and avoiding discrimination based on sexual orientation in the context of its employment policy.
- c) **Reporting** on the discriminatory actions pursued by several Polish authorities against the LGBTQI community.
- d) **Ascertaining** Poland's failures under EU law with regard to the effect of such discriminatory behaviours on its employment policy.

The memo will conclude that **Poland has failed to fulfil its obligations under EU law** by:

- i. adopting several resolutions and other public acts declaring certain areas of Poland free of the LGBTQI ideology,
- ii. voicing defamatory statements against the LGBTQI community,
- iii. failing to intervene against and by justifying discriminatory employment policies,

In the light of the foregoing, it is suggested that the Commission proceeds further in the infringement action it launched against Poland. Moreover, Member States should consider intervening in support of the Commission and/or directly file a complaint against Poland for failure to comply with EU law under Article 259 TFEU.

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<sup>1</sup> The abbreviation *LGBTQI* will be used for the purpose of this document but RECLAIM and the Böll Foundation acknowledge the existence of other abbreviations that different advocacy actors might consider more appropriate and complete.

<sup>2</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a *general framework for equal treatment in employment and occupation*, OJ L 303.

<sup>3</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the *implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*, OJ L 204.

# EXECUTIVE SUMMARY

## WHAT IS HAPPENING?

Polish authorities have made statements between 2019 and 2020 and adopted numerous anti-LGBT resolutions, culminating with President Duda's pledge to eliminate the so-called "LGBT ideology" from the public sector. In particular, as of July 2020, 98 local authorities in Poland had adopted 101 discriminatory resolutions, including:

- a) at the regional level, 5 out of 16 voivodeships or regions (województwo);
- b) at the sub-regional level, 38 poviats or districts (powiat); and
- c) at the local level, 55 gminas or communes.

Such Discriminatory resolutions included 57 resolutions "against LGBT ideology" (also referred to as "LGBT-free zone" resolutions), 39 so-called Charters of Family Rights, and five other resolutions.

In response to these events, the European Commission **rejected** grants for six LGBTI-free zone Polish towns under a citizens' program for twin municipalities. Moreover, in March 2021, the Members of the European Parliament declared the EU an "**LGBTIQ Freedom Zone**" and urged the Commission to take further actions to address violations of the fundamental rights of LGBTIQ people.

The Commission responded by first **launching** an infringement action against Poland for failure to fully and appropriately respond to its inquiry regarding the "LGBT free zones" (principle of sincere cooperation). Then, it **wrote** to five Polish regional councils urging them to abandon declarations to receive recovery funding.

Over the threat of losing funds from the European Union, several local authorities have now revoked the anti-LGBT declarations. Despite this, as of February 2022, discriminatory resolutions continue to be in force

- a) at the regional level, in 1 out of 16 voivodeships or regions (województwo);
- b) at the sub-regional level, in 32 poviats or districts (powiat); and
- c) at the local level, in 47 gminas or communes.<sup>4</sup>

The adoption of such resolutions and charters has been accompanied by **many anti-LGBTQI public statements by Polish authorities**. Within these statements, no reference is usually made to LGBTQI individuals as people. Instead, LGBTQI individuals are **portrayed as a "foreign ideology"** dangerous to children and Western values. This "ideology" has been compared to a **virus dehumanising both society and young people** and accused of **fostering and promoting paedophilia**. LGBTQI people have also been portrayed as **extremists, hooligans, and violent rebels**.

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<sup>4</sup> See the table created by Atlas of Hate, which is periodically updated, available at this link <https://atlasnienawisci.pl/>.

Consequently, many Polish authorities advocated the ban of the “LGBT ideology” in schools and public institutions and the termination of the Istanbul Convention and the abolishment of funding to LGBTQI groups. Attacks have also been made on judges accused of defending LGBTQI people.<sup>5</sup>

Polish courts have acknowledged that the “LGBT-free zone” resolutions go **beyond mere ideological declarations** and constitute **executive measures**. For example, on 14 July 2020, a Polish Administrative Court in Gliwice ruled that the resolution contained an announcement of practical actions that would be taken allegedly to “defend” entrepreneurs and teachers against the “LGBT+ ideology” and thus had an executive character because it determined the direction taken by the municipal council and its head.<sup>6</sup>

## DOES THIS CONCERN EU LAW?

**Yes. Such discriminatory statements and measures directly impact LGBTQI people's access to employment.** On the one hand, public authorities' statements and measures create both excessively difficult or disadvantageous conditions to access public jobs and a hostile environment preventing LGBTQI people from applying for public jobs. On the other, public authorities' statements justify and legitimise private parties' employment policies discriminating against LGBTQI people, thus making it excessively difficult to access a job and pursue their occupation.

Under EU anti-discrimination law, **Member States' authorities must:**

- a) Adopt employment policies in the public sector that do not contain discriminatory clauses.
- b) Declare null and void employment policies or clauses in both the public and private sectors, resulting in direct or indirect discrimination.
- c) Engage with civil society organisations in a cooperative way in order to strengthen dialogue and prevent the establishment of a hostile environment that could result in harassment.

Conversely, **they must not:**

- a) Adopt employment policies in the public sector resulting in direct or indirect discrimination.
- b) Fail to intervene or justify employment policies or clauses, neither in the public nor in the private sector, resulting in direct or indirect discrimination.

<sup>5</sup> See [here](#), [here](#) and [here](#). See also: [Ombudsperson's information about his activity and the state of the human freedoms and rights in Poland in 2019; tweet of Janusz Kowalski dated 6 August 2020; tweet of Janusz Kowalski dated 9 August 2020.](#)

<sup>6</sup> See Judgement III SA/GI 15/20 of Voivodship Administrative Court in Gliwice dated 14 July 2020, page 26, available [here](#).

In the light of the above, it is possible to conclude that Poland is in breach of EU law, with specific regard to the following provisions:

- a) **Article 2, paragraphs 1 and 2, Employment Directive (Directive 2000/78/EC) and Articles 2, paragraphs 1, and 14, Gender Equality Directive (Directive 2006/54/EC)**. By adopting "LGBT-free zones" Resolutions and the Charter of Family Rights, Poland failed to fulfil its obligation to actively prevent direct or indirect discriminatory employment policies both in the public and in the private sector. Furthermore, it failed to declare them null and void. Conversely, through their statements, Polish public authorities justified and legitimised discriminatory practices while delegitimising those practices to correctly implement public and private parties' obligations under the Employment and Gender Equality Directives.
- b) **Article 2, paragraph 3, Employment Directive and Articles 2, paragraph 2(a), and 14, Gender Equality Directive (Directive 2006/54/EC)**. By adopting defamatory public statements, inciting hatred and violence and justifying (or inciting to adopt) discriminatory employment practices against LGBT+ people, Polish public authorities failed to fulfil their obligations to prevent the establishment of an intimidating, hostile, degrading, humiliating and offensive environment, thus resulting in harassment under said provisions.
- c) **Article 21 of the Charter**. By allowing public and private parties to adopt discriminatory employment policies, Poland failed to fulfil its obligations to prohibit all discrimination on the basis of, *inter alia*, gender identity and sexual orientation.
- d) **Article 4, paragraph 3, TEU (principle of sincere cooperation)**. By adopting and operationalising the "LGBT-free zones" Resolutions and the Charter of Family Rights and omitting to intervene to avoid the abovesaid violations of EU law, Poland failed to fulfil its obligation of sincere cooperation.

**Consequently, the Commission should:**

- **Proceed further** in the infringement action it launched against Poland in July 2021 for failure to fully and appropriately respond to its inquiry regarding the "LGBT free zones" and **hold the State accountable** for breaching the above-mentioned provisions.

**Moreover, Member States should:**

- **Support the Commission-led action** or **directly file a complaint** against Poland for failure to comply with EU law under Article 259 TFEU.

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# 1. A Member State may challenge another Member State's failure to comply with EU law under Article 259 TFEU, regardless of the author of the violation.

1. Under Article 259, paragraph 1, TFEU, a "Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union."
2. In addition to a violation of the Treaties, a Member State may bring another Member State before the CJEU for failure to comply with the provisions of the Charter when they are implementing Union law.
3. Furthermore, it must be pointed out that Member States are responsible for ensuring that all State authorities comply with EU law and ensure the application of EU law. Accordingly, the Court has consistently held that Member States' obligation for failure to comply with EU law applies to all State authorities.<sup>7</sup> This also stems from the general principles of EU law and, in particular, from the principle of **sincere cooperation** enshrined in Article 4, paragraph 3, TEU. In this regard, the Court has consistently held that "in the fields covered by European Union law, [...] the public authorities of the Member States are bound by a duty of sincere cooperation. Under that principle, they must take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union and refrain from any measure which could jeopardise the attainment of the European Union's objectives".<sup>8</sup> Consequently, Member States' public authorities have both active and negative obligations: they **must act (and must not fail to act)** in order to ensure the correct implementation of EU law, and they **must refrain** from measures liable to impair it.

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<sup>7</sup> See, with regard to Member State's obligation to redress individuals damaged by the incorrect implementation of EU law: CJEU, Judgment of the Court of 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich and Others*, ECLI:EU:C:1991:428, and Judgment of the Court of 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, ECLI:EU:C:1996:79. In particular, the Court held that "In international law, a State whose liability for breach of an international commitment is in issue will be viewed as a **single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive**. This must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law" (*Brasserie du pêcheur and Factortame*, para. 34 – emphasis added). See also, with regard to the notion of Member State under Articles 258-260 TFEU (i.e. infringement procedures), Judgment of the Court of 5 May 1970, Case 77/69, *Commission v Belgium*, ECLI:EU:C:1970:34, para. 15 and Advocate General Opinion of 3 June 2003, Case C-129/00, *Commission v Italy*, ECLI:EU:C:2003:319, point 50, where the Court clarified that **the liability of a Member State under Article 258 TFEU arises whatever the agency of the State whose action or inaction is the cause of the failure**. Indeed, "Member State as such must ensure that the result sought by the relevant provisions of the Treaty or of secondary law is attained in the national legal order" (AG Opinion, *Commission v Italy*, point 50).

<sup>8</sup> CJEU, Judgment of the Court of 7 November 2013, Case C-518/11, *UPC Nederland BV v Gemeente Hilversum*, ECLI:EU:C:2013:709, para. 59 and caselaw cited.

4. It stems from the above that a Member State may bring another Member State before the CJEU based on the procedure laid down in Article 259 TFEU. In particular, a Member State may challenge another Member State's failure to fulfil an obligation under the Charter if such failure occurred in the implementation of EU law.



## 2. Member State' authorities must ensure that no discriminatory employment practices are implemented in the public and private sectors.

### 2.1. Member States' obligations under primary law

5. Article 4, paragraph 3, TEU provides that *"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."* (emphasis added)
6. With specific regard to antidiscrimination law, under Article 21 of the Charter, **"[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."** (emphasis added)

### 2.2. Member States' obligations under secondary law

7. Concerning Member States' obligations under secondary law, the Court clarified that the Employment Directive is a specific expression of the general prohibition of discrimination set forth in Article 21 of the Charter.<sup>9</sup> The Directive lays down a general framework for combating discrimination on the grounds of, inter alia, sexual orientation in the field of employment in order to put into effect the principle of equal treatment by providing everyone with effective protection against discrimination based on sexual orientation and other protected grounds.<sup>10</sup>
8. For the purposes of the Employment Directive, the "principle of equal treatment" means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1, including sexual orientation (Article 2(1)).
  - a) Direct discrimination occurs when one person is treated less favourably than another person in a comparable situation (Article 2(2)(a)).
  - b) Indirect discrimination occurs where an apparently neutral provision,

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<sup>9</sup> CJEU, Judgment of the Court of 17 April 2018, Case C-414/16, [Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.](#), ECLI:EU:C:2018:257, para. 47; this is confirmed in the Directive itself, particularly in Recitals 9, 11, 12 and 28.

<sup>10</sup> CJEU, Judgment of the Court of 15 January 2019, Case C-258/17, [E.B. v Versicherungsanstalt öffentlich Bediensteter](#), ECLI:EU:C:2019:17, para. 40.

criterion, or practice would put persons having a particular sexual orientation at a particular disadvantage compared with other persons unless a legitimate aim objectively justifies that provision, criterion, or practice and the means of achieving that aim are appropriate and necessary. (Article 2(2)(b)).

9. The Employment Directive also prohibits harassment as a form of discrimination when some conduct “takes place with the **purpose or effect** of violating the dignity of a person and **of creating an intimidating, hostile, degrading, humiliating or offensive environment.**” (Article 2(3)).<sup>11</sup>
10. The Employment Directive applies to both the public and private sectors in relation to (Article 3(1)):
  - “(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.
  - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
  - (c) employment and working conditions, including dismissals and pay;”
11. Additionally, Member States shall take the **necessary measure** to ensure that any provision resulting in direct or indirect discrimination or unequal treatment is abolished and/or declared null and void and amended (Article 16).
12. Finally, the Gender Equality Directive provides for comparable provisions applicable with regard to persons having undergone a legal gender reassignment procedure.<sup>12</sup> In particular, it provides that the Member States shall ensure that there is no direct and indirect discrimination as well as harassment on the basis of gender in both public and private employment policies.<sup>13</sup>

### 2.3. Grounds for Member States’ responsibilities

13. The Court has ruled that **discriminatory statements** made by a person in the mass media **may fall within the material scope of the Employment Directive** if the link between the statements and the conditions for access to employment and occupation with that employer is not hypothetical.<sup>14</sup> It is possible to assume

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<sup>11</sup> Article 18(5) of the Polish Employment Code uses the same definition of harassment as Article 2(3) of the Directive: “*undesirable behaviour the purpose or effect of which is to violate the dignity of an employee and to **create an intimidating, hostile, degrading, humiliating or offensive atmosphere***” (emphasis added).

<sup>12</sup> See Recital no. 3 of the [Gender Equality Directive](#).

<sup>13</sup> See, in particular, Articles 1, 2, 3 and 14 of the Gender Equality Directive.

<sup>14</sup> CJEU, Judgment of the Court of 23 April 2020, Case C-507/18, [Associazione Avvocatura per i diritti LGBTI](#), ECLI:EU:C:2020:289, paras. 43, 57 and 58.

the same concerning the Gender Equality Directive.

14. Whether such a link exists must be assessed in the context of the specific circumstances of any given case. According to the Court, **three key criteria** should be taken into account:

a) First, **the person making the discriminatory statements must either be a potential employer or be, in law or in fact, capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer.** It suffices that the person making the statements is perceived by the public or the social groups concerned as capable of exerting such influence, even if she or he does not have the legal capacity to define the recruitment policy of the employer concerned.<sup>15</sup>

The Court in *AGM-COS.MET* noted that statements made by officials that give the impression that they are official positions taken by the State (rather than personal opinions of the official) are attributable to the State. Therefore, the decisive factor is whether the persons to whom those statements are addressed can reasonably believe that they are positions taken by the official in their official capacity and exercising their legal authority.<sup>16</sup> This is particularly the case if: (i) the official does not indicate that her or his statements must be distinguished from the official position of the competent department; and (ii) the competent State departments do not take the necessary steps to dispel the impression that such statements are the official positions taken by the State.<sup>17</sup>

b) Second, **the nature and content of the statements concerned must relate to the conditions for access to employment or occupation** with the employer concerned and **establish the employer's intention to discriminate** based on a criterion laid down in the Employment Directive. In this regard, it is worth mentioning that the environment created by discriminatory statements directly relates to the establishment of discriminatory practices. As expressed by the Advocate General in the *Feryn* case: "To ignore that [the role of statements in establishing a discriminatory environment] as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue."

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c) Third, **the context in which the statements at issue were made** is relevant,

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<sup>15</sup> CJEU, Judgment of the Court of 25 April 2013, Case C-81/12, *Asociația Accept*, ECLI:EU:C:2013:275, paras. 47 to 51.

<sup>16</sup> CJEU, Judgment of the Court of 17 April 2007, Case C-470/03, *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen*, ECLI:EU:C:2007:213, paras 56-58 and 66.

<sup>17</sup> *Ibid.*, para. 58.

<sup>18</sup> Opinion of Advocate General on 12 March 2008, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:155, para. 15

particularly if they are made in public or broadcasted to the public, whether via traditional media or social networks. In *Feryn*, the Court found that statements in which an employer in a newspaper article publicly makes known that, under its recruitment process, it will not recruit any employees of a certain ethnic or racial origin gives rise to a presumption of a discriminatory recruitment policy, in violation of the Employment Directive.<sup>19</sup>

15. Statements by State officials may fall within the material scope of the Employment Directive even if:

- a) No recruitment procedure had been opened or planned, and no negotiation with a view to recruitment was underway when the statements concerned were made;<sup>20</sup> or
- b) The alleged discriminatory recruitment system is not based on a public act or a selection procedure requiring the submission of applications and pre-selection.<sup>21</sup> In *Asociația Accept*, it was sufficient for the Court that the facts suggested that the employer, in that case, had a discriminatory recruitment policy.<sup>22</sup>

16. Under established case law, Member States may seek a finding of the Court that EU law has been breached because another Member State has not adopted sufficient measures to prevent the violation of EU law. Indeed, the Court recognised Member States' failure to prevent the violation of EU law committed by private actors where the measures adopted by that Member State were manifestly inadequate to prevent and effectively dissuade the perpetrator of the offences from committing and repeating them.<sup>23</sup>

17. In conclusion, **Member States' authorities must:**

- a) Adopt employment policies in the public sector that do not contain discriminatory clauses.
- b) Declare null and void employment policies or clauses in both the public and private sectors, resulting in direct or indirect discrimination.
- c) Engage with civil society organisations in a cooperative way in order to strengthen dialogue and prevent the establishment of a hostile environment that could result in harassment.

18. Conversely, **they must not:**

- a) Adopt employment policies in the public sector that result in direct or indirect discrimination.

<sup>19</sup>CJEU, Judgment of the Court (Second Chamber) of 10 July 2008, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397, paras. 31-34

<sup>20</sup> Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*, para. 42.

<sup>21</sup> Case C-81/12, *Asociația Accept*, para. 44 and 45.

<sup>22</sup> *Ibid.* para. 49.

<sup>23</sup> CJEU, Judgment of the Court of 9 December 1997, Case C-265/95, *Commission v France*, ECLI:EU:C:1997:595, para. 66.

- b) Fail to intervene or justify employment policies or clauses, neither in the public nor in the private sector, which might result in direct or indirect discrimination.
- c) Defame, insult, or incite hatred resulting in direct or indirect discrimination.
- d) Contribute, through their actions or omissions, to the establishment of a hostile environment which could result in harassment.

### 3. Polish authorities have adopted acts and behaviours explicitly targeting the LGBTQI community.

19. **The measures described below must be considered both individually and holistically in the context of the deteriorating situation of LGBTQI persons in Poland.** Whereas the anti-LGBTQI campaign put in place by Polish authorities encompasses several acts, such as defamation, incitement to violence, hatred and discrimination, misinformation, abuse of rights from police officers etc., the present memo will only report those actions and behaviours that have a direct impact on employment policies in Poland.
20. It is worth underlining that **the general environment of hostility that Polish authorities are establishing in Poland impacts LGBTQI persons' access to employment.** For further evidence of acts and behaviours supporting such an argument, please refer to the European Union Agency for Fundamental Rights' latest report on the situation of LGBTQI persons in Europe.<sup>24</sup> As reported therein, Poland is among the EU Member States with the highest rates of hate-motivated physical and sexual attacks against LGBTQI people.<sup>25</sup>
21. Against this backdrop of **general and systemic hostility against LGBTQI people**, the Polish Authorities have made **statements** and adopted numerous anti-LGBTQI resolutions between 2019 and 2021, culminating with President Duda's pledge to eliminate the so-called "LGBTQI ideology" from the public sector. In particular, as of July 2020, 98 local authorities in Poland had adopted 101 discriminatory resolutions, including:
  - a) at the regional level, 5 out of 16 voivodeships or regions (województwo);
  - b) at the sub-regional level, 38 poviats or districts (powiat); and
  - c) at the local level, 55 gminas or communes.
22. Such discriminatory resolutions included 57 resolutions "against LGBTQI ideology" (also referred to as "LGBTQI-free zone" resolutions) and 39 so-called Charters of Family Rights.
23. In response to these events, the European Commission **rejected** grants for six LGBTQI-free zone Polish towns under a citizens' program for twin municipalities. Moreover, in March 2021, the Members of the European Parliament declared the EU an **"LGBTQI Freedom Zone"** and urged the Commission to take further actions to address violations of the fundamental rights of LGBTQI people.
24. The Commission quickly followed up. First, it **launched** an infringement action against Poland for failure to fully and appropriately respond to its inquiry regarding the "LGBTQI free zones". Then, it **wrote** to five Polish regional councils urging them to abandon declarations to receive recovery funding.

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<sup>24</sup> European Union Fundamental Rights Agency, "[A long way to go for LGBTI equality](#)", 2020.

<sup>25</sup> *Ibid.*, pp. 41-43.

25. Over the threat of losing funds from the European Union, several local authorities have now revoked the anti-LGBTQI declarations. Despite this, as of February 2022, discriminatory resolutions continue to be in force
- a) at the regional level, in 1 out of 16 voivodeships or regions (województwo);
  - b) at the sub-regional level, in 32 poviats or districts (powiat); and
  - c) at the local level, in 47 gminas or communes.<sup>26</sup>

### 3.1. “LGBTQI-free zone” resolutions

26. The “LGBTQI-free zone” resolutions declare that the local administration and its territory are “free of LGBTQI ideology.”
27. Regarding employment and occupation, the resolutions **aim to prevent the application of the principle of equality and non-discrimination** in the selection of employees, service providers, and other professionals. For example, various resolutions state that:
- a) “We will not allow administrative pressure to apply political correctness (sometimes just simply called homopropaganda) in selected professions.” (Free translation of the original)<sup>27</sup>
  - b) “[The district council opposes] [p]utting pressure in favour of the so-called cultural and political correctness (homopropaganda) in many areas of social, political and economic life. We will support teachers, local government officials, entrepreneurs and representatives of other professions in containing this ideological pressure and applied homoterror.” (Free translation of the original)<sup>28</sup>
  - c) “We will protect, among others, teachers and entrepreneurs from unprofessional criteria being imposed upon them, e.g. in educational work, in the selection of employees or contractors!” (Free translation of the original)<sup>29</sup>
28. It must be borne in mind that “LGBTQI-free zone” resolutions are not only political declarations. In this regard, Polish courts have acknowledged that the “LGBTQI-free zone” resolutions go beyond mere ideological declarations and, in fact, constitute executive measures. For example, on 14 July 2020, the Voivodeship Administrative Court in Gliwice declared null and void the “LGBTQI-free” resolution of the municipal council of Istebna, dated 2 September 2019, following a complaint from the Polish Ombudsperson. The Court ruled that the resolution contained an announcement of practical actions that would be taken allegedly to “defend” entrepreneurs and teachers and thus had an executive

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<sup>26</sup> See the table created by Atlas of Hate, which is periodically updated, available at this link <https://atlasnienawisci.pl/>.

<sup>27</sup> The passages reported above are extracted from the “LGBT-Free zone” resolution of the Świdnik Council, available [here](#) in the original language.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

character because it determined the directions of the municipal council and its head.<sup>30</sup>

## 3.2. Charter on Family Rights

29. A model Charter on Family Rights was first drafted in March 2019 by Ordo Iuris, a conservative and anti- LGBTQI association with ties to the Polish government and the ruling Law and Justice party. Thirty-nine public bodies across Poland have adopted the model Charter.
30. The Charters include provisions that inter alia:
- a) Encourage businesses to adopt policies vis-à-vis employees and customers who conform with the “traditional” notion of marriage, thus discriminating against employees and customers in same-sex families.  
“Good practices regarding the rights of families should also be promoted in the business sector. Local government should support certification programmes addressed to businesses that have adopted family-friendly solutions. This may be a programme for certifying solutions addressed to consumers, such as discounts for families or amenities for families with children, or a programme of good practices regarding the situation of employees who are parents.”
  - b) Limit access to public tenders or funds for projects that deviate from the definition of marriage as a union between a man and a woman. For example, according to the model text:  
“Suspension of public financing of projects undermining constitutional identity and autonomy of marriage and family. It is especially crucial to exclude any chance of allocating public funds and public property for projects that undermine the constitutional identity of marriage as a relationship between a man and a woman or the family's autonomy. Furthermore, the terms and conditions of local government competitions for community organisations should be supplemented with standards that support the family and marriage and exclude the earmarking of funds for activities undermining the constitutional foundation of the family law or prejudicing the rights of citizens.”
31. Some local governments have taken steps to **operationalise** the Charter of Family Rights. For example, the city councils of Przasnysz, Rawa Mazowiecka, Radom, and Tomaszów Mazowiecki have appointed “family rights advocates”, and the communes of Rawa and Opoczno, and the cities of Dębica and Tomaszów Mazowiecki distributed their version of the Charter to schools.
32. Further, the City Hall of Dębica sent a letter to the Municipal Social Welfare Centre in Dębica informing it about the adoption of the resolution enacting the Charter of Family Rights, which **commits to exclude from public financing all**

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<sup>30</sup> Judgement III SA/GI 15/20 of Voivodship Administrative Court in Gliwice dated 14 July 2020, p. 26, available [here](#).



projects “that violate” the family values enshrined in said Charter of Family Rights.<sup>31</sup>

### 3.3. Statements by public officials

33. On several occasions, Polish authorities have encouraged homophobia and LGBTQI discrimination in the field of employment.
34. For instance, in May 2020, public prosecutors in Warsaw brought criminal charges against a human resources manager at IKEA Poland with “the offence of limiting an employee’s rights on the ground of religion” over the manager’s decision to fire an employee who had shared homophobic messages.<sup>32</sup> The employee in question had posted on IKEA’s internal messaging board messages opposing IKEA’s participation in a pro-LGBTQI campaign and offered two quotes from the Bible suggesting that homosexuals deserve to be killed. Following IKEA’s termination of the employee’s employment, prosecutor general Zbigniew Ziobro (who is also the Minister of Justice) described IKEA’s decision as “scandalous” and “unacceptable.” He announced that he would order prosecutors to investigate, stating that “this is a case of legal and economic violence against those who do not want to share the values of the pro-LGBTQI activists”.<sup>33</sup> Mr Ziobro’s deputy, Marcin Romanowski, likewise criticised IKEA for “promoting LGBTQI ideology”, according to him, an “aggressive revolution that destroys our tradition”.<sup>34</sup>

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<sup>31</sup> See page 36 of the [National Ombudsman's information](#) about his activity and the state of human freedoms and rights in Poland in 2019.

<sup>32</sup> For additional information on this event and the subsequent declarations, see [here](#).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

## **4. Poland violated its obligations under EU law as concerns non-discrimination in the field of employment.**

### **4.1. The “LGBTQI-free zones” Resolutions and the Charter(s) of Family Rights constitute direct and indirect discrimination in the field of employment.**

35. The conditions established in the Court's case law are met in this case. The statements have been made by Polish public authorities, who have also adopted anti-LGBTQI resolutions and Charters (either at the local, provincial, general or state level). Such authorities are themselves employers in relation to positions in the local administration/public bodies, public services and publicly owned or supervised enterprises.
36. Furthermore, even if the bodies adopting the “LGBTQI-free zone” resolutions or the officials making discriminatory statements were not responsible for decisions concerning recruitment and employment, they are at least perceived by the public as capable of exerting a decisive influence on the recruitment policy or a recruitment decision of a potential employer.

### **4.2. The statements of public officials constitute harassment under the Employment Directive and the Gender Equality Directive.**

37. While most of the measures and statements made by government officials are not directly related to the field of employment, their discriminatory effect should be seen in the general context of LGBTQI discrimination in all aspects of private and social life in Poland.
38. Given the **generalised environment of discrimination, intimidation and constant harassment** that the Polish authorities foster, LGBTQI persons are bound to be also discriminated against in the field of employment. As a result, they are discouraged from applying for jobs, are indirectly pressured to terminate their employment, and many even consider fleeing the country for a better future. Even if they do not face direct discrimination and harassment in their specific workplace, the general negative - and often violent - environment they have to endure daily hobbles their employment opportunities in Poland and constitutes harassment under the Employment Directive and the Gender Equality Directive.

# CONCLUSIONS

In the light of the above, it is possible to conclude that Poland is in breach of EU law, with specific regard to the following provisions:

- **Article 2, paragraphs 1 and 2, Employment Directive and Articles 2, paragraphs 1 and 14, Gender Equality Directive.** By adopting "LGBTQI-free zones" Resolutions and the Charter of Family Rights, Poland failed to fulfil its obligation to actively prevent direct or indirect discriminatory employment policies both in the public and in the private sector. Furthermore, it failed to declare them null and void. Conversely, through their statements, Polish public authorities justified and legitimised discriminatory practices while delegitimising practices aimed at correctly implementing public and private parties' obligations under the Employment and Gender Equality Directives.
- **Article 2, paragraph 3, Employment Directive and Articles 2, paragraph 1, and 14, Gender Equality Directive.** By adopting defamatory public statements, inciting hatred and violence and justifying (or inciting to adopt) discriminatory employment practices against LGBTQI persons, Polish public authorities failed to fulfil their obligations to prevent the establishment of an intimidating, hostile, degrading, humiliating and offensive environment, thus resulting in harassment under the said provisions.
- **Article 21 of the Charter.** By allowing public and private parties to adopt discriminatory employment policies, Poland failed to fulfil its obligations to prohibit all discrimination on the basis of, inter alia, sex and sexual orientation.
- **Article 4, paragraph 3, TEU (principle of sincere cooperation).** By adopting and operationalising the "LGBTQI-free zones" Resolutions and the Charter of Family Rights and failing to intervene to avoid the abovesaid violations of EU law, Poland failed to fulfil its obligation of sincere cooperation.

**Therefore**, we suggest that

- **The Commission proceeds further** in the infringement action it launched against Poland in July 2021 for failure to fully and appropriately respond to its inquiry regarding the "LGBTQI free zones and **hold the State accountable** for breaching the above-mentioned provisions.
- **Member States support the Commission-led action or directly file a complaint** against Poland for failure to comply with EU law under Article 259 TFEU.

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