

## Chapter 10

### Queering Brexit: What's in Brexit for Sexual and Gender Minorities?+

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#### 1. UK Sexual and Gender Minorities in Troubled Water?

Have you ever had the feeling that you have gone to sleep in one place and woken up in another? On 24 June 2016, many people in the UK had that feeling: as if they had gone to bed in a cosmopolitan and global European Union (EU) Member State and woke in a country prone to isolationism and protectionism, risking its economic and social development because of imperial nostalgia and moral panic about 'loss of sovereignty' and 'mass migration'. That feeling of fear and nostalgia – translated into the referendum result favouring the UK leaving the EU – inevitably affected many individuals who identify or are identified as members of minorities based on their sexual orientation or gender identity (SOGI).<sup>1</sup> Considering statistics indicate that more than one million people aged 16 and over in the UK identify as lesbian, gay or bisexual (Office for National Statistics 2017a), and that to this figure we can add those who identify as transsexuals, non-binary, intersex, queer, etc, it is clear that there are sizeable SOGI minorities in the UK. Yet, although the possible impact of Brexit has been scrutinised from many angles, there has been very limited analysis of how it may affect these minorities.<sup>2</sup>

Many analyses post-referendum have attempted to precisely determine the demographics of referendum voting preferences. Voters' age, urban/rural setting, region, social class, ethnicity, income, education levels, political party preference, media and social media preferences, financial situation, place of birth, national identity, and marriage status have all been linked to certain voting tendencies (Barr 2016; BBC News 2016b; Busquets Guàrdia 2016; Goodwin and Heath 2016; Lambert 2016; McGill 2016). None of these analyses, however, have inquired into a possible link between self-identification as a member of SOGI minorities and Brexit voting preference. The closest that such analyses have come to SOGI issues can be found in a report concluding that those in favour of the UK remaining in the EU (generally referred to as 'Remainers') are more likely to accept same-sex marriage, in particular those 'Remainers' who support the Labour Party (Ipsos MORI 2017). Despite this very limited consideration of SOGI issues in analyses of Brexit, there is no doubt that Brexit will affect SOGI minorities on a range of levels. These include likely serious effects in terms of human rights and equality policy, 'soft law' instruments, socio-cultural environment, economic resources, regional variations within the UK and civil society vibrancy, as will be seen.

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+ This contribution builds on a shorter piece published by the authors as a blog entry (Danisi, Dustin, and Ferreira 2017). The authors are members of SOGICA ([www.sogica.org](http://www.sogica.org)), a four-year (2016-2020) research project funded by the European Research Council (ERC) that explores the social and legal experiences of asylum seekers across Europe claiming internal protection on the basis of their sexual orientation or gender identity (SOGI) (grant agreement No 677693). The authors wish to thank the pertinent and useful suggestions offered by Bal-Sokhi-Bulley, Philip Bremner, and the participants at the workshop 'Europe, Brexit and Human Rights' held on 22 November 2017 and organised by the Sussex Rights and Justice Research Centre, and the workshop 'Feminist and Queer Perspectives on Brexit' held on 17 November 2017 and organised by the Sussex European Institute, both at the University of Sussex.

<sup>1</sup> We recognise that 'SOGI minorities' is not an ideal expression, to the extent that not everyone we wish to refer to may identify with it, but for practical reasons we will use it as shorthand to refer to everyone who does not identify as heterosexual or cis-gender; we ask readers to interpret this expression in this broad sense throughout this contribution.

<sup>2</sup> The only relevant analyses of which the authors are aware other than the one they have produced (Danisi, Dustin, and Ferreira 2017) have been published by Wintemute (2016), Cooper (2018), Cooper et al. (2018) and the Trade Union Congress (TUC 2018).

This contribution offers what is, to our knowledge, the first comprehensive academic assessment of the Brexit process in relation to the situation of SOGI minorities and submits that SOGI minorities should prepare for very significant challenges from all quarters as a consequence of Brexit. This is particularly timely in light of the 2017 UK Supreme Court decision in *Walker v Innospec Limited*,<sup>3</sup> where the Court relied on EU law to hold a provision of the Equality Act 2010 unlawful for violating pension rights of same-sex couples.<sup>4</sup> In section 2, we start by identifying the role of the EU in developing a legal and policy framework that protects the rights of SOGI minorities. We will argue that, although the EU has played an important role in this field, its actions have often fallen short of desired aims, mostly owing to lack of law-making-powers. In section 3 our attention moves to the UK legal and policy framework in relation to SOGI minorities and the extent to which that framework has been a product – or not – of EU influence. We show that, while there may be no immediate threat to the current framework protecting SOGI minorities, there are reasons for concern in relation to several matters not of a strictly legal nature. In section 4, we then note that SOGI minorities elsewhere in the EU might also be affected by Brexit. Finally, in section 5, we conclude with a reminder of the need to remain alert to legal and policy developments that may detrimentally affect SOGI minorities.

## 2. What has the EU done for SOGI minorities?

The EU has often been viewed as *the* SOGI minorities' champion as well as a 'gender actor' (Ayoub 2016, 47; European Commission 2015a; Guerrina and Masselot 2018). In order to verify this statement, in this section we explore the legislative and policy actions adopted so far at EU level, as well as the approach of the Court of Justice of the European Union (CJEU) in this field. Based on the competences granted to the EU by the Treaties, the analysis shows the EU's attempt to pursue a sort of 'SOGI mainstreaming', thus moving from a sector-specific intervention based on a non-discrimination model towards the full integration of a SOGI perspective in an increasing range of areas, such as migration and asylum, and external relations. This does not, in itself, amount to saying that the EU has always been successful or that this process is complete, especially if we look at the brakes imposed by EU Treaties or at specific countries that might grant higher standards of protection – such as the UK. Rather, the EU's attempt means that its institutions are increasingly willing to act in accordance with its own values which include the respect for human dignity and human rights (see Article 2 of the Treaty on European Union, TEU),<sup>5</sup> at least to the extent that its internal (political) dynamics permit.

### 2.1. Equality first: the EU's Trojan horse

It is recognised that the 'European project' was born with a strong 'equaliser' soul (Favilli 2008; Rossi and Casolari 2017; Tridimas 2006). Although its original scope was preventing discrimination based on nationality for economic reasons, the (now) Union was eventually able to identify 'equality' as one of its fundamental values and aims (in addition to Article 2 TEU, see also Article 3 of the same Treaty, where the fight against social exclusion and discrimination is stressed) (Bell 2002). At the same time, the Charter of Fundamental Rights of the EU (the Charter) introduced a general prohibition of discrimination based on sexual orientation at Article 21 (gender identity is still not mentioned),<sup>6</sup> while framing traditional human rights in a non-heteronormative way (see, for example, Article 9 on the right to marriage). Although it does not provide new competences to EU institutions (see Article 51 of

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<sup>3</sup> [2017] UKSC 47.

<sup>4</sup> This judgment will be further discussed below (section 3).

<sup>5</sup> Treaty on European Union (consolidated version), OJ C 326, 26 October 2012.

<sup>6</sup> *Charter of Fundamental Rights of the European Union*, OJ C 326, 26 October 2012. Article 21(1) reads as follows: 'Any 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.'

the Charter; Spaventa 2016), since 2009 the Charter has served as a ‘constitutional’ parameter for EU actions, as well as those of Member States when implementing EU law. Consequently, every piece of EU law and policy should be read in a way that may facilitate SOGI minorities’ enjoyment of human rights in light of the prohibition of discrimination.<sup>7</sup> It could even be argued that today Article 21 sometimes plays the role of a Trojan horse, potentially maximising the protection of SOGI minorities under EU law in areas where equality secondary law does not apply (Danisi 2015; De Schutter 2011). To put it briefly, as a result of this long process, the prohibition of discrimination based on sexual orientation has developed into an ‘unobjectionable’ norm within the EU (Elgstrom 2005).

This does not mean that the EU institutions have had full licence to combat SOGI discrimination widely through binding instruments. If we exclude the new Directives on gender equality,<sup>8</sup> which also had clear implications for gender reassignment (Mos 2014), after the entry into force of the Treaty of Amsterdam in 1999,<sup>9</sup> only the Directive 2000/78 (the Equality Framework Directive) was enacted.<sup>10</sup> It specifically prohibits direct and indirect discrimination, as well as harassment and victimisation, on the grounds of age, religion or belief, disability and sexual orientation in the field of employment. As a result, Member States are now obliged to prevent, detect and condemn any distinctions based on sexual orientation in relation to conditions for access to employment, including selection criteria and recruitment conditions, and all types and levels of vocational guidance and training; working conditions, including promotion, dismissals and pay; and membership of, and involvement in, an organisation of workers or employers. The continued lack of an agreement between Member States has prevented the adoption of a new equality directive – the so-called ‘horizontal’ directive – prohibiting sexual orientation discrimination more widely, i.e., in areas beyond employment.<sup>11</sup> Worse, gender identity is largely invisible in the EU legal framework beyond the scope of gender reassignment.

Despite the limited tools available to the EU to empower SOGI minorities, the implementation of the Equality Framework Directive has gone well beyond its authors’ imagination, thanks to the interpretation of this instrument provided by the CJEU. Through the adoption of an ‘anti-stereotyping approach’, based on the Charter and the European Convention on Human Rights (ECHR), EU law proved influential in improving certain aspects of SOGI minorities’ lives even in those EU Member States with an already strong equality legislation. Three examples may be useful to prove this. Firstly, the obligations contained in the Directive have been read in light of the social experience of sexual minorities in European society, which signalled persistent and hidden forms of discrimination against SOGI minorities (FRA 2015). Without the CJEU’s watchful eye, it would have been impossible to identify public statements reproducing clichés about gay people (e.g. ‘there are no gay footballers’)<sup>12</sup> as direct discrimination based on sexual orientation prohibited by the Directive. Indeed, homophobic

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<sup>7</sup> In light of the CJEU’s position in *Mangold* (C-144/04), however, the general prohibition based on sexual orientation might have already existed as a general principle of EU law before the entry into force of the Charter (Schiek 2006).

<sup>8</sup> Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23, 26 July 2006; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004.

<sup>9</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997.

<sup>10</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000. The Directive is based on Article 19 of the Treaty on the Functioning of the EU, TFEU (Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26 October 2012).

<sup>11</sup> Proposal for a directive of 2 July 2008 against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace, COM/2008/0426 final.

<sup>12</sup> The example is taken from the CJEU’s Judgment of 25 April 2013, *Asociația Accept*, C-81/12, ECLI:EU:C:2013:275.

statements have the effect of hampering the employment of (actual or presumed) gay people and, as such, should be fought by Member States. Secondly, thanks to the judgments in *Maruko*,<sup>13</sup> *Römer*,<sup>14</sup> and *Hay*<sup>15</sup> regarding the national treatment of same-sex couples, the CJEU made entirely clear that every employment benefit should be given to all employees without distinctions based on their civil status when these distinctions mask discrimination based on one's sexual orientation. Since employment benefits are aimed at supporting employees' families, and given that the concept of family is not limited by sexual orientation, measures such as special leaves and pensions (under some conditions) cannot be denied (only) to homosexual employees. Thirdly, in *Hay*,<sup>16</sup> EU judges skilfully qualified marriage as a 'heteronormative notion', itself embedding stigma and discrimination against sexual minorities when it is not granted irrespective of sexual orientation. If EU anti-discrimination law applies, this creates an obligation to treat equally employees who are married and those who have entered into a civil partnership *when* same-sex couples are still excluded from marriage.

These developments make it more striking that, apart from soft law instruments (European Parliament 2012b), gender identity as a general and comprehensive concept is absent in EU law (Bell 2012). Yet, the CJEU has been revolutionary in obliging Member States to protect people whose gender is reassigned from any discriminatory treatment through legislation aimed at prohibiting 'sex' discrimination.<sup>17</sup> Indeed, any distinction based on gender reassignment, including the dismissal or the denial of a state or a survivor's pension, has been identified as discrimination based on sex in *P v S*,<sup>18</sup> *KB*<sup>19</sup> and *Richards*.<sup>20</sup> More recently, in *MB*<sup>21</sup>, the CJEU has set the path for a more radical recognition of transgender people's rights. Relying again on the prohibition of discrimination based on sex, it established that a Member State cannot require a person whose gender was reassigned to satisfy the condition of not being married to a person of the gender that they have acquired in order to be eligible for a State retirement pension at the same age as people with the acquired gender. Interestingly, in this way the CJEU has indirectly embraced an intersectional approach by ensuring that people such as MB should not have to undergo divorce against their religious beliefs in order to avoid discrimination because of their gender reassignment, thus recognising both faith and gender as important identities for an individual.

This range of achievements shows a degree of internal inconsistency within the Union: on one hand, jurisprudential activism in relation to SOGI minorities' quest for equality; on the other, a more hesitant legislative and policy agenda. This is even more palpable if we look beyond the anti-discrimination framework, where the SOGI perspective has not always been integrated.

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<sup>13</sup> Judgment of 1 April 2008, *Maruko*, C-267/06, ECLI:EU:C:2008:179.

<sup>14</sup> Judgment of 10 May 2011, *Römer*, C-147/08, ECLI:EU:C:2011:286.

<sup>15</sup> Judgment of 12 December 2013, *Hay*, C-267/12, ECLI:EU:C:2013:823.

<sup>16</sup> *Ibid.* The importance of this approach is even more evident if compared with the more restrictive attitude adopted by the ECtHR.

<sup>17</sup> While this approach excludes everyone who has not undergone reassignment, people who underwent gender reassignment enjoy a wider protection under EU law than LGB minorities. In fact, if compared to the Equality Framework Directive, gender Directives also cover access to goods and services and occupational social security schemes. See Mills' chapter in this book for all references on EU gender equality framework.

<sup>18</sup> Judgment of 30 April 1996, *P v S and Cornwall County Council*, C-13/94, ECLI:EU:C:1996:170.

<sup>19</sup> Judgment of 7 January 2004, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, C-117/01, ECLI:EU:C:2004:7.

<sup>20</sup> Judgment of 27 April 2006, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, C-423/04, ECLI:EU:C:2006:256.

<sup>21</sup> Judgment of 26 June 2018, *MB v Secretary of State for Work and Pensions*, Case C-451/16, ECLI:EU:C:2018:492. The CJEU has tried nonetheless to restrict the scope of the judgment, in light of the Member States' competence in matters of civil status and legal recognition of the change of a person's gender: see points 27-29 and 47.

## 2.2 Mainstreaming a SOGI perspective... and its limits

Looking beyond equality law, SOGI minorities' needs were not usually addressed at the time when most of the current EU legislation was adopted. While the EU has tried to fill this gap through the most recent reforms trying to amend legal provisions that prevented them from enjoying human rights, again it is the CJEU that has played a key role in mainstreaming a SOGI perspective. Developments in two areas that are open to EU intervention, asylum law and freedom of movement, provide a good example of this state of affairs.

To begin with the Common European Asylum System (CEAS), the EU has been able to elaborate a few solutions aimed at improving the experiences of asylum seekers and refugees claiming international protection on SOGI grounds (Balboni 2012; Ferreira 2018). For example, it has at least clarified that SOGI may be used to define a particular social group for the recognition of refugee status under the 1951 Geneva Convention (Article 10(1)(d) of the Directive 2011/95/EU).<sup>22</sup> While the current reform process might strengthen such protection in terms of procedures and reception and by defining individuals claiming asylum on SOGI-related grounds as people with specific needs (Ferreira et al. 2018),<sup>23</sup> the CJEU has already read the relevant provisions in a way that largely complies with the standards set out in the dedicated UNHCR SOGI Guidelines (UNHCR – UN High Commissioner for Refugees 2012). Hence, in *X, Y and Z*<sup>24</sup> the Court rejected the idea that SOGI asylum seekers should be asked to be discreet in order to avoid persecution in their home countries. By the same token, in *A, B, and C*<sup>25</sup> and in *F*,<sup>26</sup> the Court rejected methods that may violate Charter rights when national authorities seek to assess the credibility of an asylum seeker who claims to be persecuted on the basis of sexual orientation (Ferreira and Venturi 2017). So, it is recognised that relying exclusively on stereotyped questions or on personality projective tests to confirm one's sexual orientation is not only detrimental to the right to dignity of SOGI asylum seekers (Article 1 of the Charter), but could also amount to a disproportionate interference with the right to respect for private and family life (Article 7 of the Charter).

Moreover, in relation to freedom of movement *within* EU Member States,<sup>27</sup> the EU is bolstering the protection of SOGI minorities while safeguarding Member States' sovereignty (Belavusau and Kochenov 2016; Bell and Selanec 2016; van den Brink 2016). Other than by including non-heteronormative provisions, this result is possible thanks to an interpretation of the EU law in force that grants SOGI minorities equal social recognition. That is why in the *Coman* case, regarding the notion of 'spouse' included in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, the CJEU found

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<sup>22</sup> Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20 December 2011.

<sup>23</sup> See EU Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, 6 April 2016, COM(2016) 197 final.

<sup>24</sup> Judgment of 7 November 2013, *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, C-199-201/12, ECLI:EU:C:2013:720.

<sup>25</sup> Judgment of 2 December 2014, *A and Others v Staatssecretaris van Veiligheid en Justitie*, C-148-150/13, ECLI:EU:C:2014:2406.

<sup>26</sup> Judgment of 25 January 2018, *F v Bevándorlási és Állampolgársági Hivatal*, C-473/16, ECLI:EU:C:2018:36.

<sup>27</sup> Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004.

that, at EU level, this concept is gender-neutral and covers the same-sex spouse of a Union citizen.<sup>28</sup> In fact, even if Member States are not obliged under EU law to legally recognise same-sex marriage, they cannot make their internal legislation a condition for the recognition of the right of such same-sex married couples to move and reside within the Union, as heterosexual married couples in a comparable situation have enjoyed to date. Even more strikingly, although the CJEU seems to restrict this powerful gender-neutral reading of EU law for the sole purpose of granting a derived right of residence to a third-country national for ensuring the effective enjoyment of the status of Union citizen, it strongly refused the idea that the recognition of 'such marriages [...] does not undermine the national identity or pose a threat to the public policy of the Member State concerned'.<sup>29</sup> Instead, the lack of such a recognition may additionally prevent the enjoyment of the right to family life as protected by Article 7 of the Charter, read in light of Article 8 ECHR (Danisi 2017),<sup>30</sup> thus amounting to an unnecessary restriction prohibited under the Charter.

To be clear, no EU institution has been completely successful in their efforts to advance a normative and cultural change within the Union in favour of SOGI minorities' rights. However, if analysed from a post-Brexit perspective, the emerging link between EU citizenship and the enjoyment of a more comprehensive catalogue of human rights in EU Member States where marriage is solely a 'heteronormative' institution leaves SOGI minorities in the UK in a vulnerable condition. Same-sex couples married in the UK, whose members will be deprived of the Union's citizenship because of Brexit, will experience serious difficulties in having their right to stay as a family unit recognised in those EU Member States that have not legally recognised same-sex marriage.

The same lack of protection will arise from the impossibility of relying on the CJEU's ability to detect practices harmful to SOGI minorities, as well as from the non-application of new EU Parliament's proposals aimed at mainstreaming SOGI considerations in international relations. Two examples may be useful to clarify this point. First, when the CJEU was asked to specify how to implement Directive 2004/33/EC<sup>31</sup> in relation to blood donors, it was able to identify a homophobic attitude in the imposition of a total ban on blood donations from 'men having sex with other men' in sharp contrast with the right to equality under the Charter (see decision in *Léger*).<sup>32</sup> More importantly, this sort of clarification may nudge the Commission to adopt a more active role in the enforcement of EU law, using all the available powers provided by the Treaties to make sure that Member States mainstream equality for SOGI minorities (e.g. by using infringements procedures). Second, in light of the important role of the EU Parliament in denouncing SOGI-related human rights violations in and outside the EU (e.g. European Parliament 2011, 2012a, 2017), we may recall its attempt to develop an interconnected and comprehensive set of measures in all spheres of action of the EU through a dedicated SOGI *Roadmap* (European Parliament 2012b, 2014). Here, for the first time, intersex people appeared on the EU agenda, and the need to expand the EU's role in promoting and protecting the enjoyment of human rights by SOGI minorities worldwide was stressed in light of the EU's broader obligation to promote human rights through its external policy (Article 3(5) TEU; Smith 2015). In this respect, if we exclude the Commission's attempts to improve the situation of SOGI minorities in accession countries

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<sup>28</sup> Judgment of 5 June 2018, *Coman*, C 673/16, ECLI:EU:C:2018:385. See also the Opinion of Advocate General Wathelet concerning the same case, delivered on 11 January 2018, which was based more on the principle of non-discrimination (Article 21 of the Charter).

<sup>29</sup> *Ibid.*, point 46 (in contrast to arguments advanced by many Member States that still have not entitled same-sex couples to marry).

<sup>30</sup> See Article 52 of the Charter and, for instance, ECtHR, 21 July 2017, *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11.

<sup>31</sup> Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, OJ L 91, 30 March 2004.

<sup>32</sup> Judgment of 29 April 2015, *Léger*, C-528/13, ECLI:EU:C:2015:288.

(European Commission 2016) and the adoption of specific *Guidelines to promote and protect the enjoyment of all human rights by LGBTI persons* to be applied in the relationship with non-EU Member States (Council of the European Union 2013), a more radical change may come in the context of international agreements signed by the EU. The EU Parliament is promoting the inclusion of a specific reference to the prohibition of discrimination on SOGI grounds in future economic agreements with third countries, starting from the revision of the Cotonou Agreement in 2020.<sup>33</sup> While the positive effects may be noteworthy (Bartels 2017), even from a cultural point of view, the fact that such a move will not bind the UK is not only worrying in itself, but is also compounded by the UK's emerging policy 'towards a common future' with the Commonwealth countries to be pursued in the post-Brexit era, which may omit completely any SOGI considerations (Kirby 2009; Robertson 2018).

### **3. God save the... queers?**

#### **3.1 How did we get where we are and who do we have to thank?**

As the previous section highlights, EU membership is a concern for SOGI minorities living in the UK because of the many different levels on which the EU operates: as a legislator, a regulator, and enforcer, an educator, a campaigner, a mediator, a funder and a bridge builder or facilitator. In this section, we highlight some of these roles, but we start from a different perspective: identifying and assessing the potential benefits for SOGI minorities in the UK of leaving the EU.

Although the majority who voted in favour of Brexit was small, inevitably it will include some or many members of SOGI minorities, although that remains unknown and would be difficult to quantify (it is only with the next Census in 2021 that the UK population will have the option of answering a question about their sexual orientation or gender identity: Office for National Statistics 2017b). While many openly SOGI minority parliamentarians were firmly in the Remain camp (Gay Times 2016), there was also an organised SOGI lobby arguing in favour of Brexit. The organisation Out & Proud campaigned on the basis that parliamentary sovereignty – not the EU – is the basis of gay rights in the UK, that the UK is at the forefront of SOGI equality and will continue to be so post-Brexit, and – critically – that the EU is no longer a champion for SOGI rights: 'With the addition of socially conservative Eastern European countries in 2004, and countries such as Turkey, Serbia, Macedonia, Albania and Montenegro looking to join, LGBT rights look set to be held back further as those with a less tolerant views [sic] veto legislation, as we have recently seen from Hungary.' (Out & Proud n.d.)

There are two slightly contradictory claims here to be unpicked: the first claim is that the EU was not responsible for SOGI rights advancement in the UK, because the UK was at the forefront of the gay rights agenda; the second assumption is that if the EU was once a champion of gay rights, it no longer is, based on the xenophobic assumption that opening up membership to countries in Eastern Europe and beyond has opened the doors to homophobia and bigotry. Here we have an inversion of homonationalism (Puar 2007), in which the EU no longer defines itself by its progressive position on sexual minorities because Western liberal values have been sacrificed to the 'less tolerant views' of outsiders. The UK needs to withdraw from the EU to maintain its position as a haven from homophobia.

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<sup>33</sup> See Council Decision (EU) 2017/435 of 28 February 2017 on the conclusion of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ L 67, 14 March 2017; European Parliament resolution of 11 February 2015 on the work of the ACP-EU Joint Parliamentary Assembly (2014/2154(INI)), par. K1.

Supporters of this position might point out that, at the time of the referendum, the country was led by a Conservative Prime Minister who introduced gay marriage into the UK.<sup>34</sup> They might draw attention to the parliamentary transgender equality inquiry (Women and Equalities Committee 2016) or to the Government announcement of plans to reform and demedicalise the process for changing one's gender (Government Equalities Office 2017). All of the above could be used to argue that, whether or not the UK's SOGI minorities ever needed the EU to secure equality, that time is past.

To assess the validity of such claims, we look back at the way improvements to SOGI minority rights came about in the UK. It will surprise no one to read that for much of the twentieth century, UK law was a source of persecution rather than protection for SOGI minorities (Moran 1996). Lesbian, bisexual and trans people were not covered or recognised as existing – which was of course both a blessing (if it meant they were shielded from persecution) and a curse (if it meant they needed protection). And even the positive measures that were introduced did not provide anything close to full equality. So, although the 1957 Wolfenden Committee published a report recommending that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence', up until 1967, gay and bisexual men could face a maximum sentence of life in prison (Home Office 1957). The 1967 Sexual Offences Act provided only a limited decriminalisation of homosexual acts between men over 21 and in private. The age of consent was lowered to 18 in 1994 (still not equal to the age for heterosexuals).<sup>35</sup> It was not until the Sexual Offences (Amendment) Act of 2000 that the UK had an equal age of consent, for the first time including lesbian relationships.

Moreover, legal changes were not always positive: as late as 1988, under the Thatcher Government, Section 28 of the Local Government Act 1988 stated that a local authority 'shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality' or 'promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'. This measure remained on the statute books until it was repealed through the Local Government Act 2003.

From the early 2000s the law started delivering some positive outcomes for SOGI minorities with the 2002 Adoption and Children Act bringing rights for same-sex couples adopting in England and Wales. Civil partnership for same-sex couples was recognised through the Civil Partnership Act 2004 in 2005. Same-sex marriage was introduced in 2013 (though it is still not recognised in Northern Ireland, despite a vote in favour by the Northern Ireland Assembly in 2015).<sup>36</sup> Legislation on hate speech and hate crime based on sexual orientation or gender identity was passed in 2008 and 2012 as part of a series of measures to address these phenomena.<sup>37</sup>

Employment law was an important site of change and is where the critical role of the EU begins to be visible. Responding to a CJEU decision, the Sex Discrimination Act 1975 was amended in 1999 to include gender reassignment (Wintemute 2016).<sup>38</sup> Moreover, the above analysed Equality Framework Directive was the spark for a change of direction in UK discrimination law that directly and indirectly benefitted SOGI minorities (Fredman 2001). One of the earliest achievements was the Employment Equality (Sexual Orientation) Regulations 2003: for the first time, and as a direct result of the implementation of the Equality Framework Directive, lesbians, gays and bisexuals were protected

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<sup>34</sup> At the Conservative Party Conference in 2011, Prime Minister David Cameron said 'I don't support gay marriage in spite of being a Conservative. I support gay marriage because I am a Conservative' (BBC News, 2011, <http://www.bbc.co.uk/news/uk-politics-15189614>).

<sup>35</sup> Criminal Justice and Public Order Act. 1994.

<sup>36</sup> Marriage (Same Sex Couples) Act 2013; Northern Ireland Assembly. 2015. "Official Report (Hansard), Monday 2 November 2015 Volume 109, No 1." <http://data.niassembly.gov.uk/HansardXml/plenary-02-11-2015.pdf>.

<sup>37</sup> Criminal Justice and Immigration Act 2008 and Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>38</sup> Judgment of 30 April 1996, *P v S and Cornwall County Council*, C-13/94, ECLI:EU:C:1996:170.



from direct and indirect discrimination, and also harassment and victimisation in the workplace. Yet, this was only part of a broader equality agenda that began to develop after 2000. Prior to this, the UK's equality law and statutory bodies had developed in an ad hoc way over the latter half of the twentieth century to protect individuals only on the grounds of race, gender and disability. The EU Directives set in motion a series of developments culminating in the Equality Acts of 2006 and 2010 and the creation of a statutory Equality and Human Rights Commission (EHRC), as well as the production of government white papers, legislative reviews and stakeholder engagement (Spencer 2008). Civil society organisations came together often for the first time to identify shared concerns and areas of disparity and hierarchies of discrimination (Spencer 2008, 9). Over a number of years, SOGI minority rights organisations – including Stonewall, GIREs and the LGBT Foundation – worked with NGOs covering other areas of discrimination to lobby the Government for a levelling up of the equality law and an independent body to enforce that law – both achieved at least in part through the afore-mentioned Equality Acts. Crucially, these Acts harmonised the UK's hitherto piecemeal equality law, providing some degree of parity of protection for all victims of discrimination (Davis et al. 2016; Hepple 2014).

While causality is always hard to demonstrate with legislation and policy, the EU was *a* – if not *the* – catalyst for a broader equality agenda than had previously existed, one that not only recognised sexual and now gender identity as protected characteristics, but also had the potential for recognising the way these characteristics overlapped and intersected with others – race, gender, disability, etc. Before the Equality Framework Directive, UK equality law had only recognised race, gender and disability as the bases for discrimination and provided protection through different silos of legislation and institutional protection – the Race Relations Acts and the Commission for Racial Equality; the Sex Discrimination Act 1975 and the Equal Opportunities Commission; and the Disability Discrimination Act 1995 and the Disability Rights Commission. The chain of events set in motion by the EU led to the creation of the EHRC – an independent body that has developed a measurement framework for equality and human rights that recognises intersectionality in a way that the earlier gender, race and disability commissions did not (EHRC 2017).

It is also fair to say that in some areas the UK has gone further than required by the EU. While EU law allows NGOs and other organisations to act on behalf of individual complainants, it largely follows an individual complaint-based model that often fails to recognise the systemic and structural nature of most inequality and turns societal problems into individual ones.<sup>39</sup> Through the Public Sector Equality Duty (section 149 of the Equality Act 2010), UK equality law has an additional positive approach to equality aimed at securing the rights of individuals without forcing them to seek legal redress in response to a specific case of discrimination (Fredman 2011). The duty could be hugely beneficial for SOGI minorities, for example, as the trigger for schools developing programmes to prevent bullying of SOGI minority children where this is the cause of under-achievement, or in targeted health care to meet the specific needs of lesbian women. Yet, there has been little enthusiasm for fulfilling the duty, which is often portrayed by governments as a bureaucratic burden, for example, when the coalition Government launched the Red Tape Challenge to cut 'unnecessary red tape' and included the Equality Duty as one of the themes of the Challenge (Home Office 2012; Race Equality Coalition 2013).

The UK has also developed a proactive agenda around trans equality – both within and outside Government. The Gender Recognition Act in 2004 gave people the legal right to change their gender and, in July 2017, the Government announced plans to demedicalise the process for changing gender, launch a national SOGI minorities survey, and consult on the reform of the Gender Recognition Act (Government Equalities Office 2017). The parliamentary select committee on women and equality has kept trans rights on the legislative agenda, with a trans equality inquiry reporting in 2016, including many policy and legislative recommendations to the Government (Women and Equalities Committee

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<sup>39</sup> Article 9(2) of the Equality Framework Directive.

2016). Here, as with the Public Sector Equality Duty, the UK's agenda apparently owes little to the EU and has taken initiatives outside the areas of EU competence.

In the next section we explain why the above narrative does not show that the UK SOGI rights agenda can rely on its own momentum, independent of EU carrots or sticks. Before doing so, it is important to note that the equality agenda has not taken the same path or timeline across the UK's four nations. While the Equality Act 2010 harmonised equality law across England, Scotland and Wales, and equality provisions apply equally across Great Britain in the main, these matters are devolved to Northern Ireland, whose equality law derives largely from Section 75 of the Northern Ireland Act 1998. While some SOGI-related protections are replicated on both sides of the Irish Sea – for example, the provisions on employment protection<sup>40</sup> – there remain disparities in rights unconnected to either the Equality Act 2010 or the Northern Ireland Act 1998. Most notable among these, while civil partnership is available throughout the UK, same-sex marriage does not exist in Northern Ireland. There are particular concerns about the equality and human rights implications of Brexit for people living in Northern Ireland, and these include issues relating to sexual orientation and gender identity, as we consider in the next section. After Brexit, existing areas of EU competence will be repatriated to the UK, but there is considerable uncertainty as to which of these competences will be allocated to Westminster/Whitehall, and which to the devolved governments across the UK.

In conclusion, it follows that the EU has been an important driver for SOGI rights in the UK, including, on the one hand, discrete rights that benefit individuals on the basis of their SOGI, and, on the other hand, broader pan equality and human rights protections that recognise SOGI minorities have many other characteristics that interact with each other, potentially making some individuals more vulnerable to discrimination and abuse than others. Looking forward, one might argue that what we have seen is a historical account of why EU membership *was* beneficial for UK SOGI minorities, but that full legal equality has now been achieved. The UK no longer needs EU membership as a stick to make us comply with equality standards. One could argue further that the UK is in the forefront of the SOGI minority rights agenda and has nothing to gain from EU membership on this front. We find such arguments unconvincing for several reasons, as we explore in the following section.

### **3.2 No way of knowing**

In this section, we identify some of the ways in which SOGI minorities would benefit from the UK's continuing membership of the EU. Firstly, most members of SOGI minorities would reject the idea that full equality has been achieved. It is even arguable that there has been regression in some areas, in all likelihood connected to the EU referendum and the political and media climate surrounding it. The rise in hate crime post-referendum was well-observed (Home Affairs Committee 2016) and it was not only ethnic and national minorities who were targeted. Figures released by the charity Galop show that hate crimes against SOGI minorities rose by 147 per cent between July and September 2016 (Galop 2016) and research by Stonewall published in September 2017 claimed a 78% increase in such crimes over a four-year period (Stonewall 2017). So, it seems that the toxic culture created by or related to Brexit has impacted on SOGI minorities, as well as individuals minoritised on the basis of race or ethnicity. The UK has many initiatives – academic, official and within civil society – analysing and addressing this phenomenon (Home Office 2016; University of Sussex n.d.). However, hate crime also features strongly in the list of European Commission actions to advance SOGI equality, with a Commission-led group coordinating work including dialogue with IT companies to combat online hate, ongoing data collection by the EU Fundamental Rights Agency (FRA) to monitor the problem, and specific funding allocated to Member States for work tackling hate crime (European Commission

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<sup>40</sup> Measures now in the Equality Act 2010 correspond to those in Employment Equality (Sexual Orientation) Regulations (NI) 2003, Equality Act (Sexual Orientation) Regulations (NI) 2006, Equality Act (Sexual Orientation) (Amendment) Regulations (NI) 2006, Equality Act (Sexual Orientation) (Amendment No.2) Regulations (NI) 2007.

2015b). These initiatives currently include the UK along with other EU Member States, but will not fall within the scope of the European Union (Withdrawal) Act 2018, which means the UK will most likely no longer benefit from them. Nor have there been government assurances that the funding currently available through the EU to UK bodies combatting homophobia and transphobia will be replaced by the UK Government.<sup>41</sup> Consequently, work on hate crime will continue in the UK, but in all likelihood without some of the existing sources of financial support, with fewer connections with European partners and without the cross-country mapping and data collection that provides the potential for comparisons and sharing of good practice between different countries.

Turning to potential improvements in the law, the EU is committed to extending to sexual orientation and gender identity (amongst other grounds) legal protection against discrimination in social protection, social advantages, education and access to and supply of goods and services which are available to the public, to take place sometime in the future through the above mentioned proposed 'horizontal' directive (section 2.1). The directive has had a troubled past, with opposition from a number of Member States (including Germany), which means it is unlikely to come into effect before the UK leaves the EU (Equinet 2015). Moreover, it is unclear if the directive will provide any protection on grounds of sexual orientation or gender identity over and above what already exists in the UK. However, while the benefits of future EU directives are unknowable, SOGI minorities in the UK are clearly using EU law to secure their rights both in UK and EU courts. A case in point is the UK Supreme Court decision in *Walker v Innospec Limited* (mentioned in section 1), where the Court relied on EU law to hold a provision of the Equality Act 2010 unlawful for violating pension rights of same-sex couples. Similarly, a decision in 2018 supporting the pension entitlements of a trans woman in the UK relies on Council Directive 79/7/EEC on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security.<sup>42</sup>

Furthermore, equality is a work in progress. Prior to the turn of this century, few would have anticipated the momentum that currently exists in the trans equality agenda around the world. No one knows what future initiatives there will be at EU level for promoting minority rights, but if the UK is not at the table, it will not be a part of their design or implementation. Similarly, the UK may have a broadly liberal approach to SOGI minorities at present, but its equality framework is an unstable one: the EHRC has experienced a series of reductions in its capacity over the years (Department for Digital, Culture, Media & Sport 2013) and the government department responsible for equality – the Government Equalities Office – is at best a movable feast, tagged on to whichever department contains its minister at any given time. Rights need to be embedded within the permanent structure of institutions and instruments, not dependent on the whims of politicians at any point in time. Here, the EU plays an important stabilising role in setting standards and promoting common values.

Related to the previous point, SOGI minority rights should not be seen in isolation and SOGI minorities are not only affected by policies and laws relating to sexual orientation and gender identity. The UK Government has implemented a programme of austerity measures, including cuts to services and access to justice (House of Commons Justice Committee 2015). These may hit members of the SOGI minorities hard in areas such as recourse to domestic violence services and access to legal aid. While the EU is not a remedy for victims of austerity measures, the Charter includes the right to an effective remedy and to a fair trial, including legal aid to those who lack sufficient resources (Article 47), which can be of assistance to claimants when the matter falls within the scope of EU law (Article 51).

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<sup>41</sup> For example, Galop, the UK's LGBT anti-violence organisation is a partner in the project Come Forward: Empowering and Supporting Victims of Anti-LGBT Hate Crimes is funded by the Rights, Equality and Citizenship Programme (2014-2020) of the European Union, <http://www.lgbthatecrime.eu/partners>.

<sup>42</sup> Judgment of 26 June 2018, *MB v Secretary of State for Work and Pensions*, Case C-451/16, ECLI:EU:C:2018:492.

Moreover, equality has not been achieved consistently throughout the UK. As mentioned above, in Northern Ireland, same sex marriage is not recognised. As a consequence of the *Coman* case (section 2.2), EU same-sex spouses who move to Northern Ireland (including couples where one spouse is from Northern Ireland) have the same rights as opposite-sex spouses while the UK remains within the EU. Given that UK citizens in Northern Ireland voted clearly against leaving the EU in contrast to some other parts of the UK, any resultant reduction in rights for SOGI minorities in that country will be a source of frustration (BBC News 2016a).

This exists alongside strong concerns about equality protection in Northern Ireland post-Brexit. While equality law is devolved to Northern Ireland, this does not mean that the Northern Ireland Assembly and Executive can legislate as they wish in this area. Both bodies are constrained by the EU compliance provisions of the Northern Ireland Act 1998. The need to comply with EU standards has provided a basis for challenging SOGI discrimination, for example, resulting in the lifting of the lifetime ban on blood donation by men who have sex with men (Human Rights Consortium 2018, 83; Chris McCrudden 2017, 8). Yet, while there has been much discussion about trade, citizenship and immigration controls, and the prospect of a hard border between the north and south of Ireland, there has been little consideration of the implications of Brexit for equality protection, including the protection of SOGI minorities in Northern Ireland (Curtis et al. 2017). If, after March 2019, equality continues to be devolved to Northern Ireland but the EU no longer provides the floor of minimum standards, then there is a potential for widening disparities of protection between Northern Ireland and Great Britain, in the absence of the EU as a force for harmonisation on issues such as equal marriage for example.

Turning from equality law to human rights more broadly, we have already seen that the Charter contains many principles that are highly relevant to SOGI rights, such as Articles 1, 3 and 7 relating to human dignity, physical and mental integrity and respect for family and private life. The Charter will not be applied in the UK after leaving the EU, but one could argue that the rights it bestows are secured for UK citizens through the ECHR and given further effect at a domestic level by the Human Rights Act 1998 (HRA 1998) (Human Rights Consortium 2018, 83). However, the future of the UK's membership to the ECHR and of the HRA 1998 are doubtful – in fact, it is probably only because of the hugely time-consuming nature of Brexit that there has not been more progress in the Conservative Government's commitment to replace the HRA 1998 with a British 'Bill of Rights' and withdraw from the ECHR. The Conservative Party manifesto makes clear that the HRA 1998 and UK status as a party to the ECHR are only safe during this Parliament and while the Brexit process is underway (The Conservative Party 2017, 37). European courts – both the Court of Justice and the European Court of Human Rights – are an important way of holding the UK Government accountable for its treatment of SOGI minorities and the UK's membership of both is under threat (Fenwick and Masterman 2017). Finally, there is also the loss of standardisation or consistency, if not always enhanced protection for people seeking asylum fleeing homophobia and transphobia that is provided by the EU CEAS (section 2.2).

Important though legal measures are, equality is not achieved only through law and legal measures in isolation. The EU, through bodies like FRA and programmes such as PROGRESS and the European Refugee Fund, is involved in a host of non-legal and non-regulatory activities that contribute to progress by informing public opinion, educating people, monitoring progress, and commissioning research on gaps in protection.<sup>43</sup> Alongside the formal EU bodies, many NGOs, networks and initiatives

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<sup>43</sup> Past programmes such as PROGRESS, which ran from 2007-2013, provided financial support to civil society organisations to help them embed EU equality law such as through the Employment Equality (Sexual Orientation) Regulations 2003, raise awareness and train employers and employees ([http://ec.europa.eu/justice/discrimination/files/sexual\\_orientation\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/sexual_orientation_en.pdf)). The European Refugee Fund (ERF, EUR 630 million over the period 2008-13) supports EU countries' efforts in receiving refugees and displaced persons and in guaranteeing access to consistent, fair and effective asylum procedures ([https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund_en)). In 2017,

related to SOGI minorities bolster solidarity and are the basis for awareness raising and campaigning. Examples include ILGA-Europe and the Hungarian Helsinki Committee, which in 2013 published, with EU support, a training manual on credibility assessment in asylum with chapters on asylum claims lodged by women and SOGI minorities written by UK lawyers and practitioners (Hungarian Helsinki Committee, 2013). There is no reason why these links should not survive Brexit, but it seems likely that they will diminish over time, as UK NGOs will have less and less reason and resources to collaborate with NGOs in other EU Member States.

To conclude, while there is no immediate threat to SOGI equality through withdrawal from the EU, that statement must be hedged with the caveats identified in this section. We argue that while the EU has not delivered full-fledged equality for SOGI minorities in the UK, it has certainly been the catalyst for cultural change and a shift in approach with the potential (still unrealised) of moving beyond a silo approach to inequality. While there has not been the progress that many hoped would come from an integrated anti-discrimination and human rights agenda, once outside EU membership, the UK will not be nudged by new legal norms, case law and other initiatives to the same extent as it is now into tackling discrimination beyond formal civil and political rights for SOGI minorities.

#### **4. A European Union without the UK: a lose-lose situation**

The implications of Brexit are not limited to the treatment of SOGI minorities in the UK. The EU-UK divorce may also have consequences for the EU's momentum in forging ahead with SOGI mainstreaming post-Brexit. In the new scenario, the potential negative effects for the protection of the rights of SOGI minorities in all Member States cannot be underestimated. This section tries to answer this final question: what might be the consequences of Brexit for SOGI minorities outside the UK but still within the Union after Brexit?

This is not a rhetorical question: it recognises that the Union retains some of the characteristics of an inter-governmental organisation, (for instance, its Member States gather in the Council of the EU, which has a high level of control over the legislative and political agenda in several key areas).<sup>44</sup> Consequently, there is a need for a strong consensus among Member States, as well as among Members of the EU Parliament, in order to pursue SOGI mainstreaming at EU level. A cohesive Council and Parliament are needed to use all powers available to the EU to secure parity of protection for SOGI minorities through new law and policy. Indeed, political dynamics within EU Member States suggest that opponents of SOGI minority rights or, simply, of strengthening the EU equality agenda may gain influence after Brexit. This is where UK membership of the Union could make a difference, building on the UK's legislation, despite the caveats identified above. Given that the UK has been identified as one of EU's most SOGI-friendly countries (ILGA – International Lesbian, Gay, Bisexual, Trans and Intersex Association, Carroll, and Ramón Mendos 2017), the Council of the EU will lose a Member State that did not oppose the adoption of the Equality Framework Directive, is not hampering the adoption of the proposed 'horizontal' equality directive (section 2.1.) and, more generally, has not been against the integration of SOGI perspectives at EU level (Privot and Pall 2014).<sup>45</sup> For its part, the

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the EU FRA published a review of the 'Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers' (FRA 2017).

<sup>44</sup> See Treaties' provisions still requiring special procedures for adopting EU legislation, which are relevant also for SOGI minorities, including Article 19 TFUE on equality related powers or those related to foreign affairs, in light of the conclusions of international agreements with countries with high records of human rights violations towards sexual minorities.

<sup>45</sup> For further information, see the EU's Legislative Train Schedule web page (<http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive>), the EUR-Lex web page with all relevant documents (<https://eur-lex.europa.eu/legal-content/en/HIS/?uri=CELEX:52008PC0426>), and Council of the EU, Dossier interinstitutionnel, 2008/0140 (CNS),

European Parliament will be deprived of a significant number of Members pressing for the implementation of the SOGI *Roadmap* and potentially challenging heteronormativity in the EU framework (or, at least, not holding back such measures).

The Union, as a whole, will also be deprived of one of the few Member States that have introduced same-sex marriage and legally protect the recognition of gender identity.<sup>46</sup> If a restriction to EU nationals' freedom of movement to the UK is a consequence of Brexit, SOGI minorities may also lose the access that freedom of movement provides to greater rights in the UK than exist in some other Member States (see also Cooper et al. 2018). Freedom of movement as a right has encouraged many SOGI minorities to move between Member States without feeling the need to define themselves as permanent residents of any one state. This will inevitably be restricted with the UK's departure from the EU, with particular implications for SOGI minority parents and would-be parents (FRA 2015).

While the UK is not the ideal haven for SOGI minorities for the reasons explored above, for many members of SOGI minorities living outside the UK it is a country where it is possible to express one's identity. This is especially true until greater respect for SOGI rights materialises in their home countries, something that may eventually happen, in part through the influence of EU law, policy and wider cultural harmonisation. It may be argued that, after leaving the EU, the UK will continue to offer a wider protection to SOGI minorities coming from some EU countries because these standards are an integral part of the UK domestic legislation and will continue to be influenced indirectly by the CJEU's case law in those instances where the European Court of Human Rights (ECtHR) uses CJEU's principles. Nonetheless, if it is true that belonging to the ECHR system currently provides a safe umbrella in most cases and the ECtHR is gradually aligning its interpretative activity to the CJEU's more inclusive reasoning outlined above,<sup>47</sup> the different positions occupied by EU law and the ECHR in the UK legal order currently give greater weight to EU human rights when compared to the ECHR.

Moreover, as mentioned above, SOGI protection standards will no longer follow possible developments in the EU in light of the SOGI mainstreaming process (section 2.2), and the withdrawal from the ECHR and the repeal of the HRA 1998 are still a possibility (even if *legally* dubious).<sup>48</sup> As a consequence, one cannot completely exclude the risk of exposing SOGI minorities already in the UK, as well as those wishing to move to the UK in the post-Brexit era, to levels of protection inferior to EU standards.

All in all, what is certain is that, once outside the EU, the UK will lose any possibility of influencing progress towards greater enjoyment of SOGI minority rights in the EU. Imperfect as its internal legal framework and social structures may be, until today the UK has been instrumental in strengthening within the EU the position of the group of Member States with solid equality agendas vis-à-vis those without. That is why Brexit seems to put both the EU and the UK in a lose-lose situation as far as SOGI minorities are concerned.

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8 December 2014, p. 2,  
<http://register.consilium.europa.eu/doc/srv?l=FR&f=ST%2015705%202014%20ADD%201%20REV%202>.

<sup>46</sup> See Marriage (Same Sex Couples) Act 2013 and Gender Recognition Act 2004.

<sup>47</sup> See Article 52 of the Charter. We are aware that, in areas such as free movement and asylum, the EU seems to provide a higher protection in relation to SOGI minorities than the ECHR. Yet, this protection is in any case limited to EU law's scope of application and may also be offered by the ECtHR's reading of the ECHR as a 'living instrument' in light of the wider range of situations falling within the scope of the ECHR. See Article 1 ECHR on the scope of the Convention, which does not entail the same limitations imposed on the Charter.

<sup>48</sup> In this respect, from an international law perspective, the hypothesis of withdrawal from the ECHR must take into account the fact that, once rights are recognised to people, they cannot be simply removed at will by a State (UN Human Rights Committee 1997; Conforti 2013).

## 5. Hard, soft or no fall?

We have argued that Brexit will most likely entail a range of risks, if not consequences, for SOGI minorities in the UK, namely regarding human rights and equality policy, 'soft law' instruments, socio-cultural environment, economic resources, regional variations within the UK and civil society vibrancy. Yet, what will actually happen to SOGI rights if and when the UK formally leaves the EU is obviously an exercise in futurology. One thing is clear: there is a likelihood that the fall will be hard for SOGI minorities and anyone else relying on discrimination law to protect them. Although there is discussion about UK citizens being able to retain their 'acquired rights' under EU law in the light of customary international law, for the sake of legal certainty and protection of legitimate expectations, it is very unclear what 'acquired rights' would be protected and whether a certain degree of 'crystallisation' of those rights would be required (Waibel 2017).

In light of the European Union (Withdrawal) Act 2018 and Theresa May's well-known wish to withdraw from the ECHR, not only might a future government erode EU-derived norms that currently protect SOGI minorities, but where this results in a human rights violation, it might also try to deprive SOGI minorities of the possibility of resorting to the ECtHR. While the legality of such a withdrawal may be questioned under international human rights law, the possibility of a British 'Bill of Rights' replacing the HRA 1998 serves as little reassurance, knowing that such Bill would most likely narrow down the rights (and their interpretation) currently enjoyed by people in the UK, much in the light of EU and ECHR law.<sup>49</sup> There is, justifiably, a clear sense of fear and emergency that extends to SOGI minorities (Cooper 2018).

Although it is theoretically possible that the UK will not regress from the advances and achievements identified above, SOGI minorities, organisations and communities should be well aware of one thing: over time, they are likely to be deprived of a number of pathways to justice and of more progressive policies (Belavusau and Kochenov 2016). For all its failings and flaws, in many people's eyes the EU symbolises a re-imagining of citizenship across borders, embracing diversity and welcoming SOGI minorities (Belavusau 2015). The reality of policy and law may not entirely live up to this vision, but there has been steady progress that Brexit threatens to slow down or bring to a halt. To compensate for the loss of this legal and policy arsenal, SOGI minorities will need to step up the domestic fight and build new forums for international cooperation. Red alert it is.

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<sup>49</sup> House of Lords and House of Commons Joint Committee on Human Rights, *A Bill of Rights for the UK? Government Response to the Committee's Twenty– ninth Report of Session 2007-08*, Third Report of Session 2008-09, HL Paper 15 / HC 145, 2009.

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