

# Mitigation of Discrimination Acts Online Concerning Sexual Orientation

## A two-level strategy for feasible and desirable change

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Rajeckyte, L. (2022). Mitigation of Discrimination Acts Online Concerning Sexual Orientation: A two-level strategy for feasible and desirable change. *Public Note*, 10(1), 4-7.

### **Abstract**

This paper tackles the prominent matter of online discrimination against sexual minorities, introducing a two-level strategy within the European Union (EU). Discrimination of sexual minorities has gained traction within academia since a positive correlation was determined between sexual orientation-specific stressors and psychological distress (DeBlaere et al., 2014). The establishment of such a negative impact entails the need for "policies that prohibit discrimination on the basis of sexual orientation" (Chang et al., 2021, p. 1). In recent decades, a gradual change in the legal framework has begun to offer protection against mundane and structural discrimination (European Commission, 2017). However, the spectrum of laws is not sufficiently far-reaching to cover critical mental and physical safety in modern times. Except for the Charter of Fundamental Rights of the European Union, no other international legal document protects against discrimination on the grounds of sexual orientation. Even though most Member States, to some degree, have included sexual orientation in their national anti-discrimination laws (European Commission, 2015), the shortage of attention to this matter on the international level has caused gaps in both the EU and national legislation.

### **Lessons for practice**

- Although there are laws protecting against discrimination on the grounds of sexual orientation, no international regulation covers such misconduct in the digital space.
- Considerable cooperation with society members is desired for the EU to achieve a credible strategy to mitigate discrimination against sexual minorities.

**Keywords:** discrimination online, sexual minorities, EU, policy proposal

## Gaps in legislation

National and international legislation indicate prohibitions of discrimination only in absolute terms. Although this may appear exhaustive, it has the potential to create loopholes or unintentionally permit leeway for manipulative systems to bypass the laws. Only one (legally binding) international treaty directly addresses the need to protect the victims of sexual orientation discrimination at the EU level. Article 21 of the Charter of Fundamental Rights of the European Union prohibits discrimination against sexual minorities, amongst other grounds. Other important treaties and Covenants, for instance, Article 14 of the European Convention on Human Rights (ECHR) or Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), cover the grounds for the protection of rights and freedoms against discrimination without the coverage of sexual orientation. In addition, Article 20(2) of the same Covenant prohibits by law "any advocacy of national, racial or religious hatred" (General Assembly, 1966) without indicating the violence against sexual minorities.

The international courts are also significant actors in controlling violations and regulating the harmonisation of prevailing values. In the judgment of *Beizaras and Levickas v. Lithuania*, the European Court of Human Rights (ECtHR) signified the state's responsibility to protect individuals from homophobic hate speech in any environment. ECtHR also determined that applicants' sexual orientation played a role in how the Lithuanian authorities had treated them. With this judgment, the ECtHR set the threshold of the European stance against structural discrimination and hate speech online against sexual minorities.

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## Current policies

None of the international regulations explicitly mention the digital sphere and hate crimes on social media platforms. In 2016, the Commission settled with Facebook, Microsoft, Twitter and YouTube to create a *Code of Conduct* to counter illegal hate speech online (European Commission, 2016). In 2018, more social media platforms such as Instagram, Snapchat and Dailymotion joined, with TikTok joining in 2020. The goal was to monitor hate speech online in collaboration with a network of organisations from various EU countries. This network tested to which extent national IT companies have implemented the *Code*. Since its adoption, the *Code* has delivered positive results. The last evaluation report in 2021 showed that, on average, 81% of flagged content was assessed within 24 hours after being posted, and 62.5% of the content deemed illegal hate speech was removed (Directorate-General for Justice and Consumers, 2021a). Whilst such platforms may be a rational starting point, the scope and monitoring policies need to be enlarged consistently (Directorate-General for Justice and Consumers, 2021b) by, for instance, including more platforms or improving the content checkpoint baseline.

In addition, the current *Code* does not bring public attention to the issue at stake. The regulation of hate speech online behind closed doors is not as effective as a continuous reminder to the public. Collaboration with society is vital for any change. The EU needs a more credible and cooperative strategy to mitigate discrimination against sexual minorities.

## The proposed strategy

The two-level strategy aims to increase the efficiency of mitigating online discrimination against sexual minorities among the Member States. The first level contains the initiation of a social media campaign, serving as a preparatory stage before legal action can take place. Since mass media is a crucial channel for opinion formation and processes of democratic legitimacy, it stimulates public consultations with the community.

The next step would be implementing minimum harmonisation laws in a new Directive. The *Code of Conduct* has already taken action towards a content European society. However, because of its vast aim and the weight of implementation resting on domestic companies, the *Code* did not match the anticipations. Gaps in the current legislation necessitate additional supranational measures to provide fundamental protection for sexual minorities.

Most EU legislation has been implemented based on minimum harmonisation and has proven desirable. Since the Directive sets minimum standards for the Member States, it also recognises that some legal systems in the EU have already or may in the future covet setting higher standards regarding sexual orientation anti-discrimination laws concerning online platforms. Such flexibility permits a more alleviated change.

## Conclusion

The proposed two-level strategy would gradually tackle discrimination against sexual minorities on digital platforms. There must be an enactment of dialogue and cooperation between national and supranational levels to achieve anticipated results. As the first level of the proposed strategy, the social media campaign would identify the need for harmonisation and detect national approaches and divergences among the Member States. This campaign is a cost-effective preparatory stage for legislative alteration. Once the EU community is informed on why, how and when the development will occur, the implementation of minimum harmonisation laws will follow. It is challenging to set the timeline of this approach because the results will depend on the efficiency of outreach to the community and the possible legislative hurdles. However, it seems reasonable to expect finalisation within five years.

Hate speech is a complex and ever-evolving matter. For the means to be effective, their enforcement must be strengthened by acknowledging "the evolving landscape, language and terminology of hateful behaviours" (Directorate-General for Justice and Consumers, 2021b). Monitoring the efficiency of this strategy would require establishing regular training focused on detecting hateful behaviours, terminology, and offensive stereotypes. Enacting the change on the EU level would bring a wide assortment of partners and opportunities for establishing advisory boards and expert networks.

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Finally, it is crucial to note that this paper focuses on a single marginalised identity, namely, sexuality. Such a choice may dismiss issues concerning the experiences of people with multiple marginalised identities who fall through the cracks in most research (DeBlaere et al., 2014). Implementing such a

structure would greatly expand the depth of the selected topic. However, given the limits of this paper, this shortcoming was acknowledged in hopes that future researchers will explore it further.

### **A note from the author**

My name is Leonarda Rajeckyte, a beginning author. I have recently obtained a bachelor's degree in Politics, Psychology, Law & Economics at the University of Amsterdam. My fondness for protecting and enhancing human rights is explicit in my academic work. The first scholarly work to which I have contributed was the reports scrutinising the legal safeguards in the national legislation of 32 European countries against Female Genital Mutilation (FGM). I also wrote my bachelor's thesis on British social media's perception of FGM and its victims. A career in human rights would be splendid, with a yet-to-be-decided niche in the field.



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